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CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND PRACTICES OF THE EUROPEAN COURT OF HUMAN RIGHTS: FEATURES AND PROBLEMS IN APPLICATION BY THE NATIONAL COURTS OF UKRAINE

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INTRODUCTION

The post-war restoration and development of the Ukrainian State seems impossible without proper protection of the rights and freedoms not only of citizens of Ukraine who suffered as a result of military actions, but of the entire population living in our country and outside its borders. One of these tools is the mechanism of judicial protection by the European Court of Human Rights (ECHR).

The application by national courts of the practice of the ECHR in accordance with ratified international treaties, one of the most important of which should be considered the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention), is burdened by the lack of unity of approach in domestic legal doctrine regarding the issue of the obligation of practice ECHR as a source of law in the legislative framework of Ukraine.

However, theoretical obstacles stand in the way of improving the practical aspects of the application by Ukrainian courts of ECHR decisions, primarily adopted against other states. The study of the difficulties of implementation and practical application by the national courts of Ukraine of the practice of the ECHR and the European Convention will allow to update the view on this issue with an emphasis on civil cases and criminal proceedings related specifically to the armed aggression of the russian federation against Ukraine, which will help to outline the ways of overcoming existing problems with modern challenges.

1. The legal regime and peculiarities of the application of the practice of the ECHR and the European Convention in Ukraine in the consideration of civil cases by national courts

In the field of civil and civil procedural law of Ukraine, the practice of the ECHR is a source of law, the application of which in the conditions of European integration of our country is gaining more and more importance in the field of protection of civil human rights. Legal substantiation of decisions

of national courts in civil cases is carried out, including taking into account the positions of the ECHR. Given that, it is extremely important for the representatives of the domestic legal community to correctly and unambiguously understand the correctness of the interpretation of the provisions of the European Convention and its Protocols contained in the decision of the ECHR.

Pursuant to part 1 of Art. 2 of the Civil Procedure Code of Ukraine, the task of the civil judiciary is the fair, independent and speedy consideration of civil disputes, which aims to provide high-quality protection for individuals and legal entities, namely in relation to their violated rights, as well as ensuring compliance with the interests of the state [1].

In accordance with Part 1 of Art. 3 of the Code of Civil Procedure of Ukraine establishes the implementation of civil proceedings in accordance with the Constitution of Ukraine, the Code of Civil Procedure of Ukraine, legislation on international private law, those laws of Ukraine that determine the specifics of consideration of certain categories of cases, and, of course, on the basis of international treaties, the binding consent of which has been given Verkhovna Rada of Ukraine (VRU) of Civil Procedure of Ukraine [1]. The provisions of Part 2 of Art. 3 of the Code of Civil Procedure of Ukraine provides for the application of the rules of an international treaty of Ukraine in the presence of the condition of establishing by an international treaty, the binding consent of which has been given by the VRU, other rules than those defined by the Code of of Civil Procedure of Ukraine [1].

Domestic procedural legislation provides for the principle of the rule of law when considering civil cases, so the court, resolving a civil dispute in accordance with constitutional provisions, national laws, interstate agreements ratified by the Verkhovna Rada of Ukraine, may also take into account other normative acts that were adopted by the competent authority in accordance with the procedure and in the manner determined by the Constitution and current national legislation (Parts 1-3 of Article 10 of the Civil Code of Ukraine) [1]. Analysis of the content of clauses 4 and 5 of Art. 10 of the Code of Civil Procedure of Ukraine gives leave to determine as a source of law the application of civil law by the court jurisdiction when considering cases of ECHR practice and norms of the European Court of Justice Convention and Protocols to it, consent to binding whose provided by the VRU, as well as the laws of other states in the event that it provided for by the law of Ukraine or international agreement, consent to binding whose provided by the VRU [1]. In addition, the obligation to apply the practice of the ECHR is enshrined in clause 12 of the Resolution of the Plenum of the Supreme Court

[1] Цивільний процесуальний кодекс України № 1618-IV від 18.03.2004 року. URL: https://zakon.rada.gov.ua/laws/show/1618-15#n6039

of Ukraine "On Judgment in a Civil Case" No. 14 of 18.12.2009 (the Plenum), which directly states the obligation reference in the court decision to norms active legislation material and procedural law, which the court motivated own solution in the determination actual circumstances, as well as the circle of rights and obligations plaintiff and defendant [2]. It is confirmed by the plenum attribution of norms of the European Union Conventions and practices of the ECHR to the sources of law, which have to be applied by the courts, therefore an obligation is also established refer to them on the basis of Law of Ukraine No. 3477– IV [2]. In 2015, the Ukrainian legislator took the correct and necessary step regarding the proper implementation of Art. 6 of the European Convention and the development of the mechanism for implementing the right to go to court by adopting the Law of Ukraine "On Ensuring the Right to a Fair Trial" [3], which introduced a number of changes to many legislative acts. Thus, the reform of the domestic legislation and adaptation to the law of the European Union (EU) led to the strengthening of control over the fulfillment by Ukraine of its obligations regarding the implementation, in particular, of those provisions of the European Convention that relate to the administration of justice. Therefore, the national courts of Ukraine are obliged to be guided by the provisions of the European Convention and its interpretation in the decisions of the ECHR when administering justice.

We consider it expedient to focus further research specifically on the specifics of the application by national courts of Art. 6 of the European Convention "Right to a fair trial". However, the essence of this norm should be determined first.

Yes, according to the provisions of Art. 6 of the European Convention actually regulates the right to a fair trial, and this right can be considered extremely meaningful in its scope from a number of other rights arising from this provision, and its meaning is to grant everyone the right to a fair and open consideration of his dispute within a reasonable time, established by law, by an impartial court that can resolve a conflicting case regarding his legal claims of a civil nature or determine the provenance of any accusation of committing a crime against him [4].

In addition, the norms of Art. 6 of the European Convention establishes the publicity of the pronouncement of the court verdict, but indicates the possibility of not allowing representatives of the mass media and listeners into

[2] Про судове рішення у цивільній справі : Постанова Пленуму Верховного суду України № 14 від 18.12.2009 р. URL: https://zakon.rada.gov.ua/laws/show/v0014700-09#Text

[3] Про забезпечення права на справедливий суд : Закон України № 192-VIII від 12.02.2015 року. URL: https://zakon.rada.gov.ua/laws/show/192-19#Text

[4] Конвенція про захист прав людини і основоположних свобод (з протоколами) (Європейська конвенція з прав людини) від 04.11.1950 року. URL: https://zakon.rada.gov.ua/laws/show/995_004#Text

the courtroom during court proceedings or certain episodes in order to ensure in a democratic society the interests of generally recognized norms of morality, public order or the foundations of national security, and also regarding the protection of the interests of minors and the protection of the details of the intimate life of the participants in the process, in exceptional cases and in the presence of special circumstances of the threat of harming the goals of justice by the publicity of the proceedings [4].

A study of the peculiarities of the application of the ECHR and European practice in Ukraine Conventions when considering civil cases by national courts, focus on the application of Art. 6 "Right to a fair trial" of the European Conventions. Especially taking into account the fact that the legal support of this very norm of the European Convention is extremely relevant in the conditions of the legal regime of martial law in Ukraine as a result of the armed aggression of the Russian Federation against Ukraine. After all, as of today, since the beginning of hostilities in 2014 and the full-scale invasion of the russian federation into the territory of independent Ukraine, five regions of Ukraine and the Autonomous Republic of Crimea are under the temporary partial occupation of the russian federation, namely: Zaporizhzhia (≈ 19.6 thousand sq. km, or 73%), Kherson (≈ 20.5 thousand sq. km, or 72%), Kharkiv (≈ 603 sq. km, or 2%), Luhansk (≈ 26.3 thousand sq. km, or 98 % of the territory), Donetsk (≈ 15.07 thousand sq. km, or 57%), AR Crimea (26.9 thousand sq. km of territory is fully occupied). The terrible events of the military operations became a harsh reality of the life of all Ukrainians, which for the majority will never recover. So, citizens of Ukraine forced to go to court to protect their violated rights. One of a number of such remedies is legal protection through the filing of a claim for damages moral damage caused because of armed aggression Russian Federation against of Ukraine.

According to the data of the state information system – the Unified State Register of Court Decisions, public access to which is provided in a test (limited) mode, the judicial practice of national courts of general jurisdiction indicates a certain number of court decisions passed specifically in cases of compensation for moral damage caused as a result of armed aggression of the russian federation against Ukraine. However, some of them are worth analyzing in order to identify the specifics of the application of the ECHR case law and the norms of the European Convention.

