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ECONOMIC ASPECT OF CRIMINAL LAW COUNTERACTION TO JUSTIFICATION OF ARMED AGGRESSION AGAINST UKRAINE: RISKS FOR THE STATE BUDGET IN THE LIGHT OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS*

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Abstract. *Research subject.* The scientific article analyses the economic aspect of criminal law enforcement in the context of the Russian Federation's armed aggression against Ukraine and associated actions. It examines the potential financial implications for the Ukrainian state budget in relation to the settlement of compensation claims arising from violations of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the Convention). The criminal law is employed to combat justification, as well as to recognise the legitimacy of the denial of the armed aggression of the Russian Federation against Ukraine and the glorification of its participants. This is achieved through the application of Art. 436[2] of the Criminal Code of Ukraine (henceforth – CCU). In this regard, the objective of the present study is to predict the potential financial compensation that may be granted by the European Court of Human Rights (hereinafter – ECHR) in such cases, and the ensuing financial implications for the state budget of Ukraine, which will assume the financial responsibility for the relevant expenditures. In order to achieve this objective, the compliance of Art. 436[2] of the CCU by the provisions of Articles 3, 5, 8 and 10 of the Convention and the practice of the ECHR was checked. *Materials and methods.* The empirical basis of the study was as follows: (1) statistical data on Ukraine's participation as a defendant in the ECHR and the expenses incurred by it for the compensation of damages in 2019-2023; (2) approximately 900 verdicts of Ukrainian courts under Article 436[2] of the Criminal Code; (3) the survey results of 4015 law enforcement officers of Ukraine on countering the glorification of the Russian armed aggression in Ukraine; (4) the survey results of 16 Ukrainian judges on countering the glorification of the Russian armed aggression in Ukraine; (5) 46 ECHR judgments. The following methodological approaches were employed: dialectical, inductive and deductive reasoning, analysis and synthesis, and economic analysis. *Results.* It has been determined that the criminal law provisions stipulated in Article 436[2] of the CCU, by virtue of their subject matter and nature, give rise to the potential for restrictions on the rights to privacy (Article 8), freedom of speech and expression (Article 10), and, in a indirect capacity, the prohibition of torture (Article 3) and the liberty and security of the person (Article 5) as guaranteed by the Convention. Consequently, this may result in a negative economic effect, manifesting as potential expenditures from the state budget for the purpose of compensating individuals who have been subjected to violations of the aforementioned Convention provisions. Based on the average amount of compensation in cases against Ukraine of 13,190.8 EUR and the number of convictions under Article 436[2] of the CCU, as well as taking into

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account the factors that may affect the number of applications to the ECHR by persons convicted under this Article, an approximate total amount of possible satisfaction was calculated in the range of 264,000 EUR - 923,000 EUR. At the same time, this amount could reach up to 18 million EUR, assuming that all convicted persons bring an action.

Keywords: economic losses; state budget; price of compensation; justification, recognition of legitimacy, denial of armed aggression; glorification of participants in armed aggression; criminal liability; Convention for the Protection of Human Rights and Fundamental Freedoms; case law of the European Court of Human Rights.

JEL Classification: K14, K42

1. Introduction

The use of criminal law measures to combat certain socially dangerous phenomena requires a careful calculation of the economic impact, in particular in terms of the costs of conducting criminal proceedings, keeping convicted persons in custody, as well as the possible payment of compensation from the state budget in the event of violations committed in this case.

As a rule, such a calculation should be made at the stage of drafting a law on criminalisation of relevant actions. At the same time, under the conditions of a full-scale invasion of the Russian Federation into Ukraine, the Ukrainian legislator hastily and without making economic calculations adopted a number of laws aimed at countering Russian aggression and fighting its supporters, especially in the information sphere. One of these laws (The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Strengthen Criminal Liability for Production and Distribution of Prohibited Information Products", 2022) introduced into the Criminal Code of Ukraine (The Criminal Code of Ukraine, 2001) (hereinafter – CCU) criminal liability for a number of manifestations contributing to such aggression. In particular, it was supplemented by Article 436[2] "Justification, recognition as lawful, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants" (Table 1).

This offence has been included by the Ukrainian legislator in Chapter XX of the CCU "Criminal Offenses Against Peace, Human Security and International Law and Order" together with such crimes as waging aggressive war, violation of the laws and customs of war, use of weapons of mass destruction, genocide, etc.

At the same time, in the explanatory note to the corresponding draft law, within the framework of the financial and economic justification, it was pointed out that the implementation of the provisions of the draft law will not require any additional budgetary funds, and within the framework of the forecast of socio-economic and other consequences of the adoption of the draft law, attention was drawn exclusively to the fact that it will allow strengthening effective countermeasures against hybrid information warfare, protection of state sovereignty and territorial integrity of Ukraine, will contribute to strengthening patriotic sentiments (Explanatory note to the Draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine (Concerning Strengthening of Criminal Liability for Production and Distribution of Prohibited Information Products)", 2021). Consequently, the legislator did not consider the potential adverse economic implications of the implementation of the proposed legislation.

