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Робоча група з питань розвитку кримінального права
Комісії по правовій реформі при Президентові України

Робоча група з питань кримінального та кримінального процесуального права
Науково-консультативної ради при Голові Верховної ради України

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Кафедра кримінального права НУ «ОЮА»

Одеський місцевий осередок ГО «Всеукраїнська асоціація кримінального права»

Завдання кримінального права в умовах надзвичайного стану

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«Завдання кримінального права в умовах надзвичайного стану». Матеріали міжнародної науково-практичної конференції, присвяченої 25-річчю утворення Національного університету «Одеська юридична академія». Одеса, 9 грудня 2022 року. Укладачі: Є.Л. Стрельцов, В.П. Кедик. Відп. редактор Є.Л. Стрельцов. Одеса: ПРЦ НАПрН України, НУ «ОЮА», 09.12.2022. – 214 с.

У збірнику представлені тези доповідей та повідомлень, які були оприлюднені на міжнародній науково-практичній конференції «Завдання кримінального права в умовах надзвичайного стану», присвяченій 25-річчю утворення Національного університету «Одеська юридична академія», яка відбулась 9 грудня 2022 року на базі Південного регіонального центру Національної академії правових наук України та кафедри кримінального права Національного університету «Одеська юридична академія». Збірник розрахований на науково-педагогічних працівників, докторантів та аспірантів, магістрантів та студентів, практичних працівників, всіх, кого цікавлять сучасні проблеми кримінального права.

Відповідальний за випуск:
д.ю.н., професор Є.Л. Стрельцов

Тези друкуються в авторській редакції. Відповідальність за зміст поданого матеріалу несуть автори.

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L. Timofieieva
PhD, assistant professor of Criminal
Law Department of the National
University «Odesa Law Academy»

EUROPEAN VALUES AND PRINCIPLES IN THE CRIMINAL LAW POLICY OF UKRAINE IN THE CONDITIONS OF WAR

The war in Ukraine was an unexpected not only for Ukraine but for the whole world. However this situation strengthened Ukraine's direction towards the European Union (EU) and showed the importance of European values not only in documents, but in concrete steps to meet Ukraine's European countries. Now, more than ever, this step has become closer. On February 28, 2022, President V. Zelensky signed the application for Ukraine's membership in the EU.

Many scholars and scientist have studied the principles of criminal law. Some aspects related to the issue of European integration were studied by: L.A. Garbovsky, G.V. Yepur, V.V. Kornienko, V.O. Tulyakov, S.V. Khilyuk, M.I. Khavronyuk and others. At the same time, given current changes and challenges, it remains relevant.

European values and their influence. The President of the European Council stated that Ukraine demonstrates its commitment to European principles and freedoms on a daily basis because were fighting not just for the future of Ukrainian children, but for the fundamental values and principles of Europe. Ukraine shares common values with EU countries, including respect for the rule of law, human rights and fundamental freedoms, non-discrimination, and respect for diversity. The above values are also reflected in other international instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms, ECtHR decisions, EU Directives, Council of Europe and EU documents. They (values) are humanistic and common to many countries around the world.

Values directly affect all work of EU. Limits to the harmonization of criminal law result less from barriers to jurisdiction and national sovereignty than from the rule of law and fundamental rights, which are particularly relevant. If there are serious doubts as to whether the rule of law and fundamental rights are being observed in EU Member States, the fundamental premise on which judicial cooperation in criminal matters is based – the mutual trust of the Member States that their partner's legal and judicial systems follow the values of the EU (Art. 2 TEU) –, is no longer valid [2].

According to the Article 1.2.9 of the Draft of the New Criminal court of Ukraine (2022) «Criminal Code applies in accordance with the principles» [3]. This provision claimed the primacy of principles over other provisions of the Criminal Code. It could be agreed with this statement and principle. It is also important that the code makes it necessary to take into account practice of the ECHR [3].

Mechanisms for the protection of human rights in the EU. The Convention not only declares the need to protect human rights, but also introduces a mechanism to ensure such protection. The European human rights mechanism is specific. Human rights protection is based on the principle of «*non-illusory rights*». It means that the state cannot hide human rights violations according to official formulations. Institutions were created that ensure such realization of rights and freedoms. In particular, the European Committee for the Prevention of Torture has been set up to prevent torture. In addition, activities aimed at combating crime are engaged in Europol, Interpol and others. Many actions are aimed at prevention.

The Association Agreement and EU regulations set out several important areas that Ukraine seeks to implement and thus approximate to EU law. There are combating illegal migration and human trafficking, organized crime, terrorism, environmental protection. These areas have been singled out for a reason, as they cause the greatest damage not only at the state, but also at the international level.

Strategic guidelines for justice and home affairs include: mobilizing all instruments of judicial and police cooperation, strengthening the role of Europol and Euro just in the fight *against organized crime and terrorism*. It should also support: reviewing the internal security strategy, developing a comprehensive approach to cyber security and cybercrime, preventing radicalization and extremism.