So, for example, the Leninsky District Court of Kharkiv in the decision dated 02.12.2019 in case No. 642/5977/19, proceeding No. 2/642/1625/19, in which the Claimant motivated his claims against the russian federation in the person of the Embassy of the Russian Federation the fact that his father was called up for military service on 27.01.2016 under a contract, and in the period from 17.06.2016 to 16.06.2017, his father directly participated in the battles

for the independence, sovereignty and territorial integrity of Ukraine in the Donetsk and Luhansk regions, and during the execution of a combat mission on 16.06.2017 to maintain the position of a platoon support point, he came under fire from the armed forces of the russian federation, as a result of which he received non-life-threatening gunshot wounds, which caused his death [5]. As a result of the consideration of the civil case, the Lenin District Court of Kharkiv issued a decision dated 13.03.2019, which recorded the fact of the death of the Claimant's father while performing his duty in the Armed Forces on 16.06.2017 near the village of Novotoshkivske, which is located in the Popasnyan district in the Luhansk region, due to the military actions of the russian federation against Ukraine. In substantiating the claim for moral damages as a result of the tragic and premature death of his father due to military actions, the Claimant referred to the violation of the inalienable right to life of his deceased father, which is provided for by the provisions of Art. 27 of the Constitution of Ukraine and provisions of Art. 2 of the European Convention. Thus, the Plaintiff's moral suffering is directly caused by the russian federation's violation of fundamental human rights and freedoms, which consists in depriving his father of his life, by which the Russian Federation caused him severe moral suffering by grossly violating the right to respect for family life. The Plaintiff emphasized the presence of a special cynicism with which by launching armed aggression against Ukraine, the russian federation violates fundamental human rights and freedoms in Ukraine, in connection with which the Claimant experiences continuous, unrelenting mental pain and suffering, loss of mental peace, he has a constant feeling of insecurity and disappointment, which is manifested in the loss of faith in the future, to the constant feeling of suffering from the loss of a loved one, which deprives him of the opportunity to have normal communication with other people, work and maintain a normal lifestyle [5]. As a direct subject, as a result of which the Claimant suffered moral damage, he indicated the russian federation and the Armed Forces of the russian federation, the armed formations of the russian federation, which its government supports, manages and sponsors, using as weapons the means, the use of which poses an increased danger to humanity [5]. It should be noted that the court, making a decision on this case, took into account the nature and extent of the moral suffering caused to the Plaintiff, significant violations of his rights, the intentional nature of the actions of the russian federation, as well as the emotional pain from the loss of a loved one, the sense of helplessness that he feels due to the loss of a loved one. When deciding the amount of

[5] Рішення Ленінського районного суду м. Харкова від 02.12.2019 р. по справі № 642/5977/19, провадження № 2/642/1625/19. URL: https://reyestr.court.gov.ua/Review/86018545

compensation for the moral damage caused to the Plaintiff, the court proceeded from the amount of satisfied claims of the plaintiffs in similar disputes, which were the subject of consideration by the ECHR, in which the average amount of compensation was approximately 60,000.00 EUR for the death of one person. So, in its decision, the court referred to the following ECHR decisions in the cases of KHACHUKAYEV v. RUSSIA (No. 28148/03), SAGAYEVA AND OTHERS v. RUSSIA (No. 22698/09 and 31189/11), ISLAMOVA v. RUSSIA (No. 37614/02), SULTYGOV AND OTHERS v. RUSSIA (No. 42575/07, 53679/07, 311/08, 424/08, 3375/08, 4560/08, 35569/08, 62220/10, 3222/11, 22257/11, 24744/11 and 36897/ 11). In addition, when assessing the amount of moral damage claimed by the Claimant, the court was guided by the provisions of p. 15, paragraph 3 of the "Court Rules – Compensation for Damages", promulgated by the ECHR dated January 1, 2016, which establish the right of applicants who have expressed a desire to receive compensation for non-material damage, to specify the amount that, in their opinion, is fair to the nature of the existing moral suffering. Thus, the court satisfied the claims of the Plaintiff, who lost his father as a result of the military aggression of the russian federation against Ukraine, in full, deciding the amount of compensation for the moral damage caused to him to be sufficient and fair in the amount of 1,677202.98 UAH, which on the day of filing the claim to of the court at the official rate of the National Bank of Ukraine (NBU) is 60,000.00 EUR, noting that this amount of compensation was determined by the ECHR when considering similar claims of natural persons to recover compensation for moral suffering due to the death of a natural person [5]. Therefore, the court justified its conviction regarding the absence of judicial immunity in the russian federation as an aggressor state by the fact that the russian federation went beyond its sovereign rights, guaranteed by Art. 2 of the United Nations Charter, violation of the provisions of the United Nations Charter, the Universal Declaration of Human Rights, clauses 1 and 2 of the Budapest Memorandum, the Helsinki Final Pact of the Conference on Security and Cooperation in Europe dated August 1, 1975, as well as treaties concluded between Ukraine and the russian federation, in including those relating to the Ukrainian-Russian state border.

Buski District Court of the Lviv Region, in which the Claimant, who is a participant in the hostilities, asked the court to recover moral damages from the russian federation in the amount of 300,000.00 UAH. In substantiation of her claims, she referred to the fact that the invasion of the Crimean Peninsula by defected russian troops at the end of February – beginning of March 2014 without identification marks into the territory of the Autonomous Republic of Crimea, which is the territory of Ukraine, which is actually the beginning of the military aggression of the russian federation against Ukraine, in as a result

of which the Autonomous Republic of Crimea, parts of Donetsk and Luhansk regions were occupied, where she personally participated in an anti-terrorist operation in the period from 13.06.2014 to 24.04.2017 and from 01.09.2017 to 30.04.2018, which significantly affected her mental health, physical and moral condition [6]. The plaintiff points to a constant state of depression, a decrease in vitality and a deterioration in general well-being, which negatively affected her relationships with others and led to the disruption of normal life relationships due to the beginning of the armed aggression of the russian federation against Ukraine and her direct participation in hostilities, associated with a risk to life and health, is regarded as moral damage caused to it by the illegal actions of the russian federation and, accordingly, is subject to recovery from the russian federation, which is the subject as a state, as a result of which armed aggression against Ukraine and the occupation of part of the territory of Ukraine violated a number of rights and freedoms of citizens of Ukraine, in particular their personal rights [6]. Given that, taking into account the multiple nature of gross violations of her constitutional rights, their scope and duration, the Claimant assessed the moral damage caused to her in the amount of 300,000.00 UAH in accordance with the average amount of compensation for non-pecuniary damage, which is applied by the ECHR in case of violation of the norms of the European Convention[6]. As a result of the consideration of this case, the court, making a decision, resolving the issue of judicial immunity of the Russian Federation, referred to the Resolution of the Verkhovna Rada of Ukraine of January 27, 2015 No. 129– VIII, the provisions of which approved the Appeal to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of NATO, of the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, national states of the world on the recognition of the russian federation as an aggressor state, as well as the fact that the military actions of the russian federation on the territory of Ukraine were actually recognized and condemned by a number of international bodies [7]. In view of the fact that the court reached a conclusion similar to that made in case No. 642/5977/19, noting the following: "the russian federation, in violation of the United Nations Charter, the Universal Declaration of Human Rights, the

[6] Рішення Буського районного суду Львівської області від 29.06.2022 р. по справі № 943/1741/19, провадження № 2/943/423/2022 URL: https://reyestr.court.gov.ua/Review/105182285

[7] Про Звернення Верховної Ради України до Організації Об'єднаних Націй, Європейського Парламенту, Парламентської Асамблеї Ради Європи, Парламентської Асамблеї НАТО, Парламентської Асамблеї ОБСЄ, Парламентської Асамблеї ГУАМ, національних парламентів держав світу про визнання Російської Федерації державою-агресором : Постанова Верховної Ради України № 129-VIII від 27.01.2015 року. URL: https://zakon.rada.gov.ua/laws/show/129-19#Text

Budapest Memorandum (clauses 1, 2), the Helsinki Final Act of the Security Conference and Cooperation in Europe on August 1, 1975, agreements concluded between Ukraine and russia, including on the Ukrainian-russian state border, went beyond the limits of its sovereign rights, guaranteed by Art. 2 of the United Nations Charter, and therefore, according to the normative acts adopted by Ukraine, it is an aggressor state, which, in turn, indicates its lack of judicial immunity" [6]. As a result, the court, making a decision in this case, referred to the decision of the ECHR in the case of LOIZIDOU v. TURKEY (No. 15318/89), by which the claims were satisfied and it was decided to oblige to pay compensation to the plaintiff, in particular, for the moral suffering caused by the illegal occupation of part of Cyprus by the Turkish armed forces in the amount equivalent to 300,000.00 UAH in compensation for moral damage [6].