In practice, Article 436[2] of the CCU has been applied quite actively – for more than 2.5 years of its existence, more than 3,500 criminal offences have been

Table 1
Content of Article 436[2] of the CCU

Disposition	Sanction
Part 1: – Justification, recognition of the legitimacy, denial of the armed aggression of the Russian Federation against Ukraine, which began in 2014. – Justification, recognition as lawful, denial of the temporary occupation of part of the territory of Ukraine. – Glorification of the persons who carried out the armed aggression of the Russian Federation against Ukraine, which began in 2014, and other persons who contributed to its implementation (the full list is specified in the disposition of this provision).	Correctional labour for up to two years or probation for up to three years, or imprisonment for up to three years.
Part 2: Production, distribution of relevant materials containing information specified in part 1 of this Article.	Restriction of liberty for up to five years or imprisonment for the same term, with or without confiscation of property.
Part 3: Acts provided for in paragraphs 1 or 2 of this Article, committed by an official, or committed repeatedly, or by an organised group, or with the use of mass media.	Imprisonment for a term of five to eight years with or without confiscation of property.

registered (Office of the Prosecutor General, n.d.) and about 1,000 sentences have been passed (Unified State Register of Court Decisions, n.d.). Such active implementation of this provision obviously has a significant economic effect in the form of expenditures from the state budget of Ukraine, which include the following:

1) Direct costs of organising and conducting pre-trial investigations and trials of relevant criminal offences (including the salaries of investigators, prosecutors, judges and other employees of pre-trial investigation bodies, prosecutors and courts; costs of free legal aid to suspects and accused persons; costs of forensic examinations; costs of detention of convicts in penitentiary institutions or supervision of convicts released on probation, and so forth);

2) potential expenses for damages (compensation) to those persons who were unreasonably brought to criminal responsibility under Art. 436² of the CCU and/or whose rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950) (hereinafter – the Convention) were limited as a result of its application.

The analysis of these sentences, as well as a survey of judges and law enforcement officials in Ukraine, showed that the application of this norm does not take the specified economic effect into account at all. Such a situation is typical of the Ukrainian criminal justice system, which, guided by the principles of formal legality and publicity, does not provide for the discretion of law enforcement officers to bring criminal charges depending on considerations of economic expediency.

At the same time, this criminal prohibition entails restrictions on certain rights and freedoms enshrined in the Convention, in particular Article 5 (right to liberty and security of person), Article 3 (prohibition of torture), Article 8 (right to respect for private and family life) and Article 10 (freedom of expression).

Since the ECHR establishes the violation of the rights and freedoms guaranteed by the Convention and provides for compensation to applicants from the state budget, the price of any fair satisfaction must be determined. In view of the state budget deficit in Ukraine under martial law, this issue becomes even more relevant, as existing and potential public expenditures need to be carefully calculated.

The ***purpose of the study*** is to make a forecast of the possible price of satisfaction that may be awarded by the ECHR in such cases and the losses to the state budget of Ukraine, which will bear the burden of the corresponding payments.

For this purpose, it is necessary to check the admissibility of such restrictions and the compliance of the provisions of Article 436² of the CCU with the provisions of the Convention and the ECHR in the following aspects:

1) Given that Article 436² of the CCU inherently restricts the freedom of expression and the right to respect for private life, it is necessary to establish whether it creates a risk of violation of Articles 8 and 10 of the Convention based on the ECHR criteria for justified interference with the relevant rights;

2) as Article 436² of the CCU provides for deprivation of liberty in all three parts for non-violent acts, it is necessary to check the compliance of this provision with Article 3 of the Convention (in terms of proportionality of punishment to the act committed) and Article 5 of the Convention (on the principle of legal certainty in the imposition of a custodial sentence).

2. Materials and Methods

The empirical basis of the study was: (1) statistical data on the participation of Ukraine as a defendant in ECHR cases and the costs incurred by it for compensation of damages in 2019-2023; (2) about 900 verdicts of Ukrainian courts under Article 436² of the Criminal Code; (3) the results of the survey of 4015 law enforcement officers of Ukraine on countering the glorification of Russian armed aggression in Ukraine; (4) the results of the survey of 16 Ukrainian judges on countering the glorification of Russian armed aggression in Ukraine; (5) 46 judgments of the ECHR. The methods used were: dialectic, induction and deduction, analysis and synthesis, economic analysis.

3. Literature Review

3.1. Regarding the Study of Possible Losses of the State Budget of Ukraine due to Participation as a Defendant in the ECHR

The issue of direct forecasting of losses for the state budgets of the countries caused by their participation as defendants in the ECHR has not been the subject of separate studies. However, a certain idea of this problem can be gained thanks to the research of V. Fikfak (2020), which is devoted to the analysis of a certain "information asymmetry" in the position of applicant and respondent states due to the absence of an official scale of the Court according to which the amount of damages is calculated. In particular, the author concludes that states are in a more advantageous position than individuals, since in most cases they are able to calculate the appropriate price of satisfaction and in some cases to include in the state budget the projected amount of compensation according to the ECHR decision (Fikfak, 2020, p. 361).