The EU is involved in helping to identify those involved in **terrorism**, including foreign terrorists. Harmonization of national legislation on the effective exchange of information with other countries, in particular on suspects and perpetrators of criminal offenses, is extremely important. In 2018, the Council of the EU adopted the Regulation establishing the European Information and Permitting System (ETIAS). ETIAS will be an EU information system that will pre-screen visa-free third countries, to identify potential risks to security, illegal immigration and health (ETIAS and the Schengen Information System itself («SIS»)) (*Newsletter*, 2020). It is necessary to develop tools to help in detecting and removing from the Internet content that incites terrorist acts. These tools also need to be complemented by appropriate legislation. In 2018, the Commission published a Recommendation «on measures to work effectively and combat illegal content on the Internet», including terrorist propaganda on the Internet [1]. Member States should also ensure that the competent authorities intervene in terrorist content on the Internet. Finally, online service providers are required to store the content they remove. It serves as a safeguard against erroneous removal and provides potential evidence that is not lost in order to prevent, detect, investigate and prosecute terrorist criminals.

The European Court of Justice (ECJ) has limited the application of the principle of mutual recognition in the area of criminal proceedings by adding an implicit reservation regarding matters of the rule of law and fundamental rights. Therefore, if serious shortcomings regarding the rule-of-law principle or fundamental rights within a Member State are identified, other Member States may no longer recognize judicial decisions from that State. In contradiction to the wording of Framework Decision 2002/584/JHA, this is how the ECJ has rendered decisions in cases concerning the execution of a European arrest warrant. Additionally, the same explicitly applies to Directive 2014/41/EU on the European Investigation Order in criminal matters. According to Directive, the recognition or execution of an investigation order in the executing State «may» be refused if there is reason to fear that the rule-of-law principle or fundamental rights will be violated [2]. Terrorist offenses are defined Directive (EU) 2017/541. Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing is significant as well.

Moreover, due to the war in Ukraine, *mass migration* began, in particular to neighboring countries in particular to Poland, Lithuania, Czech Republic, Moldova, Germany and other country. Such mass migration also causes problems related to the growth of crime, in particular related to border crossing problems. Implementing Council Decision (EU) 2022/382 of 4 March 2022 established a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55 / EC. The legal regime of temporary protection is a measure to prevent crime in this area. Border crossing rules ensure security and are a preventive measure against crime, including smuggling of goods, cigarettes and precious metals.

Sanctions. The EU has imposed unprecedented sanctions on Russia over its war against Ukraine. In total, five restrictions packages have already been introduced. The agreed package, approved on April 8, 2022, includes a number of measures aimed at increasing pressure on high-ranking Russian officials, government and the economy, as well as limiting Russia's resources for aggression. In addition, the package prohibits Russian ships from accessing EU ports, and Russian and Belarusian trucking companies will also not be able to transport goods to the EU. Moreover, the EU has also imposed a total ban on transactions with key Russian banks. After disconnecting from SWIFT, these banks were become isolated from EU markets. On May 4, 2022, the sixth package of sanctions against Russia was presented. It includes a gradual embargo on Russian oil, the disconnection of 3 banks from SWIFT and sanctions for the siege of Mariupol. The first

element will be personal sanctions against Russian officers who «committed war crimes in Bucha and are responsible for the inhumane siege of Mariupol».

It seems that such sanctions are effective and can have significant consequences for the aggressor state for the economy, shake people's trust, shake the power. War is not a cheap and requires money. However, financial sanctions are not so fast. The aggressor also did not immediately feel their scale. Ordinary people felt them almost immediately due to rising food prices, shortages of certain goods (including cereals, sugar, salt). Isolation as a sanction against the aggressor is also effective. Large companies, Internet sites refused to work with Russia. There is also significant dissatisfaction among Russians with restrictions on using Instagram, as many of them have businesses on the site. These are the consequences of temporary changes. Sanctions should be painful for the person, as well as have a preventive effect. In this context state should pay attention on criminal law nature of these sanctions (case of the ECHR *Shvidka v. Ukraine*, application No 17888/12 of 30 October 2014).

Conclusions. To sum up, there is nothing to be gained from war because humanity, human rights, everyone human is a value. Any political ambition is not worth a human life. Russia's invasion of Ukraine is encroaching not only on the territorial integrity of Ukraine. Moreover, any armed invasion of the territory of another state in the 21st century is an encroachment not only on territorial integrity. This is an encroachment on European values. These values have been built for centuries in response to the experience of war.

The best way to deal with crimes against humanity and war crimes as well is the integration and unity of the international community in combating these crimes. *Working hand in hand, looking out for each other, and supporting one another, we will win.* The war has come at a high price, but it has united European countries and demonstrated the EU's sanctions capabilities. European integration trends require the approximation of Ukrainian legislation to European. It is necessary to approach this issue carefully and cautiously, taking into account national specifics.

First of all, European legislation is based on values. Given the necessity of protection these values, their implementation in law enforcement practice, appropriate institutions, regulations and sanctions for their violation. European law is quite progressive and provides a combination of criminal law, procedural, criminal enforcement, preventive, remedial measures. Such integration of measures will effectively address the challenges facing the Ukrainian criminal justice system. Therefore, such an approach needs to be implemented in national practice.

Last but not least numbers of crimes are committed by the Russian Federation are increasing significantly. The more crimes committed, the more aggression from Ukrainians and all over the world, who support Ukraine. However government should focus their attention on legality of criminal law means. It is crucial for our European direction and to stay human being. The civilized world must respond to and ensure security by civilized methods.

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