The decision of the Ivano-Frankivsk City Court of the Ivano-Frankivsk Region dated February 19, 2024 in case No. 344/18141/23, proceeding No. 2/344/732/24 is also exemplary. In this case, the plaintiffs appealed to the russian state, represented by the Embassy of the russian federation in Ukraine, in order to establish a fact of legal significance regarding the forced resettlement of them and their common children from the currently temporarily occupied territory of the city of Kirovsk (currently the city of Golubivska). Luhansk Oblast to Brovary, Brovary District, Kyiv Oblast, which took place on November 12, 2014 as a result of the armed aggression of the russian federation against Ukraine, as well as the forced resettlement from the territory of Rubizhne, Luhansk Oblast to Ivano-Frankivsk, Ivano-Frankivsk Oblast, which took place 03/15/2022, as a result of the armed aggression of the russian federation against Ukraine due to the start of active hostilities from 02/24/2022 to 05/13/2022 and the subsequent russian occupation of the territory of the city of Rubizhny Luhansk from 05/13/2022, the plaintiffs also asked the court to recover the state of the russian federation for their benefit and two for the benefit of minor children, in whose interests they act, compensation for moral damage caused as a result of the armed aggression of the russian federation against Ukraine, in the amount of UAH 3,000,000.00 each, which according to the official rate of the NBU as of on the date of filing the claim is equivalent to EUR 75,000.00 for each [8]. When deciding this case, the court applied the ECHR practice in the STANKOV case v. BULGARIA (No. 68490/01) referring to the position that "the assessment of non-pecuniary damage is by its nature a complex process, except in cases where the amount of compensation is determined by the court"

[8] Рішення Івано-Франківського міського суду Івано-Франківської області від 19.02.2024 р. по справі № 344/18141/23, провадження № 2/344/732/24. URL: https://reyestr.court.gov.ua/Review/117134557

[8]. The court also referred to paragraph 37 of the decision in NEDAYBORSHCH v. RUSSIA (No. 42255/04) in which it is stated that "the applicant cannot be required to provide any confirmation of the moral damage he has suffered, which means that if there is an established fact of violation of the applicant's rights, the moral damage is present and ascertained by the court" [8], as well as the decision of the ECHR in the LOIZIDOU case v. TURKEY (No. 15318/89), according to which the plaintiff's claim for compensation for moral suffering caused by the illegal occupation of a part of the territory of Cyprus by the Turkish armed forces was satisfied [8]. The court confirmed the fact of Russian aggression against Ukraine with references to the latest international documents such as: 1) resolution ES -11/1 "Aggression against Ukraine", by which the UN General Assembly of March 2, 2022 recognized the armed aggression of the russian federation against Ukraine, which requires the russian federation to immediately cease the use of force against Ukraine, to refrain from threats or the use of force against any EU country, the complete and unconditional withdrawal of armed forces from the territory of Ukraine within its internationally recognized borders, as well as the provision of full protection of civilians, including humanitarian personnel, journalists and persons in a vulnerable position, including women and children; 2) the decision of the International Court of Justice of the United Nations in the interstate case of Ukraine against Russia on taking temporary measures, according to which it is determined that the Russian Federation must immediately stop the hostilities that it started on the territory of Ukraine on February 24, 2022; 3) the resolution "Consequences of the continued aggression of the russian federation against Ukraine: the role and response of the Council of Europe", adopted by the Parliamentary Assembly of the Council of Europe No. 2433 of April 27, 2022, which recognized that the aggression of the russian federation against Ukraine is an unprecedented act both in itself and for its far-reaching consequences, because it provokes the most severe humanitarian crisis in Europe with the largest number of victims, the largest internal and external displacement of the population since the Second World War [8].

The position of non-application of judicial immunity of the russian federation in this case was substantiated by the court in more detail than in previous cases, in particular, by applying the legal position of the Supreme Court, set out in the resolution dated 06.08.2022 in case No. 490/9551/19, proceeding No. 61– 19853sv21), by which the Supreme Court noted that the Russian Federation has been carrying out the described actions since 2014 and has been doing so at the time of the adoption of this court decision, therefore, since the invasion of the russian federation into Ukraine in 2014, Ukrainian courts, when considering cases against the russian federation, have the right

to cancel the immunity of the russian federation and adopt a decision on the recovery of damages caused to natural persons as a result of the invasion of the russian federation, according to a lawsuit filed directly against the specified state [9]. In addition, the court in its decision also applied the same positions of the ECHR, which the Supreme Court referred to in its decision, namely: the decision of the ECHR dated 03.14.2013 in the case of OLEYNIKOV v. RUSSIA (No. 36703/04), which indicates the application of the provisions of the European Convention on Jurisdictional Immunities of States and their Property of 2004 in accordance with customary international law, even if this state has not ratified it, as well as the decision of the ECHR dated 23.03.2010 in the case CUDAK v. LITHUANIA (No. 15869/02), the text of which indicates the existence of customary norms in matters of state immunity, the predominance in international practice of the theory of limited state immunity, where restrictions may pursue a legitimate goal and be proportionate to such a goal [8]. Thus, the court took into account the nature and extent of the moral suffering caused to the Plaintiffs, significant violations of their constitutional rights, the intentional nature of the actions of the russian federation, and decided to satisfy the claims, considering the amount of compensation for the moral damage caused to the Plaintiffs to be sufficient and fair in the amount of 12,000,000.00 UAH, which is equivalent to 300,000.00 EUR, namely 3,000,000.00 UAH for each family member, which is equivalent to 75,000.00 EUR at the official rate of the NBU as of the time of the appeal to the court [8]. As we can see, with the onset of a full-scale invasion of the Russian Federation on the independent territory of Ukraine, the implementation of Art. 6 of the European Convention has undergone certain peculiarities, in particular, by making decisions by national courts of Ukraine denying the concept of absolute jurisdictional immunity of another state, in our case the russian federation.

However, cases of refusal to satisfy claims against the russian federation in civil cases for compensation for moral damage caused as a result of the armed aggression of the russian federation against Ukraine and the occupation of a part of the territory of Ukraine by the russian federation due to the prevention of violation of such a principle of international law as the immunity of the state are not rare. For example, the Decision of the Swativ District Court of Luhansk Oblast dated 04/06/2020 in case No. 426/10700/19 [10] and the decision of the Korostyshiv District Court of Zhytomyr Oblast dated

[9] Постанова Верховного Суду від 08.06.2022 року по справі № 490/9551/19 (провадження № 61-19853св21) URL : https://reyestr.court.gov.ua/Review/104728451

[10] Рішення Сватівського районного суду Луганської області від 06.04.2020 р. по справі № 426/10700/19. URL: https://reyestr.court.gov.ua/Review/88737292

06/24/2020 in Case No. 280/1380/19, proceedings No. 2 /935/103/20 [11], which the Zhytomyr Court of Appeal, based on the results of the review of the appeal, left unchanged [12], seeing no reason to depart from the conclusion regarding the existence of judicial immunity in the russian federation, which is set forth in the Supreme Court's decision in case No. 914 /3360/2012 dated 23.10.2019 and the decision of the Supreme Court in case No. 711/17/19 dated 13.05.2020. Therefore, until 2022, national courts did not dare to apply the practice of the ECHR in cases of limitation of jurisdictional immunity, in particular, the position of the ECHR in cases OLEYNIKOV v. RUSSIA (No. 36703/04), CUDAK v. LITHUANIA (No. 15869/02). Since the opposite practice of the Supreme Court regarding judicial immunity of the russian federation began to take shape at the beginning of 2022, when the Cassation Civil Court of the Supreme Court adopted a resolution dated 04.14.2022 in case No. 308/9708/19. Subsequently, it was supplemented by new resolutions of the Civil Court of Cassation as part of the Supreme Court dated 18.05.2022 in case No. 428/11673/19 and No. 760/17232/20-ts, Resolution of the Grand Chamber of the Supreme Court dated 12.05.2022 in case No. 635/ 6172/17.

On the other hand, the analysis of the judicial practice of the ECHR regarding the application of the provisions of Art. 6 of the European Convention provides grounds for asserting that the right to a court in general is understood precisely as the right of access, which creates an opportunity for a person to apply to court for the purpose of protecting his rights, as well as the absence of legal and/or practical obstacles to the exercise of this right by state [13]. However, in fact, the ECHR in its decisions constantly reminds that the conventional right to access to fair justice, regulated by Article 6 of the European Convention, cannot be absolute, that is, such a right can be limited by the state within permissible limits, because this right provides in essence, state management, while states can exercise their respective freedom of discretion in the implementation of this issue. But the court is obliged to pass a verdict in the highest instance on compliance with the requirements of the European Convention, but at the same time it must make sure that the parties have no restrictions on the legal right of access to fair justice, because the essence of such a right can be nullified [13]. In the decision in the PRINCE case

[11] Рішення Коростишівського районного суду Житомирської області від 24.06.2020 р. по справі № 280/1380/19, провадження № 2/935/103/20. URL: https://reyestr.court.gov.ua/Review/90020951

[12] Постанова Житомирського апеляційного суду від 11.08.2020 р. по справі № 280/1380/19. URL: https://reyestr.court.gov.ua/Review/90902019

[13] Навчально-методичний посібник для тренерів навчального курсу для суддів «Застосування Конвенції про захист прав людини і основоположних свобод та практики європейського суду з прав людини при здійсненні правосуддя». К.: ВАІТЕ, 2017. 192 с., с. 123.

HANS – ADAM II OF LIECHTENSTEIN v. GERMANY (No. 42527/98) the ECHR noted the inconsistency of such a restriction under Art. 6 of the European Convention in the presence of such a condition, if it does not pursue a legitimate goal, and if there is no reasonable proportional balance between the means that were used and the set legitimate goal [13].

Therefore, the mechanism of compensation for moral damage from the russian federation as an aggressor state as a result of its illegal military actions on the territory of Ukraine began to be implemented without undue burden in the form of the presence of jurisdictional immunity as a principle of international law, which, on the one hand, is a supporting element of the modern international legal order, and on the other on the other hand, taking into account the numerous facts of the brutal and cynical violation of the norms of international law by the russian federation, the international community recognized the urgency and vital necessity of the exceptional possibility of deviating from this norm, in order to ensure the protection of their violated rights by appealing to the national courts of Ukraine.