At the same time, part of V. Fikfak's research also covered the aspects of the "cost" of non-implementation of ECHR decisions (2018). Thus, based on the methods of economic analysis, a trend was established:

the more complaints against the state are submitted to the ECHR, the less compensation it pays in the end (Fikfak, 2018, p. 1110). In addition, the results of S. Roper's research (2017, p. 137) confirm that for some countries it is cheaper to pay just satisfaction than to revise national legislation.

For the purposes of this research, the article by V. Makovii, O. Kuznichenko and O. Budyachenko (2022, p. 122) is also of interest, in which they conclude that a decrease in the rate of fulfilment of compensation claims (almost 8 times) was observed for Ukraine due to the lack of an appropriate financial mechanism for such a procedure.

3.2. Regarding the Study of the Rights to Liberty and Security of the Person, to Respect for Private and Family Life, Freedom of Expression, and their Implementation in the ECHR Positions

The right to liberty and security of the person, respect for private and family life and freedom of expression as guarantees of the Convention, as well as their implementation in the positions of the ECHR, have been studied by a fairly wide range of scholars.

Accordingly, in the context of the right to liberty and security of person guaranteed by Article 5 of the Convention, a large body of scholarship is devoted to the question of ensuring this right in criminal proceedings, as well as in the sentencing and execution of sentences (Bettinson and Dingwall, 2013; Lach, 2021; Lehner, 2012; Martufi and Peristeridou, 2020; Tumanyants et al., 2023).

At the same time, in terms of scientific coverage of the issue of guaranteeing freedom of expression under Article 10 of the Convention, a significant proportion of publications relate to the correlation between this freedom and hate speech (Buyse, 2014; Caruso, 2017; Cannie and Voorhoof, 2011; Sardo, 2022; Mchangamat and Alkiviadou, 2021; etc.). In addition, the "qualitative" aspect of freedom of expression has also been studied in the context of the provision of truthful, accurate and reliable information by public authorities and the protection of the public from government interference (Pentney, 2024); the exercise of such a right under martial law (in terms of identifying criteria for determining the proportionality of interference) (Slavko et al., 2023).

The compatibility of criminal law provisions with the practice of the ECHR and the Convention on Freedom of Expression has been the subject of only a few academic studies. In particular, J. Rowbottom (2012) elaborated on the aspects of excessive criminalisation and regulation of 'everyday speech' and accordingly raised the issue of finding a more proportionate control over it, taking into account alternatives to criminal punishment. Similarly, N. Alkiviadou (2024) highlighted the issue of expediency in the context of the principles of necessity and proportionality under Article 10 of the Convention, in relation to the prosecution of an Internet user for statements made by other persons in comments on their posts.

With regard to research on the realisation of the right to respect for private and family life, numerous developments cover the issue of legal protection of privacy in criminal proceedings: from publications on the collection of big data by the police in the search for digital evidence (Sunde, 2023) to the use of mobile phone location information (Keyaerts, 2019).

The provisions of Article 436^2 of the CCU have been studied in the works of L.M. Abakina-Pilyavska (2023), A.M. Babenko, M.V. Karchevskyi (2023), V.S. Batyrgareieva (2022), D.O. Oleynikov, A.Y. Serdechna (2022), R.O. Movchan (2022), O.E. Radutnyi (2022), M.I. Khavroniuk (2022), etc.

Concurrently, the question of the provision's compliance with the Convention's provisions and the ECHR's case law has not yet been the subject of a discrete analysis.

4. Results and Discussion

4.1. Regarding the Application of Article 10 of the Convention (Right to Freedom of Expression) and Article 8 of the Convention (Right to Respect for Private Life)

The utilisation of language as a medium for human communication has the capacity to foster cohesion and unity. However, it can concurrently be employed to incite bigotry, division, hatred and distrust (Agbor, 2024). In this regard, freedom of expression as a fundamental human right can be limited by the rights of others to be treated with dignity and reason, as well as by the right of everyone to a civilised and tranquil public space (Fernando et al., 2022). On the one hand, it is emphasised that this freedom is only subject to restrictions when its realisation causes harm to others (Mill, 1859). On the other hand, it is emphasised that the realisation of this right requires taking into account various balances that should take the form of calibrating the infrastructure of freedom of expression, which is constantly evolving (Barber, 2023).

It is reasonable to concur with the perspective that the capacity to articulate perspectives, even those that may be unkind in their articulation, does not inherently constitute a violation of human rights, given the minimal probability of attaining a threshold of harm that could result in such a violation (Gelber, 2024).

In its case law, the ECHR emphasises that freedom of expression, in accordance with Article 10(2) of

the Convention, applies not only to "information" or "ideas" that are received with approval or are considered harmless or frivolous, but also to those that may offend, shock or disturb. These are the requirements of pluralism, tolerance and open-mindedness, without which there can be no "democratic society" (Handyside v. the United Kingdom, 1976; Shvydka v. Ukraine, 2014; Oberschlick v. Austria, 1991; Otto-Preminger-Institut v. Austria, 1994; "Women On Waves" and Others v. Portugal, 2009). Article 10 of the Convention protects not only the content of ideas and information expressed, but also the form in which they are disseminated: oral expressions, articles in the media, literary and artistic works, audiovisual media, conduct, and so forth (Cumpana and Mazare v. Romania, 2004; Jersild v. Denmark, 1994; Ukrainian Media Group v. Ukraine, 2005; etc.). Thus, the acts provided for in Article 436² of the CCU are, by their very nature, expressions of personal opinion.

The ECHR emphasises that States parties are bound by positive obligations regarding freedom of expression: they must not only refrain from any interference, but also take protective measures, even in the sphere of relations between private individuals. They must also create an enabling environment for all interested parties to participate in public debate and ensure that they can express their opinions and ideas without fear (Dink v. Turkey, 2010). Freedom of expression includes the protection of a person from possible negative consequences in cases where certain views are attributed to him or her following previous public statements (Vogt v. Germany, 1995). On this basis, it can be said that the provision of Article 436² of the CCU is related to the restriction of freedom of expression guaranteed by Article 10 of the Convention.

Moreover, since this provision does not specify the sphere of expression of these manifestations, it covers manifestations of these actions in both the public and private spheres. At the same time, the ECHR emphasises that the concept of "private life" is broad and cannot be defined exhaustively. The restriction of this concept to personal boundaries, within which individuals are at liberty to live their private lives as they wish whilst entirely excluding the outside world from these boundaries, would be too strict (Burghartz v. Switzerland, 1994; Friedl v. Austria, 1994; Mikulic v. Croatia, 2002; Niemietz v. Germany, 1992; X and Y v. the Netherlands, 1985). The right to respect for "correspondence" as part of the right to respect for private life extends to telephone conversations between family members or other persons (Klass and Others v. Germany, 1978; Malone v. the United Kingdom, 1985; Margareta and Roger Andersson v. Sweden, 1992), including through the use of the latest technologies (Copland v. the United Kingdom, 2007; Iliya Stefanov v. Bulgaria, 2008; Petri Sallinen and Others v. Finland, 2005). Thus, the criminalisation of the relevant acts in the private sphere, i.e., in private conversations (oral, telephone, through information and communication systems), correspondence, etc., restricts the right to privacy.

The question therefore arises as to whether the restrictions imposed by Article 436² of the CCU are contrary to Articles 8 and 10 of the Convention. First of all, it should be emphasised that the rights guaranteed by these articles are not absolute and may be subject to restrictions, which, however, must be clearly explained and the need for them convincingly established (Shvydka v. Ukraine, 2014; Stoll v. Switzerland, 2007). Restrictions on freedom of expression must also be subject to scrutiny and be convincingly justified (Sürek v. Turkey, 1999). Thus, the nature of these restrictions and their compatibility with the Convention must be critically analysed.

When deciding whether these articles of the Convention have been violated, the three-part test used in the ECHR case law should be applied (Niemietz v. Germany, 1992; Shvydka v. Ukraine, 2014; Siryk v. Ukraine, 2011; Steel and Others v. the United Kingdom, 1998; Ukrainian Media Group v. Ukraine, 2005), i.e., the criteria for justifying interference with the rights provided for in these articles:
– The presence of interference "provided for by law";
– compliance of the interference with a legitimate goal;
– the need for interference in "democratic society", i.e., proportionality to the goal pursued.

As for the existence of interference "provided for by law", the ECHR checks whether the applicant is subject to restrictions in the state party's laws to the Convention. As a rule, a restriction must be legalised by parliament in a written and public law.

The provisions of Article 436² of the CCU were introduced in accordance with the established procedure, namely the *Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Strengthen Criminal Liability for Production and Distribution of Prohibited Information Products"* (The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Strengthen Criminal Liability for Production and Distribution of Prohibited Information Products", 2022). Thus, the manner and form of fixing this restriction complied with the requirements of the Convention.

Regarding the compliance of the interference with the legitimate aim.

A legitimate aim implies an exhaustive list of possible grounds for restricting a right/freedom provided for in the Convention. State representatives cannot arbitrarily go beyond this list. Hence, the purpose of the restrictions must correspond to one of the legitimate interests defined in Articles 8(2) and 10(2) of the Convention, which must be real and not potential.

Article 8(2) of the Convention lists the following grounds for restriction: the interests of national security, public safety or the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others. Article 10(2) of the Convention lists the following grounds: the interests of national security, territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the reputation or rights of others; the prevention of disclosure of confidential information; or the maintenance of the authority and impartiality of the court.

Thus, the criminal liability of a person under article 436^2 of the CCU can be recognised as compatible with a legitimate aim under both Articles 8 and 10 of the Convention, since the fight against this offence is aimed at protecting national interests, territorial integrity and public morality.

Regarding the need for intervention in a "democratic society" (proportionality to the aim pursued).