An analysis of a number of civil cases on compensation for moral damage caused as a result of the armed aggression of the russian federation against Ukraine, the decision of which was published in the state information system – the Unified State Register of Court Decisions, which is publicly accessible in a test (limited) mode, revealed that the compensation mechanism moral damage from the Russian Federation as an aggressor state as a result of its illegal military actions on the territory of Ukraine began to be realized without undue burden in the form of the presence of jurisdictional immunity as a principle of international law, which, on the one hand, is a supporting element of the modern international legal order, and on the other, taking into account the many facts of the russian federation's brutal and cynical violation of the norms of international law, the international community recognized the urgency and vital necessity of the exceptional possibility of deviating from this norm, in order to ensure the protection of their violated rights by appealing to the national courts of Ukraine by the citizens of Ukraine who suffered from the military actions of the russian federation.

2. Legal principles and peculiarities of the application of the practice of the ECHR and the European Convention in Ukraine in the consideration of criminal proceedings by national courts

The procedure for criminal proceedings on the territory of Ukraine is carried out on the basis of the criminal procedural legislation of Ukraine, which consists of a specific codified law – the Criminal Procedure Code of Ukraine, relevant provisions of the Constitution of Ukraine, international treaties, the binding consent of which was given by the Verkhovna Rada of

Ukraine, and as well as other laws of Ukraine (Article 1) [14]. Therefore, according to the European Conventions and the practice of the ECHR constitute part of the national criminal procedural legislation of Ukraine.

In order to understand the essence of the task of criminal proceedings in national law, one should refer to the content of Art. 2 of the Criminal Procedure Code of Ukraine, according to the content of which, in fact, such a task was defined by the domestic legislator as the preservation of individuals, legal entities, society and the state from criminal acts, protection of the legal rights and interests of participants in criminal proceedings, guarantee of timely, comprehensive and independent investigation and trial of criminal cases with with the aim that all those guilty of crimes were brought to criminal responsibility for the committed act, but at the same time no innocent person was convicted or subjected to illegal procedural coercion, and that the appropriate legal procedure was applied to all participants in the consideration of criminal cases [14].

Analysis of the provisions of Art. 21 of the Criminal Procedure Code of Ukraine gives grounds for asserting the fixing of such guarantees in the criminal process as the right to a fair trial as soon as possible by an impartial court acting in accordance with the law; execution under any circumstances throughout the entire territory of the country of a court verdict that has entered into force in accordance with the Code of Criminal Procedure of Ukraine; the opportunity to participate in court hearings at all levels of consideration of a case that affects his interests, in accordance with the procedure regulated by the Criminal Procedure Code of Ukraine; also, it is prohibited to hinder the participation of persons in other forms of legal protection in criminal cases, in case of violations of the legal rights of such persons, which are established by the Constitution of Ukraine and interstate agreements of Ukraine, however, unless otherwise established by other norms of the Criminal Procedure Code of Ukraine [14]. Such prescriptions are actually duplicated and coordinated with Art. 6 of the European Convention, in which the provision of the right to a fair trial is defined in detail, because the provisions of Part 1 of Art. 6 of the European Convention is applied both in the consideration of civil and criminal cases. The other two parts of the above-mentioned legal norm relate exclusively to criminal proceedings and have certain features of practical law enforcement.

Yes, the norm of Part 2 of Art. 6 of the European Convention establishes that the innocence of every person who is accused of committing a criminal offense until his guilt is confirmed in accordance with the established procedure [4].

[14] Кримінальний процесуальний кодекс України № 4651-VI від 13.04.2012 року. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text

In the provisions of Part 3 of Art. 6 of the European Convention regulates the minimum amount of rights of each person accused of committing a crime, which can be characterized as follows: 1) the right to receive information in a known language about the essence of the accusation; 2) the right to receive an actual opportunity and available assistance for protection; 3) the right to defend oneself personally or with the help of a professional defender chosen at one's own discretion or at the expense of the state in case of lack of financial ability to pay for his services, if it is necessary to ensure effective justice; 4) the right to ask questions to the prosecution witnesses and invite defense witnesses in the same manner as prosecution witnesses; 5) the right to obtain an interpreter at the expense of the state in case of conducting a case in an incomprehensible language [4]. Therefore, the entire list of the above-mentioned rights are constituent elements of the right to a fair trial, which is also included among the provisions of the International Covenant on Civil and Political Rights. Instead, in civil proceedings, according to the position of the ECHR, set out in the GOLDER case v. UNITED KINGDOM (No. 4451/70) the norm of the right to a fair trial is understood as the right to a trial [15]. However, in modern legal doctrine, there are opposite views, and nevertheless, the right to a fair trial itself is understood as a more meaningful and complex right that encompasses a number of other procedural rights.

The implementation of access to justice in criminal proceedings consists in providing the participant in the proceedings with the opportunity and the right to apply to the court in order to protect his rights and/or interests protected by law, to make various types of petitions, to appeal to the investigating judge, court or higher court instance [16]. Nevertheless, the analysis of the judicial practice of the ECHR shows the formation of a more or less stable position of the ECHR stated, for example, in the decisions of DEWEER v. BELGIUM (No. 6903/75) and KART v. TURKEY (No. 8917/05), which repeatedly states that the right to trial is not absolute in either criminal or civil proceedings, emphasizes the establishment of restrictions on the exercise of such a right [17].

Therefore, the practical component of determining the specifics of the application of the practice of the ECHR and the European Convention in

[15] Рішення Європейського суду з прав людини у справі GOLDER v. THE UNITED KINGDOM (№ 4451/70) від 21.02.1975 р. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/SO0591.html

[16] Кримінальне процесуальне право України: навч. посібник / Р. І. Благута, Ю. В. Гуцуляк, О. М. Дуфенюк та ін.; за заг. ред. А. Я. Хитри, Р. М. Шехавцова. – Львів: ЛьвДУВС, 2017. 774 с., с. 110.

[17] Посібник зі статті 6 Конвенції – Право на справедливий суд (кримінально-процесуальний аспект). URL: https://www.echr.coe.int/documents/d/echr/Guide_Art_6_criminal_UKR

Ukraine in the consideration of criminal proceedings by national courts should be devoted to the study of judicial practice in relation to the application of the provisions of Art. 6 of the European Convention "Right to a fair trial" in sentences for criminal offenses against the established order of military service (military criminal offenses) and criminal offenses in the field of protection of state secrets, inviolability of state borders, provision of conscription and mobilization, illegal transportation of persons across the state border of Ukraine. Since, during the legal regime of martial law in Ukraine, as a result of the armed aggression of the russian federation, the commission of crimes in these categories of cases has increased significantly, and new criminal offenses are gaining public publicity in the mass media and social networks on the Internet.

An interesting example is the acquittal of the October District Court of Kharkiv on September 20, 2023 in case No. 639/1619/23, proceeding No. 1-kp/639/337/23, in which a person was accused of committing a criminal offense – the crime provided for in Art. 336-1 of the Criminal Code of Ukraine – evasion of civil protection service during a special period. Therefore, in this case, the prosecutor considered the guilt of the accused proven, asked the court to sentence the accused to imprisonment for 4 (four) years. And the accused and his defense attorney pointed out the absence of the composition of the criminal offense provided for in Art. 336-1 of the Criminal Code of Ukraine, claiming that he did not evade civil protection service, and his non-arrival at the place of service was caused by objective reasons and the impossibility of leaving after the start of the war on 02/24/2022 from the settlement of Slatine, Kharkiv Region, where he and his family members lived, due to active hostilities in the area, lack of transportation and damage to his vehicle [18]. According to the testimony of the accused, given by him at the court hearing, on February 24, 2022, on the day of the beginning of the armed aggression of the russian federation against Ukraine, he was with his family in the village of Slatine of the Kharkiv region, namely, he was at home and collecting things, when around 10 o'clock in the morning the head of the guard called him, informing him of the start of the general meeting and asking why he was absent from the workplace, to which he replied that he had not received a phone call from the dispatcher. After this telephone conversation, the accused immediately drove to the place of work in his own car, but while driving, he was stopped by the servicemen of the Armed Forces of Ukraine near the settlement of Novi Dergachi, due to the sudden start of shelling, the servicemen forbade further passage and ordered him to turn back. The accused