An interference can only be recognised as "necessary in a democratic society" if there is a legitimate restriction and a legitimate aim of the restriction. In applying this criterion, it is also necessary to determine whether the aim was proportionate to the means used to achieve it. In turn, the purpose is considered to be those interests provided for in Article 8(2) and Article 10(2) of the Convention, for the protection of which states may interfere with private life and freedom of expression. The means is the interference itself, i.e., in the case under study – the establishment of criminal responsibility. Proportionality in each case is assessed from the point of view of compliance with the principles of democratic society.

The ECHR has held that the adjective "necessary" within the meaning of Article 10(2) of the Convention requires the existence of a "social emergency" (Observer and Guardian v. the United Kingdom, 1991). Obviously, the situation of full-scale armed aggression corresponds to the understanding of such a situation, and the aim of the intervention corresponds to that defined in Articles 8(2) and 10(2) of the Convention in the interests of national security, territorial integrity, the prevention of riots or other crimes (primarily against the peace and security of humanity or national security), as well as public morality. Therefore, interference with freedom of expression through the use of criminal law means may be considered necessary in a democratic society during martial law or armed conflict and meet an urgent social need.

At the same time, the ECHR states that in assessing the proportionality of the interference, account should be taken, inter alia, of the nature and severity of the penalties imposed. Moreover, the Court should pay particular attention to cases where the penalties imposed by national authorities for non-violent behaviour include imprisonment (Ceylan v. Turkey, 1999; Shvydka v. Ukraine, 2014; Skalka v. Poland, 2003; Tammer v. Estonia, 2001; Taranenko v. Russia, 2014).

At the same time, with regard to the sanctions for an offence under Art. 436^2 of the CCU, it should be noted that all three parts of this article provide for imprisonment for non-violent offences. The imposition of a custodial sentence for non-violent acts is of concern to the ECHR because of the high probability of a disproportion between the social danger of the act and the punishment, i.e., a disproportion between the punishment and the objective pursued. This requires the legislator to revise the sanctions for acts under Article 436^2 of the CCU.

The establishment of criminal liability for the acts provided for in the analysed article in the private sphere (private communications, telephone calls, correspondence, etc.) does not appear to be justified by the need to intervene in "democratic society", since they present a significantly lower public danger and risk of violation of the relevant interests specified in Article 8(2) of the Convention. Therefore, the criminal prohibition in this case does not seem to be justified, all the more so since it is punishable by imprisonment. From this point of view, there is at least a reason to limit the scope of criminal acts provided for in Article 436^2 of the CCU.

Therefore, not all the criteria of the above-mentioned three-part test are met with regard to the restrictions of the rights guaranteed by Articles 8 and 10 of the Convention by the provisions of Article 436^2 of the CCU.

It is also noteworthy that these restrictions may be regarded as a derogation by Ukraine from its obligations under the Convention. Article 15 of the Convention contemplates such a possibility, particularly with regard to the obligations enshrined in Articles 3, 5, 8, and 10, in circumstances of war or other imminent threat to the nation's existence. However, these derogations are permitted only to the extent necessitated by the exigencies of the situation, and on the condition that such measures do not contravene the state's other international legal obligations.

The ECHR emphasises that the ordinary meaning of the phrase "public danger threatening the life of the nation" is "an extraordinary crisis or emergency affecting the whole population and threatening the established life of the community constituting the State" (Lawless v. Ireland, 1961). It is primarily the responsibility of each State Party to determine whether a "public danger" threatens the life of the nation, since it is responsible for the "life of the nation" (Ireland v. the United Kingdom, 1978).

The adoption of the Law and its entry into force (March 16, 2022) took place in the context of the full-scale invasion of Ukraine by the Russian Federation. It appears that this situation fell within the meaning of "war or other public danger threatening the life of the nation" under Article 15 of the Convention, and therefore entitled Ukraine to take measures derogating from its obligations under the Convention. It is also reasonable to assume that the gravity of the situation in the first weeks after the start of the full-scale invasion justified the application of such restrictions, while at the same time such measures were not inconsistent with Ukraine's other obligations under international law.

In order to determine whether Ukraine has complied with the limits required by the urgency of the situation in withdrawing from these obligations, such factors as: the nature of the rights affected in connection with the withdrawal from obligations, the circumstances leading to the emergency and its duration should be taken into account. This includes questions such as whether ordinary law would be sufficient to deal with the threat posed to the public; whether the measures are a valid response to the emergency; whether the measures have been applied for the purpose for which they were authorised; whether the scope of the measures is limited and the reasons given for their application; whether the need for derogation is continually reviewed or whether any relaxation of the measures is envisaged; whether safeguards against abuse have been provided; the importance of the right in question and the wider purpose of the judicial review of the interference with that right; whether judicial review of the measures was practicable; the proportionality of the measures and whether they have not caused unjustified discrimination (A and Others v. United Kingdom, 2009; Aksoy v. Turkey, 1996; Brannigan and McBride v. United Kingdom, 1993; Ireland v. the United Kingdom, 1978; Lawless v. Ireland, 1961). On the basis of these criteria, it can be concluded that at least one of them is present in the situation under examination, such as: constant review of the need to derogate from the obligations; possible relaxation of the measures introduced; proportionality of the measures. At the same time, the mentioned criteria are obviously taken into account by the ECHR in their entirety and in interaction with other factors, and therefore cannot by themselves indicate a clear departure from the limits required by the urgency, taking into account the unprecedented nature of the threat created by the armed aggression of the Russian Federation.

At the same time, in accordance with Article 15(3) of the Convention, Ukraine had to fully inform the Secretary General of the Council of Europe of the measures taken and the reasons for them. The ECHR emphasises that the main purpose of such notification is to make public the derogation from obligations (Greece v. United Kingdom, 1956).

It should be emphasised that such notifications were made by Ukraine even before the full-scale invasion: in particular, in June and November 2015, June 2016 by oral notes No. 31011/32-119/1-678, 31011/32-119/1-1124 and 31011/32-119/1-580 (Council of Europe, n.d.).

With the beginning of Russia's full-scale invasion of Ukraine, the first note verbale No. 31011/32-017-3 with the corresponding derogation was sent on February 28. It referred to Ukraine's derogation from its obligations under Articles 4 (paragraph 3), 8, 9, 10, 11, 13, 14, 16 of the Convention, Articles 1, 2 of the Additional Protocol, Article 2 of Protocol 4 to the Convention in connection with the imposition of martial law in Ukraine (Council of Europe, 2022). At the same time, the adoption of Law No. 2110-IX (The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Strengthen Criminal Liability for Production and Distribution of Prohibited Information Products", 2022) and the addition of a new Article 436^2 to the CCU were not mentioned in this report.

In assessing the legal consequences of the possible lack of proper notification at the time of the implementation of the restrictions of the Convention, which actually took place with the entry into force of Law No. 2110-IX, the position of the ECHR should be taken into account, according to which, in the absence of official and public notification of derogation from obligations, Article 15 does not apply to measures taken by the respondent State (Cyprys v. Turkey, 1976). In addition, the notification requirement is satisfied by attaching copies of the legal instruments under which the emergency measures are to be taken, together with an explanation of their purpose (Lawless v. Ireland, 1961; Netherlands v. Greece, 1969; Norway v. Greece, 1969; Sweden v. Greece, 1969; The Greek Case: Denmark v. Greece, 1969).

In view of the above, with regard to the provision under Article $436^2(2)$ of the CCU, the existence of prior proper notification of the Secretary General of the Council of Europe by Ukraine of the measures taken by it to derogate from its obligations under the Convention and the reasons for their adoption may be questioned: although general notification took place, a copy of Law No. 2110-IX (The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Strengthen Criminal Liability for Production and Distribution of Prohibited Information Products", 2022) was obviously not provided, which may indicate signs of violation of Articles 8 and 10 of the Convention.

4.2. Regarding the Application of Article 3 of the Convention for the Prohibition of Torture (in Terms of Proportionality of Punishment)

The authorities cannot justify interfering in the lives of citizens to a greater extent than is necessary to achieve a particular objective (Yost, 2023). In this regard, the guarantees enshrined in Article 3 of the Convention are considered to provide the necessary protection against dehumanising policies and practices (Mavronicola, 2024). It follows that the fundamental category in terms of the requirements of this article is "proportionality", which is also seen as the right of the offender not to be subjected to excessive punishment (Furramani and Hoti, 2022).

The ECHR emphasises that all civilised countries recognise the principle of the fairness of punishment. The assessment of what constitutes a fair or inhuman or degrading punishment may reasonably lead to different answers in different countries and, moreover, to different answers at different times in the same country. At the same time, the punishment must not be manifestly disproportionate, as this violates Article 3 of the Convention (Vinter and Others v. the United Kingdom, 2013).

It is evident that the legislator has incorporated provisions for the imposition of imprisonment as a sanction for non-violent actions, as delineated in Article 436^2 of the CCU. These provisions, however, do not result in any harm to any individual or legal entity. Consequently, this omission creates the risk of the imposition of manifestly disproportionate sentences, which may contravene Article 3 of the Convention with regard to the proportionality of punishment and the recognition of punishment as inhuman or degrading within the meaning of this Article.

4.3. Regarding the Application of Article 5 of the Convention for the Protection of the Right to Liberty and Security of Person (on the Principle of Legal Certainty when Imposing a Sentence of Custody)

According to Richard A. Edwards, a potential threat to the implementation of the rule of law are the so-called legal black holes, some of which are created by the legislature (Edwards, 2020). The response to such negative legal phenomena should be to establish legal certainty, which simultaneously covers many aspects, the common denominator of which is the focus on the individual (Suominen, 2014).

Thus, in the context of the interpretation of Article 5 of the Convention, the ECHR recalls that it is extremely important to ensure the general principle of legal certainty where deprivation of liberty is concerned. Therefore, it is an indispensable requirement that the conditions under which deprivation of liberty may be carried out are clearly formulated in national law and that the application of the latter is foreseeable to the extent that it satisfies the standard of "lawfulness" established by the Convention, which requires that all laws be formulated with sufficient clarity to enable a citizen, if necessary by seeking appropriate advice, to foresee to a sufficient degree in the circumstances the consequences to which the action may lead; the law must be accessible, it must serve as an adequate guide for the citizen, sufficient in the context in which certain legal norms are applied in the particular case (Baranowski v. Poland, 2000; Halford v. the United Kingdom, 1997; Ichin and Others v. Ukraine, 2010; Steel and Others v. the United Kingdom, 1998; Sunday Times v. the United Kingdom, 1991).