[18] Вирок Жовтневого районного суду м. Харкова від 20.09.2023 року по справі № 639/1619/23, провадження № 1-кп/639/337/23. URL: https://reyestr.court.gov.ua/Review/113573554

stated that he informed his superior about this event, and the latter stated that he did not need to go to work because all the employees were allegedly sent home. However, according to the testimony of the accused, on the same day, February 24, 2022, in the evening in the village of a military column of the russian military entered Slatine and a battle began, as a result of the hostilities that continued that evening, five cluster bombs exploded near his house, the house and his car were damaged, which received numerous damages, which led to a technical malfunction of the vehicle. The next day, the accused called the chief of the unit and informed him about the situation that had developed, to which the latter ordered him to stay at home and take care of his family, and two days later, in a telephone conversation with the chief, the accused told him about the constant shelling of the village Slatine, to which the boss ordered to stay on the phone until further notice. However, during this period in the village In Slatine, where the accused lived, problems with mobile communications began, because of which he told his colleagues the phone numbers of his neighbor and mother-in-law in order to get in touch. Later, the accused reported that he did not have the physical and technical ability to repair his mutilated car on his own, in the period from March 5 to 7, 2022, he contacted the head of the unit and told him that the situation had worsened, it was impossible to live in the settlement, the shops were not are working and there is no food, he has no opportunity to leave the settlement, the next time on March 12 or 13, 2022, during a conversation, the chief ordered the accused to stay at home and protect his family, only on 03.21.2022 the chief called the mother-in-law of the accused, informing about the need for the accused to urgently come to work within two days, in response to which the latter informed that he had almost repaired the car and could come to work on the morning of 03/22/2022. However, the next day the boss called and said that there was no need to go to work because the accused was being dismissed from the service. Further, the accused stated that on 06.04.2022 he left for the Poltava region in his car together with his wife and two minor daughters, in connection with which he sent a corresponding letter to the Head Department of State Emergency Service of Ukraine in the Kharkiv region, in which he reported that he had left for a safe place and could start performing his official duties, soon after he received a reply to this letter that he had been dismissed from the service on April 5, 2022. In addition, the accused informed the court that in February and March 2022, he will leave the village. He did not have the opportunity to go to Slatine, as there was no rail or bus transport connection, and his car was damaged as a result of shelling, therefore, taking into account the above circumstances, he did not have an objective opportunity to come to work to carry out his duties. As a result of consideration of this criminal case, the court came to the conclusion that there

was no objective side of the crime in the actions of the accused, namely: evasion of a person from the civil protection service during a special period, as well as a subjective side of the crime in the form of direct intent to commit a crime, by the court the principle of presumption of innocence enshrined in Art. 62, 63 of the Constitution of Ukraine, § 2 of Art. 6 of the European Convention, as well as Art. 17 of the Criminal Procedure Code of Ukraine, in particular, noting that all doubts about the proven guilt of a person are interpreted in favor of such a person, no one is obliged to prove his innocence in committing a criminal offense and should be acquitted if the prosecution does not prove the guilt of a person beyond a reasonable doubt [18]. Therefore, the court, having assessed the totality of the testimony of prosecution witnesses and defense witnesses questioned during the trial, as well as other collected written evidence in the criminal proceedings, came to the conclusion that the specified evidence does not confirm the guilt of the accused in intentionally evading the civil protection service in a special period, i.e. they do not prove the presence in the actions of the accused of a criminal offense provided for in Art. 336-1 of the Criminal Code of Ukraine [18]. Thus, the court decided that the charge was not proven, and therefore found the accused innocent of the charge and acquitted him on the basis of Clause 3, Part 1 of Art. 373 of the Criminal Procedure Code of Ukraine. As can be seen from the text of the acquittal in this case, the court applied the provisions of Art. 6 of the European Convention, but did not refer to the practice of the ECHR.

Exemplary examples of the application by national courts of the provisions of Art. 6 of the European Convention, there are verdicts in criminal proceedings on charges of committing a criminal offense provided for in Article 336 of the Criminal Code of Ukraine, which qualifies as evasion of conscription for military service during mobilization, for a special period, for military service during the conscription of reservists during a special period, and the sanction of this article provides for punishment in the form of deprivation of liberty for a term of three to five years [19]. Among the examples of consideration of criminal proceedings under Art. 336 of the Criminal Code of Ukraine, it is possible to note, in particular, the verdict of the Factory District Court of Mykolaiv dated 14.09.2023 in case No. 487/4641/23, proceeding No. 1-kp/487/698/23 [20], the verdict of the Trostyanets District Court of Vinnytsia of the region dated 09.10.2023 in case No. 147/1221/23,

[19] Кримінальний кодекс України № 2341-III від 05.04.2001 року. URL : https://zakon.rada.gov.ua/laws/show/2341-14#n2335

[20] Вирок Заводського районного суду м. Миколаєва від 14.09.2023 р. по справі № 487/4641/23, провадження № 1-кп/487/698/23. URL: https://reyestr.court.gov.ua/Review/113450959

proceedings No. 1-kp/147/102/23 [21], verdict of the Korsun-Shevchenkiv District Court of Cherkasy Region dated 10.10.2023 in case No. 699/ 1147/23, proceedings No. 1-kp/699/166/23 [22], verdict of the Chernyakhiv district court of Zhytomyr region dated November 30, 2023 in case No. 293/1581/23, proceedings No. 1-kp/293/241/2023 [23], the verdict of the Pokrovsky District Court of the Dnipropetrovsk region on 30.01.2024 in case No. 189/70/24, proceedings No. 1-kp/189/166/24 [24], the verdict of the Kyiv District Court of the city of Odesa from 03.29.2024 on case No. 947/7836/24, proceedings No. 1-kp/947/782/24 [25], verdict of Radyvyliv district court of Rivne region dated April 11, 2024 in case No. 568/445/24, proceedings No. 1-kp/ 568/51/24 [26] and others. In the criminal proceedings listed above, the courts sentenced the accused applying the requirements of Art. 75 of the Criminal Code of Ukraine, noting that such decisions correspond to the principle of necessity and sufficiency for the acquittal of the accused, which indicates that the courts observe the principle of equal opportunities and the principle of a fair trial, which are provided for by the norms of Art. 6 of the European Convention, as well as those that do not contradict the practice of the ECHR and the current norms of the criminal legislation of Ukraine. Of course, the courts, when deciding on the type and severity of the punishment of the accused, in accordance with the requirements of Art. 65 of the Criminal Code of Ukraine, such circumstances as the public danger of the crime committed by the accused and the degree of its gravity were taken into account, which according to the classification given in Art. 12 of the Criminal Code of Ukraine, belongs to the category of non-serious crimes, data on the identity of the accused, the presence of his permanent place of registration and residence, the characteristics of the place of work and residence were taken into account, the

[21] Вирок Тростянецького районного суду Вінницької області від 09.10.2023 р. по справі № 147/1221/23, провадження № 1-кп/147/102/23. URL: https://reyestr.court.gov.ua/Review/114007812

[22] Вирок Корсунь-Шевченківського районного суду Черкаської області від 10.10.2023 р. по справі № 699/1147/23, провадження № 1-кп/699/166/23. URL: https://reyestr.court.gov.ua/Review/114063144

[23] Вирок Черняхівського районного суду Житомирської області від 30.11.2023 року по справі № 293/1581/23, провадження №1-кп/293/241/2023. URL: https://reyestr.court.gov.ua/Review/115289325

[24] Вирок Покровського районного суду Дніпропетровської області 30.01.2024 року по справі № 189/70/24, провадження № 1-кп/189/166/24. URL: https://reyestr.court.gov.ua/Review/116662872

[25] Вирок Київського районного суду міста Одеси від 29.03.2024 року по справі № 947/7836/24, провадження № 1-кп/947/782/24. URL: https://reyestr.court.gov.ua/Review/117999292

[26] Вирок Радивилівського районного суду Рівненської області від 11.04.2024 р. по справі № 568/445/24, провадження № 1-кп/568/51/24. URL: https://reyestr.court.gov.ua/Review/118283234

absence/presence of being registered with a narcologist, a doctor was taken into account psychiatrist, criminal record, marital status of the accused, the presence of minor children in his care, as well as circumstances mitigating or aggravating the punishment of the accused, as a result of the courts taking into account the circumstances listed above, the accused were found guilty of committing a criminal offense provided for in Art. 336 of the Criminal Code of Ukraine, they were sentenced to imprisonment within the minimum sanction provided for in Art. 336 of the Criminal Code of Ukraine, for a term of 3 (three) years and released from serving a sentence with a probationary period for different terms – for 1 (one) year, for 1 (one) year and 6 (six) months, for 2 (two) years.

Thus, national courts when considering criminal proceedings regarding criminal offenses refer to the norms of the European Conventions, however, do not always apply the practice of the ECHR when adopting sentences and in the texts of most court decisions, there is a pattern of reference to the same phrases regarding the violation certain articles of the European Conventions. However, courts increasingly indicate the name of one or more decisions of the ECHR without going into the details of the essence of these decisions, which sometimes do not relate to the circumstances of the criminal proceedings at all. One of the reasons for this is the lack of official translations of texts and systematization of ECHR decisions, especially those adopted against other states. Such a gap in Ukrainian legislator significantly complicates and slows down activity courts that should not spend extra time for search, translation of ECHR decisions, and vice versa should quickly orientate, find and apply in your own solutions legal position of the ECHR regarding violation of the norms of the European Union Conventions of her and others international acts, having considered criminal proceedings from compliance procedural term in.