There is no doubt that these rules are accessible, as they were published in a timely manner and in full. At the same time, the clarity of these rules is debatable, based on their shortcomings, namely:

– The inconsistency of the object of this criminal offence, which is the information security of Ukraine, with the category of crimes against peace, human security and international law and order;
– substantive closeness of the acts provided for in Article 436^2 (1) of the CCU and lack of clarity in their distinction;
– uncertainty about the meaning of the foreign language term "glorification";
– uncertainty of the concept of "materials" in Article 436^2 (2) of the CCU.

It is therefore important to note that the provisions of Art. 436^2 of the CCU lack the clarity and precision required by the law on criminal liability. This may lead to too broad and unequal interpretation and unpredictability in its application. Consequently, there is a risk of infringement of the legal certainty principle (Article 5 of the Convention), and given that the sanctions of this article encompass imprisonment as a penalty, this may result in violations of human rights due to the failure to provide adequate protection against arbitrary interference by public authorities.

4.4. Regarding the Forecast of the Price of Satisfaction and Losses to the State Budget of Ukraine

In each judgment in which the ECHR finds a violation, the Court considers the need to apply Article 41 of the Convention, which provides that where the Court finds a violation of the Convention or its Protocols and the domestic law of the Contracting Party concerned provides for only partial reparation, the Court shall, if necessary, afford just satisfaction to the injured party.

Having established the incompatibility of Article 436² of the CCU with the four articles of the Convention, it can be assumed that if convicts file claims against Ukraine under this Article, with proper processing of the relevant applications and proper representation of the applicants' interests, a number of these claims will be satisfied by the ECHR and Ukraine will be obliged to pay compensation in these cases. In such circumstances, the imperfection of criminal legislation will result in additional expenditures from the state budget of Ukraine.

In this context, it seems appropriate to make rough estimates of these costs. It should be noted that they are purely hypothetical and based on the existing experience of compensation awarded by the ECHR in claims against Ukraine.

For this purpose, it is advisable to analyse the statistics of Ukraine's participation as a defendant in the ECHR and the costs of compensation incurred by it in the previous years (Committee of Ministers of the Council of Europe, 2019; 2020; 2021; 2022; 2023) (given that one judgment may contain violations of several articles of the Convention), which are reflected in Table 2.

The analysis of the aforementioned data indicates that the mean compensation amount in a single claim against Ukraine over the preceding five-year period amounts to 13,190.8 EUR. This data can also be utilised as a foundation for calculating the prospective compensation amount in instances of violation of the Convention, as stipulated under Article 436² of the CCU. Simultaneously, while the magnitude of compensation for violations of particular articles of the Convention may vary in practice, it is imperative to recognise that a single case may encompass multiple violations of the aforementioned articles. Consequently, the discourse pertains to the aggregate compensation for all these violations. This substantiates the validity of employing the aforementioned average amount of compensation in these calculations.

In determining the potential number of applications to the ECHR alleging violation of the relevant Convention rights by Ukraine in the application of Article 436² of the CCU, it is necessary to proceed from the number of verdicts under this article delivered to date. Therefore, as of 01.09.2024, the Unified State Register of Court Decisions contains 1373 verdicts under Art. 436² of the CCU (this figure is approximate, given that, on the one hand, a certain part of the verdicts entered in the Register are duplicate; on the other hand, not all verdicts under this article were correctly reflected in the Register) (Unified State Register of Court Decisions, n.d.). Consequently, the upper limit of potential applications to the ECHR with applications for violation of the Convention as of 01.09.2024 is approximately 1370.

At the same time, the analysis of the court decisions showed that in 93.9% of the cases the persons were sentenced to imprisonment and in 1.9% to arrest. At the same time, in almost 89% of the cases, the convicted persons were released on probation on the basis of Article 75 of the CCU, and in only 11% of the cases was the sentence (imprisonment, arrest, fine, restriction of liberty or correctional labour) actually served.

However, while the reality of the punishment imposed is not a prerequisite for the ECHR to find a violation of the Convention, it may be considered as a factor that potentially makes an application to the ECHR by a convicted person more likely than in the case of release from punishment.

Furthermore, when assessing the possibility of applying to the ECHR, it is important to consider the social profile of convicted persons. Among the individuals convicted under Art. 436² of the CCU, only 16.1% were able-bodied and employed, while the remaining cases were comprised of pensioners (34.6%), unemployed individuals (24.4%), and other categories (24.8%). While this criterion is not definitive, it does indirectly suggest that individuals with employment are more inclined to submit applications to the ECHR, potentially due to the substantial financial costs associated with the process.