The study of the application in Ukraine of the practice of the ECHR and the European Convention in the consideration of criminal proceedings by national courts, which was carried out on the basis of judicial practice regarding the application of Art. 6 of the European Convention "Right to a fair trial" in sentences for criminal offenses against the established order of military service (military criminal offenses) and criminal offenses in the field of protection of state secrets, inviolability of state borders, provision of conscription and mobilization, illegal transportation of persons across the state border of Ukraine, made it possible to identify the following features: 1) appeal of national courts to the norms of the European Convention when considering criminal proceedings regarding criminal offenses; 2) lack of permanent application of the practice of the ECHR when passing a sentence ; 3) tracing in the texts of most court decisions, so-called "patterns" of

references to the same phrases in relation to violations of certain articles of the European Convention; 4) designation by national courts of only the names of one or more decisions of the ECHR without outlining the details of the essence of these decisions, which sometimes do not relate to the circumstances of criminal proceedings at all; 5) lack of official translations of texts and systematization of ECHR decisions, especially those adopted against other states.

3. Problematic issues and prospects for the development of the practice of the ECHR and the European Convention in Ukraine

Enforcement of ECHR decisions and European norms Conventions play an important practical role in the activity of justice as a source of law, especially considering the long process of Ukraine's preparation for joining the EU. However, during the period in force in domestic legislation, the norms regarding the obligation of courts to apply the practice of the ECHR and the provisions of the European Convention in making decisions among representatives of various branches of Ukrainian scientific schools and practicing lawyers were identified a number of problematic issues, regarding which heated discussions continue for a long time through diverse scientific views. Among the fundamental problems that have arisen in relation to the application of the practice of the ECHR, the following issues have been singled out by legal scholars in the domestic legal community: first, the legal nature of the decisions of the ECHR; secondly, the mandatory application of ECHR decisions by national courts; thirdly, the application as a source of law of individual decisions of the ECHR against the state of Ukraine or the generalized practice of the ECHR in relation to any state [27].

Mandatory application of ECHR decisions by national courts as a judicial precedent is a debatable issue, and therefore is the subject of professional discussions in the scientific community and among legal practitioners. So, I would like to find out whether the decisions of the ECHR really refer to precedent practice, which is not inherent in law enforcement in Ukraine. The legal positions of domestic scholars differ significantly regarding the relevance of precedent practice of the ECHR to the Ukrainian legal system, in particular, regarding civil and criminal proceedings.

For example, V. Zavhorodnii, analyzing the legal nature of ECHR decisions, came to the conclusion that by its legal nature ECHR decisions are an element of judicial practice as a unique source of precedent, the core of which is a legal position and the adoption of which decides a specific case, as

[27] Кагановська Т.Є., Пахомова І.А. Застосування практики Європейського суду з прав людини. *Вісник Харківського національного університету імені В. Н. Каразіна. Серія «ПРАВО».* Випуск 26. 2018. С. 6-9.

well as an official interpretation of norms of the European Convention [28]. A similar position is held by V. Kreytor, according to whom, in accordance with the current procedural legislation of Ukraine, domestic courts must apply the practice of the ECHR as a source of law when making court decisions, regardless of whether Ukraine is a party to a specific decision of the ECHR to which the court refers [29], asserting the positive impact of applying the practice of the ECHR on ensuring the protection of human rights and freedoms guaranteed by the Constitution. According to A. Marchenko`s position, the practice of the ECHR was recognized as a source of law in Ukraine as early as 2006 as a result of the adoption by the Ukrainian Parliament of the Law of Ukraine No. 3477– IV, which became the introduction of the European precedent into the sources of national law, and also testifies to the approximation of the domestic legal system to the countries EU [30]. Indeed, the Ukrainian State has been on the path of adapting national legislation to European legislation for a long time. However, such reformation processes and bringing domestic legislation into compliance with European legal standards should not be equated with the introduction of European precedent into the sources of national law.

The position of V. Palyuk seems more acceptable, since the scientist is sure of the need to apply the norms of the European Convention and the judicial practice of the ECHR only in case of non-compliance of the norms of national legislation with the provisions of the European Convention, the presence of gaps in the legislation, in order to improve the understanding of the provisions of the domestic legislative framework, to which certain amendments were made changes or additions based on ECHR decisions [31]. And one should agree with this position, given the impossibility of covering exclusively the entire existing basis of ECHR practice for its application by national courts, of course, except for specific decisions involving Ukraine, which must be applied in a mandatory manner during the administration of justice.

In addition to the above, the problem of application of the ECHR practice is aggravated by the lack of a mechanism and clear criteria, following which

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[28] Завгородній В.А. Правова природа рішень Європейського суду з прав людини. *Науковий вісник Міжнародного гуманітарного університету. Сер.: Юриспруденція.* № 15. Т. 1. 2015. С. 19-22.

[29] Кройтор В. А. Використання прецедентного права, створеного суддями Європейського суду з прав людини, в процесі прийняття рішень українськими судами з аналогічних питань. *Актуальні проблеми вітчизняної юриспруденції.* № 1. 2023. С. 46-53.

[30] Марченко А. А. Прецедентний характер рішень Європейського суду з прав людини в правовій системі України. *Митна справа.* 2013. № 6. С. 23-28.

[31] Палюк В. Чи можуть судді України у своїх рішеннях посилатися на рішення Європейського суду з прав людини. *Практика Європейського суду з прав людини. Рішення. Коментарі.* 2005. № 3. С. 231–237.

national courts could correctly and effectively use the legal conclusions of the ECHR during the proceedings and be guided by the norms of the Convention when making a decision on the case. An example of this can be the application by courts of Art. 6 European Convention "Right to a fair trial", which in the doctrine of international law is considered a phenomenon with a dual legal nature. Thus, by domestic legal scholars, decisions of the ECHR as legal acts are divided by their legal nature into law-enforcement and law-interpretation acts, which, in turn, are also characterized as law-interpreting acts [32]. Thus, the description of the issues outlined above allows us to assert the need for national courts in their professional activities to detect violations of the norms of the European Convention by applying the practice of the ECHR and to refer to the relevant decisions of the ECHR, which define a specific legal position regarding the violation of a certain norm of an article of the Convention in a separate type of judicial proceeding. However, unfortunately, there are certain problems in the application of the practice of the ECHR by Ukrainian courts against other states. Such difficulties are caused by a number of the following reasons.

The first and most significant problem should be noted the lack of official translations of the texts of ECHR decisions for their further practical application by judges during the consideration of court proceedings. Turning to the content of the provision on the procedure for referring to the norms of the European Convention and the practice of the ECHR, which are defined in parts 3–5 of Art. 18 of the Law of Ukraine No. 3477– IV dated 23.02.2006, it is understood that in the absence of a translation of a decision or a court decision or a commission decision, the court uses the original text, and in the event of a linguistic discrepancy between the translation and the original text, the court must use the original text, if linguistic discrepancies are found between the original text and/or in case of linguistic interpretation of the original text, then the relevant court practice should be applied [33]. Thus, judges who are obliged to use the provisions of the European Convention and the practice of the ECHR as a source of law when considering court proceedings, have to familiarize themselves with the texts of the decisions of the ECHR against other states, in English or French. After all, our state has undertaken to ensure the translation into Ukrainian of only those decisions that have been adopted against Ukraine. Such a situation in the domestic judicial community causes considerable indignation. First of all, taking into account the fact that

[32] Дудаш Т. Юридична природа рішень Європейського суду з прав людини (загальнотеоретичний аспект). *Право України*. 2010. №2. С. 173-179.

[33] Про виконання рішень та застосування практики Європейського суду з прав людини: Закон України № 3477-IV від 23.02.2006 року. URL : https://zakon.rada.gov.ua/laws/show/3477-15#Text

the current legislation of Ukraine does not require a legislator to speak a foreign language (for example, English and/or French) to a judge (candidate for the position of a judge), as well as a juror and a judge's assistant.

Analysis of the provisions of the Law of Ukraine "On the Judiciary and the Status of Judges" No. 1402– VIII dated June 2, 2016 (hereinafter Law of Ukraine No. 1402– VIII), which is a profile normative legal act that defines the procedure for organizing the judiciary and administering justice in Ukraine, which operates on the principles of the rule of law in accordance with European standards and ensures everyone's right to a fair trial [34], shows that there is no direct obligation for a judge, his assistant, or a juror to speak a foreign language. Thus, the legislative requirements for a candidate for the position of judge are established by the provisions of Art. 69 of the Law of Ukraine No. 1402– VIII, the first part of which stipulates that a citizen of Ukraine, not younger than thirty and not older than sixty-five, who has a higher legal education and professional experience in the field of law can be appointed to the position of judge five years, is competent, virtuous and speaks the state language in accordance with the level determined by the National Commission on State Language Standards [34]. In the provisions of Art. 63 "Status of a juror", Art. 65 "Requirements for a juror", Art. 157 "Judges' assistants" of the Law of Ukraine No. 1402– VIII also consider the absence of requirements regarding the obligation of jurors and judge's assistants to speak a foreign language. However, although in the provision of paragraph 8) part 7 of Art. 56 of the Law of Ukraine No. 1402– VIII stipulates the duty of a judge to systematically develop his professional skills, to maintain his qualifications at the appropriate level necessary for the performance of powers in the court where he holds a position [34], this norm in no way obliges requires a judge to have a certain level of knowledge of a foreign language, which can be rightly called a legislative gap, which definitely affects the correct interpretation of legal terminology by judges and the effectiveness of its practical application.

The second problem regarding the lack of official translation of ECHR decisions stems from the first. We are already talking about ensuring the rights of the participants in the case, in which the court makes a decision applying the practice of the ECHR. After all, the demand of all participants in civil court proceedings (plaintiff, defendant, applicant, debtor, third parties, legal representative, lawyer, expert, specialist, translator, witness, etc.) and criminal proceedings (prosecutor, defense counsel, accused, his legal representative, victim), civil plaintiff, civil defendant, witness, expert, translator, specialist, representative of the staff of the probation authority, etc.) to speak a foreign language, for example, there is no domestic civil procedural and criminal

[34] Про судоустрій і статус суддів : Закон України № 1402-VIII від 02.06.2016 року. URL : https://zakon.rada.gov.ua/laws/show/1402-19#n580

procedural legislation. First of all, mastering a foreign language as a professional obligation should be established for prosecutors (the legislator is making the first attempts in this direction) and lawyers, whose participation in the judicial process regarding the consideration of criminal proceedings is mandatory, and no less significant in civil proceedings.

Another, no less significant problem, it is worth noting the incorrect use and description by national courts when applying the practice of the ECHR and the provisions of the European Conventions in court decisions. Analysis of the peculiarities of the application of the practice of the ECHR and European practice by national courts of Ukraine Conventions in civil proceedings and criminal proceedings in separate areas, made in section 1 of this study, revealed a template reference to certain phrases regarding the norms of the European Conventions and practices of the ECHR. Because courts usually copy the same phrases without going into the details of the circumstances of each ECHR case they refer to in their decisions. This resulted in a chaotic mention of the legal positions of the ECHR. Sometimes there are even no references to them at all. Or such references are made by the court in the case when the party in the procedural document drew attention to the violation of specific norms of the European Convention and independently made a reference to the relevant decision of the ECHR on such a violation. The problem of this issue has already been highlighted in her works by A. Piddubna, who absolutely rightly emphasized that judges during their messages on the norms of the European Conventions and practice of the ECHR usually consider it sufficient to indicate only general phrases, without resorting to explaining the meanings and justifying the application of a specific norm, which as a result quite often leads to an inappropriate reference, in addition, with errors not only in the names of decisions of the ECHR, but also distortion and by changing the essence of the text of the provisions of the European Conventions and decisions of the ECHR [35]

CONCLUSIONS

Thus, the analysis of the practice of the application of the provisions of the European Convention and the decisions of the ECHR by the national courts of Ukraine revealed a number of difficulties that need to be resolved, which have been emphasized for a long time by representatives of the domestic scientific community. So, the above made it possible to form a list of problematic issues of implementation and practical application of the practice

[35] Піддубна А.І. Проблемні питання застосування національними судами практики ЄСПЛ. *Актуальні проблеми кримінального процесу та криміналістики* : тези доп. Міжнар. наук.-практ. конф. (м. Харків, 29 жовт. 2021 р.) / МВС України, Харків. нац. ун-т внутр. справ. ; Ташкент. держ. юрид. ун-т. Харків : ХНУВС, 2021. С. 284-286.

of the ECHR and the European Convention by the national courts of Ukraine, among which: 1) lack of a mechanism and clear criteria for the application of the practice of the ECHR and the European Convention by the national courts of Ukraine ; 2) stereotyped, incorrect use and description by national courts during the application by national courts of Ukraine of the practice of the ECHR and the provisions of the European Convention in court decisions; 3) the absence of official translations of the texts of the decisions of the ECHR, adopted against other states, into the Ukrainian language; 4) absence of a requirement (candidate for the post of judge) as well as juror and assistant judge to speak a foreign language (for example, English and/or French) in the current relevant legislation of Ukraine; 5) the absence of clear requirements for prosecutors and lawyers to speak a foreign language (for example, English and/or French) in the current relevant legislation of Ukraine.

The above-mentioned problems of implementation and practical application of the practice of the ECHR and the European Convention by the national courts of Ukraine significantly affect the quality of justice, the results of the consideration of cases and the adoption of court decisions, which, of course, affects the effectiveness of the protection of human rights and freedoms in our country.

Given that there is a need for legislative regulation of a number of these problematic issues.

Accordingly, the first and second problematic issues can be resolved by developing National School of Judges of Ukraine the mechanism and definition of clear criteria for the application of the practice of the ECHR and the European Convention by the national courts of Ukraine with the creation of specific advice taking into account the field of judicial proceedings, the category of the case, the instance of the court, etc. Placing such an obligation on National School of Judges of Ukraine is justified due to the fact that in accordance with Part 1 of Art. 104 of the Law of Ukraine No. 1402– VIII is a state institution that has a special status in the justice system, which provides training of highly qualified personnel for the justice system and carries out scientific research activities, which are covered by the legislation on higher education [34]. And among a number of its tasks according to Art. 105 of the Law of Ukraine No. 1402– VIII defined: 1) the initial training of a judge, provided for in Art. 89 of the Law of Ukraine No. 1402– VIII; 2) training of judges, including elected to administrative positions in courts; 3) periodic training of judges in order to improve the level of their qualifications; 4) conducting training courses, determined by the qualification or disciplinary body, to improve the qualifications of judges who are temporarily suspended from the administration of justice; 5) training of court staff and raising their qualification level; 5-1) training of employees of the Court Security Service

and improvement of their qualification level; 6) conducting scientific research on improving the judicial system, the status of judges and the judiciary; 7) studying the international experience of the organization and operation of courts; 8) scientific and methodical support of court activities, High Qualification Commission of Judges of Ukraine and High Council of Justice [34]. Therefore, the implementation of the mechanism and the definition of clear criteria for the application of the practice of the ECHR and the European Convention by the national courts of Ukraine should contribute to the correct application of the decisions of the ECHR through the acquisition by judges of special knowledge and skills in distinguishing each legal conclusion of the ECHR with the application of certain provisions of the European Convention, which in the future will minimize and make it impossible to cancel or changing court decisions by higher courts.

The third problem regarding the lack of official translations of the texts of ECHR decisions taken against other states into the Ukrainian language can be solved by defining the duty of the Representation Authority as the body entrusted with the responsibility for ensuring the representation of Ukraine in the ECHR and carrying out coordination the further implementation of its decisions, regarding the creation of the Unified Electronic Database of ECHR Decisions (alternative name – the Unified State Register of ECHR Decisions) in the state language, ensuring the translation of the original texts of ECHR decisions into the state (Ukrainian) language with their subsequent placement in the created Unified Electronic Database of ECHR Decisions (alternative name – the Unified State Register of Court Decisions of the ECHR).

The fourth and fifth problems can be solved by establishing the respective duty of a judge and a candidate for the position of judge, a juror and a candidate for the position of a juror, an assistant judge and a candidate for the position of an assistant judge, a prosecutor and a candidate for the position of a prosecutor, a lawyer and a person who expressed a desire to become a lawyer, to speak a foreign language (to choose from: English and/or French) in accordance with the level determined by the relevant body (for example, the National Commission for Professional Foreign Language Standards) with amendments to the relevant normative legal acts – Laws of Ukraine "On the judicial system and the status of judges" No. 1402– VIII dated June 2, 2016; "On the Prosecutor's Office" No. 1697– VII dated 14.10.2014; "On the advocacy and advocacy activities" No. 5076– VI dated 07/05/2012. In addition, it is important to encourage practicing lawyers to learn a foreign language of the legal field with practical tasks in the educational process of processing not only the original texts of the ECHR's court decisions, but also other original texts of international legal acts. Professional development programs in the form of workshops, trainings, workshops, professional

discussions, master classes, etc. can also be aimed at mastering the legal English and French languages.

Such changes will contribute to ensuring the professional growth of representatives of the judiciary, prosecutors, lawyers and other young lawyers who have expressed a desire to devote their lives to serving the state, who will be able to increase not only the effectiveness of the judiciary in Ukraine, but also the entire state apparatus.