It can be concluded from the above that, based on the combination of these criteria, the projected number of applications to the ECHR in connection with violations of the Convention as a result of the application of Article 436² of the CCU may reach about 2–5% of the total number of convicts. This equates to approximately 20–70 persons as of September 1, 2024.

Therefore, based on the average amount of compensation in cases against Ukraine of 13,190.8 EUR,

Table 2
ECHR judgements against Ukraine and amounts of compensation for 2019-2023 period

Period	2019	2020	2021	2022	2023
Total number of decisions recognising violations of the legislation	111	84	196	145	125
Total amount of payments allocated from the state budget	1 675 140 EUR	685 755 EUR	2 452 840 EUR	1 864 517 EUR	2 166 105 EUR
Average amount of compensation per case (total amount divided by number of decisions)	15 091 EUR per claim	8 163 EUR per claim	12 514 EUR per claim	12 858 EUR per claim	17 328 EUR per claim

it is estimated that the total amount of possible satisfaction will fall within the range of 264,000 EUR to 923,000 EUR. It is acknowledged that this figure may be less and significantly higher than the aforementioned amount, with a maximum potential of 18 million EUR (assuming that all convicted persons file claims).

At the same time, in the light of the above analysis, the likelihood of the ECHR satisfying the applicants' claims is quite high. At the same time, it should be borne in mind both that the prospect of such satisfaction actually being granted is rather remote, given that an application to the ECHR is possible after all national remedies have been exhausted, and that the examination of cases in the ECHR is lengthy, taking an average of three to five years. Therefore, the first economic consequences of the shortcomings of Art. 436^2 of the CCU will probably not be felt for another 5 years. On the other hand, the number of convicts under Art. 436^2 of the CCU will increase, which may increase the burden on the state budget of Ukraine.

5. Conclusions

1. The penal provisions provided for in Article 436^2 of the CCU, by their subject matter and nature, create the risk of restricting the rights to privacy (Article 8), freedom of speech and expression (Article 10) and, indirectly, the prohibition of torture (Article 3) and liberty and security of the person (Article 5) guaranteed by the Convention, and may therefore have a negative economic impact in the form of possible expenses from the state budget for the payment of compensation resulting from the violation of the specified provisions of the Convention.

2. The evaluation of the restriction of the right to privacy and freedom of speech and expression utilising the three-part test (the existence of an interference "provided for by law"; the correspondence of the interference to a legitimate (legitimate) purpose; the necessity for interference in "democratic society") demonstrates inadequate adherence to these criteria. It is evident that, despite the interference being authorised by a law that had been duly adopted and made accessible, the law in question lacked the requisite clarity and specificity. The aforementioned interference was found to be consistent with the legitimate aim of protecting the interests of national security, territorial integrity, the prevention of disorder or other crimes, or public morals. However, it was not sufficiently proportionate to the objective pursued, in that it imposed a criminal prohibition in the private sphere (private communications, telephone calls, correspondence) and was disproportionate in relation to the social danger of the acts and the prison sentences provided for them.

3. In the situation that has developed as a result of the full-scale invasion of the Russian Federation, Ukraine's derogation from its obligations under Articles 8 and 10 of the Convention would be entirely permissible. This is due to the conditions of martial law, which correspond to the situation of "war or other public danger threatening the life of the nation", and the limits of such a derogation correspond, by most criteria, to the gravity of the situation. At the same time, as a party to the Convention, Ukraine had to inform the Secretary General of the Council of Europe of the measures it had taken and the reasons for them. However, the proper implementation of these measures by Ukraine may be questioned, which may lead to the incompatibility of such restrictions with the provisions of the Convention.

4. The imposition by the legislator of imprisonment for non-violent acts in the sanctions of Article 436^2 of the CCU creates conditions for the courts to impose clearly disproportionate sentences, which may violate Article 3 of the Convention on the proportionality of punishment and the recognition of punishment as inhuman or degrading.

5. The lack of clarity and precision required of a law on criminal responsibility in the provisions of Article 436^2 of the CCU may lead to overly broad and unequal interpretations and unpredictability in its application, thus violating the principle of legal certainty within the meaning of Article 5 of the Convention. The inclusion of deprivation of liberty among the sanctions provided for in this article may lead to human rights violations, as it does not provide adequate protection against arbitrary interference by public authorities.

6. Utilising the mean compensation amount of 13,190.8 EUR for cases against Ukraine and the number of convictions under Article 436^2 of the CCU, along with the factors that may influence the number of applications to the ECHR by persons convicted under this Article, it is feasible to ascertain the approximate total amount of possible satisfaction, ranging from 264,000 EUR to 923,000 EUR. Conversely, if all convicted persons were to file claims, the total could reach up to 18 million EUR.

7. The results of this study may be further used in the rule-making practice in the field of criminal law and extrapolated, in particular, to other provisions of criminal law:

– Serve as a deterrent to excessive criminalisation and punishment of acts;
– to serve as a reminder to the legislator of the need to ensure that criminal law complies with international standards and society's perceptions of justice;
– to orient legislator to a thorough advance calculation of the economic effect, primarily in the aspect of possible risks of additional costs from the state budget, when introducing criminal responsibility for certain acts.

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