SUMMARY

The article pays special attention to the study of the peculiarities of the application of the practice of the ECHR and the Convention for the Protection of Human Rights and Fundamental Freedoms in Ukraine in the consideration of civil cases and criminal proceedings by national courts, with an emphasis on the categories of cases related to compensation for moral damage caused as a result of armed aggression of the russian federation against Ukraine and the commission of criminal offenses against the established order of military service (military criminal offenses) and criminal offenses in the field of protection of state secrets, inviolability of state borders, provision of conscription and mobilization; illegal transportation of persons across the state border of Ukraine). Based on the analysis of a number of civil cases, the decisions of which were published in the state information system – the Unified State Register of Court Decisions, which is publicly accessible in a test (restricted) mode, it was found that the mechanism of compensation for moral damage from the russian federation as an aggressor state due to of its illegal military actions on the territory of Ukraine began to be implemented without undue burden in the form of the presence of jurisdictional immunity as a principle of international law, which, on the one hand, is a supporting element of the modern international legal order, and on the other, taking into account the many facts of the brutal and cynical violation of the norms of international law by the russian federation, the international community recognized the urgency and vital necessity of the exceptional possibility of deviating from this norm, in order to properly implement by the citizens of Ukraine, who suffered from the military actions of the russian federation, the protection of their violated rights by applying to the national courts of Ukraine. Elaboration of the specifics of the application of the practice of the ECHR and ECHR in Ukraine in the consideration of criminal proceedings by national courts was carried out on the basis of judicial practice regarding the application of Art. 6 of the ECHR "Right to a fair trial" in sentences for criminal offenses against the established order of military service (military criminal offenses) and criminal offenses in the field of protection of state secrets, inviolability of state borders, ensuring conscription and mobilization,

illegal transportation of persons across the state border of Ukraine. The analysis of a number of judgments in this article allowed us to come to the conclusion that, indeed, national courts refer to the norms of the ECHR when considering criminal proceedings regarding criminal offenses, but do not always apply the practice of the ECHR when passing a sentence. In addition, it was found that in the texts of most court decisions, there is a pattern of reference to the same phrases regarding the violation of certain articles of the ECHR. However, courts increasingly indicate the name of one or more ECHR decisions without going into the details of the substance of these decisions, which sometimes do not relate to the circumstances of the criminal proceedings at all. One of the reasons for this is the lack of official translations of the texts and systematization of ECHR decisions, especially those adopted against other states. Such a gap in the Ukrainian legislator significantly complicates and slows down the activity of courts, which should not spend extra time searching for and translating decisions of the ECHR, but on the contrary, should quickly find their way around, find and apply in their decisions the legal positions of the ECHR regarding the violation of the norms of the ECHR and other international acts, considering the criminal proceedings in compliance with procedural terms. As a result of the research carried out by the author, the article offers a list of possible ways to address a number of identified problematic issues.

References

1. Цивільний процесуальний кодекс України № 1618-IV від 18.03.2004 року. URL: https://zakon.rada.gov.ua/laws/show/1618-15#n6039

2. Про судове рішення у цивільній справі : Постанова Пленуму Верховного суду України № 14 від 18.12.2009 р. URL: https://zakon.rada.gov.ua/laws/show/v0014700-09#Text

3. Про забезпечення права на справедливий суд : Закон України № 192-VIII від 12.02.2015 року. URL: https://zakon.rada.gov.ua/laws/show/192-19#Text

4. Конвенція про захист прав людини і основоположних свобод (з протоколами) (Європейська конвенція з прав людини) від 04.11.1950 року. URL: https://zakon.rada.gov.ua/laws/show/995_004#Text

5. Рішення Ленінського районного суду м. Харкова від 02.12.2019 р. по справі № 642/5977/19, провадження № 2/642/1625/19. URL: https://reyestr.court.gov.ua/Review/86018545

6. Рішення Буського районного суду Львівської області від 29.06.2022 р. по справі № 943/1741/19, провадження № 2/943/423/2022 URL: https://reyestr.court.gov.ua/Review/105182285

7. Про Звернення Верховної Ради України до Організації Об'єднаних Націй, Європейського Парламенту, Парламентської Асамблеї Ради Європи, Парламентської Асамблеї НАТО, Парламентської Асамблеї ОБСЄ, Парламентської Асамблеї ГУАМ, національних парламентів держав світу про визнання Російської Федерації державою-агресором : Постанова Верховної Ради України № 129-VIII від 27.01.2015 року. URL: https://zakon.rada.gov.ua/laws/show/129-19#Text

8. Рішення Івано-Франківського міського суду Івано-Франківської області від 19.02.2024 р. по справі № 344/18141/23, провадження № 2/344/732/24. URL: https://reyestr.court.gov.ua/Review/117134557

9. Постанова Верховного Суду від 08.06.2022 року по справі № 490/9551/19 (провадження № 61-19853св21) URL : https://reyestr.court.gov.ua/Review/104728451

10. Рішення Сватівського районного суду Луганської області від 06.04.2020 р. по справі № 426/10700/19. URL: https://reyestr.court.gov.ua/Review/88737292

11. Рішення Коростишівського районного суду Житомирської області від 24.06.2020 р. по справі № 280/1380/19, провадження № 2/935/103/20. URL: https://reyestr.court.gov.ua/Review/90020951

12. Постанова Житомирського апеляційного суду від 11.08.2020 р. по справі № 280/1380/19. URL: https://reyestr.court.gov.ua/Review/90902019

13. Навчально-методичний посібник для тренерів навчального курсу для суддів «Застосування Конвенції про захист прав людини і основоположних свобод та практики європейського суду з прав людини при здійсненні правосуддя». К.: ВАІТЕ, 2017. 192 с.

14. Кримінальний процесуальний кодекс України № 4651-VI від 13.04.2012 року. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text

15. Рішення Європейського суду з прав людини у справі GOLDER v. THE UNITED KINGDOM (№ 4451/70) від 21.02.1975 р. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/SO0591.html

16. Кримінальне процесуальне право України: навч. посібник / Р. І. Благута, Ю. В. Гуцуляк, О. М. Дуфенюк та ін.; за заг. ред. А. Я. Хитри, Р. М. Шехавцова. – Львів: ЛьвДУВС, 2017. 774 с.

17. Посібник зі статті 6 Конвенції – Право на справедливий суд (кримінально-процесуальний аспект). URL: https://www.echr.coe.int/documents/d/echr/Guide_Art_6_criminal_UKR

18. Вирок Жовтневого районного суду м. Харкова від 20.09.2023 року по справі № 639/1619/23, провадження № 1-кп/639/337/23. URL: https://reyestr.court.gov.ua/Review/113573554

19. Кримінальний кодекс України № 2341-III від 05.04.2001 року. URL : https://zakon.rada.gov.ua/laws/show/2341-14#n2335

20. Вирок Заводського районного суду м. Миколаєва від 14.09.2023 р. по справі № 487/4641/23, провадження № 1-кп/487/698/23. URL: https://reyestr.court.gov.ua/Review/113450959

21. Вирок Тростянецького районного суду Вінницької області від 09.10.2023 р. по справі № 147/1221/23, провадження № 1-кп/147/102/23. URL: https://reyestr.court.gov.ua/Review/114007812

22. Вирок Корсунь-Шевченківського районного суду Черкаської області від 10.10.2023 р. по справі № 699/1147/23, провадження № 1-кп/699/166/23. URL: https://reyestr.court.gov.ua/Review/114063144

23. Вирок Черняхівського районного суду Житомирської області від 30.11.2023 року по справі № 293/1581/23, провадження №1-кп/293/241/2023. URL: https://reyestr.court.gov.ua/Review/115289325

24. Вирок Покровського районного суду Дніпропетровської області 30.01.2024 року по справі № 189/70/24, провадження № 1-кп/189/166/24. URL: https://reyestr.court.gov.ua/Review/116662872

25. Вирок Київського районного суду міста Одеси від 29.03.2024 року по справі № 947/7836/24, провадження № 1-кп/947/782/24. URL: https://reyestr.court.gov.ua/Review/117999292

26. Вирок Радивилівського районного суду Рівненської області від 11.04.2024 р. по справі № 568/445/24, провадження № 1-кп/568/51/24. URL: https://reyestr.court.gov.ua/Review/118283234

27. Кагановська Т.Є., Пахомова І.А. Застосування практики Європейського суду з прав людини. *Вісник Харківського національного університету імені В. Н. Каразіна.* Серія «ПРАВО». Випуск 26. 2018. С. 6-9.

28. Завгородній В.А. Правова природа рішень Європейського суду з прав людини. *Науковий вісник Міжнародного гуманітарного університету*. Сер.: Юриспруденція. № 15. Т. 1. 2015. С. 19-22.

29. Кройтор В. А. Використання прецедентного права, створеного суддями Європейського суду з прав людини, в процесі прийняття рішень українськими судами з аналогічних питань. *Актуальні проблеми вітчизняної юриспруденції.* № 1. 2023. С. 46-53.

30. Марченко А. А. Прецедентний характер рішень Європейського суду з прав людини в правовій системі України. *Митна справа*. 2013. № 6. С. 23-28.

31. Палюк В. Чи можуть судді України у своїх рішеннях посилатися на рішення Європейського суду з прав людини. *Практика Європейського суду з прав людини. Рішення. Коментарі*. 2005. № 3. С. 231–237.

32. Дудаш Т. Юридична природа рішень Європейського суду з прав людини (загальнотеоретичний аспект). *Право України*. 2010. №2. С. 173-179.

33. Про виконання рішень та застосування практики Європейського суду з прав людини: Закон України № 3477-IV від 23.02.2006 року. URL : https://zakon.rada.gov.ua/laws/show/3477-15#Text

34. Про судоустрій і статус суддів : Закон України № 1402-VIII від 02.06.2016 року. URL : https://zakon.rada.gov.ua/laws/show/1402-19#n580

35. Піддубна А.І. Проблемні питання застосування національними судами практики ЄСПЛ. *Актуальні проблеми кримінального процесу та криміналістики :* тези доп. Міжнар. наук.-практ. конф. (м. Харків, 29 жовт. 2021 р.) / МВС України, Харків. нац. ун-т внутр. справ. ; Ташкент. держ. юрид. ун-т. Харків : ХНУВС, 2021. С. 284-286.

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