COLLECTIVE MONOGRAPH

UKRAINE IN THE SYSTEM OF MODERN INTERNATIONAL LEGAL ORDER AND EUROPEAN INTEGRATION:

PROBLEMS OF DOCTRINE AND PRACTICE IN THE CONTEXT OF MODERN HUMANITARIAN CHALLENGES

CHERNIVTSI, UKRAINE
2022

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Department of European and Comparative Law

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The monograph considers the theoretical and practical aspects of the development of modern international law and the place of Ukraine in the and European integration. The monograph sheds light on the problems of doctrine and practice of modern international law in the context of modern humanitarian challenges. The publication is of considerable interest and will be helpful in general for lawyers, international lawyers, undergraduate and postgraduate students, judges, legal practitioners, and all those interested in the problems of international law in its broadest sense.

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FOREWORD

Recently, there has been a significant increase in the activities of state authorities aimed at achieving Ukraine's strategic constitutional goal of accession to the European Union. Moreover, with Russia's full-scale aggression against our state, accession to the EU is not only a security issue for Ukraine and its lifeline, but has also gained a new breath in the bilateral relationship between the EU and Ukraine.

Ukraine's integration into the European Union entails approximating its legislation to the EU acquis. It's a well-known axiom. The Association Agreement defines some sectors more specifically and some less, which Ukraine needs to harmonise as part of its implementation of the Agreement. The development of the policy of "approximation" in Ukraine over the past few years leads to the conclusion that the alignment of Ukrainian legislation with EU law is no longer a "process for process" (as it was under the Partnership and Cooperation Agreement 1994), which has nothing to do with the future membership of Ukraine in the EU, but is clearly subordinated to this strategic goal, it becomes targeted and aims at achieving practical results.

The proposed theoretical and practical provisions will ensure compliance with the rules of general interpretation of the Association Agreement, in particular those obligations which are particularly important for the Ukrainian legal order, including implementation of the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant by-laws, framework documents, guidelines and other administrative acts in force in the European Union.

With obtaining EU candidate status, Ukraine should rebuild those gaps in the system for ensuring Ukraine's legal integration into the EU in a more profiled and structured way so that the criterion of achieving the EU acquis is truly met and recognised by all EU members, which, apart from political and diplomatic efforts, will require changes in domestic policy: changes in institutional, regulatory and strategic planning.

Mariia MEZENTSEVA
Member of the Parliament of Ukraine IX convocation Deputy
Chair of the Verkhovna Rada of Ukraine Committee on Ukraine's Integration into the European Union

The whole world supports Ukraine in the hard struggle for its independence and territorial integrity. International organizations and partners are united in the desire to help our country, providing crucial defense and financial support, bringing our victory closer, and allowing us to look to the future with hope and belief in success.

But no less important is another force - the force of international law, which is currently being tested for stability and effectiveness.

International law is a powerful and self-sufficient tool. How to strengthen its role in a period of extraordinary humanitarian challenges, and most importantly, how to create an effective mechanism for maintaining the international legal order and restoring trust in international law, which was questioned by Russian Federation's war against Ukraine? After all, the Russian aggression against Ukraine is not just a violation of the norms of international law; it is an open attack on fundamental values recognized by the world.

Despite the dynamic changes in the modern international relations system, there is a clear understanding that there is no viable alternative to a rule-based world order based on the norms of international law. Mechanisms of international law may become obsolete and change, but the principles of fair justice remain unchanged.

Oleksii BOYKO
Chairman of the Chernivtsi Regional Council

Russia's war against Ukraine is an unprecedented violation of modern international law because, for the first time, a state that is a permanent member of the UN Security Council resorted to unprovoked, illegal aggression against another state.

The aggression is an internationally illegal act, imperative norms of international law, and the foundation of the global world order. The aim of the existing legal order is to ensure that the aggressor will be held accountable.

In such dark times, it is essential to develop solid and consolidated positions so that Ukrainian voices may be heard soundly across the globe. The aim of the global community should be to restore faith in international law by showing a practical example that the aggressor-states may and will be punished for breaching international rules.

Therefore, research books on international law are not only very timely, but they also bring us closer to the global victory of the rule of law.

Roman KLICHUK
Mayor of Chernivtsi

FROM THE AUTHORS

The authors of the prepared collective monograph represent domestic (Kyiv, Kharkiv, Lviv, Odesa, Chernivtsi) and foreign international law schools - the Czech Republic, Romania and Brazil. The monograph is an active platform for intense scientific discussions of experts on complex and controversial issues of the functioning of the system of modern international law. Undoubtedly, the monograph proves that the authors managed to provide answers to key international legal questions by combining different views on the common problems of modern international law. Today, the task of the science of international law is not only to determine general trends and factors of global legal progress but also to identify problems of the effectiveness, or even weakness, of modern international law and to find ways to strengthen and transform international law in the face of new threats world legal order.

Vitalii VDOVICHEN
Professor,
Dean of Law Faculty

International law has historically been a critical pillar of the global order. The fundamental principles of international law are relevant today more than ever, forming the basis of the general, coordinated efforts of the world community to solve global or regional problems.

Is international law silent? Does it have the strength to respond to one of the largest humanitarian crises of the century and support Ukraine's struggle to preserve its sovereignty, independence, and territorial integrity? This problem should be solved in the near future based on justice, solved by the force of international law, which protects values important to everyone, and the most important of them is the value of life.

Force in international law is subject to regulation, in other words, justice, so the entire civilized world must unite to oppose the violation of its norms and protect against aggression. If not, thanks to the existing international legal mechanisms, which need significant updating, then thanks to the power confirmed by international law - through the relevant legal tools of national and international security. At the same time, universal human values, which are the basis of the world order and are protected by international law, will be evidence of its strength and effectiveness.

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PART I

INTERNATIONAL LAW: THE PROBLEM OF STABILITY AND STRENGTH IN TIMES OF EXTREMELY COMPLEX HUMANITARIAN CHALLENGES

THE SO-CALLED "SPECIAL MILITARY OPERATION" OF THE RF ON THE TERRITORY OF UKRAINE IS A WAR CRIME, A CRIME OF AGGRESSION AND THE CRIME AGAINST INTERNATIONAL PEACE

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INTRODUCTION

Today, international law is faced with extraordinary humanitarian challenges caused, first of all, by Russia's war against Ukraine. The whole civilized world is witness to how, from the standpoint of international law, the Russian Federation (RF) falsely justifies the annexation of the Ukrainian peninsula of Crimea, armed aggression against Ukraine in the Donbas, military atrocities against the civilian population in Buch-Irpen-Hostomel, other regions of Kyiv Oblast, Kharkiv, with references to international law. Melitopol and many cities in almost the entire territory of Ukraine. Previously, the Russian Federation carried out aggression against Georgia with impunity.

On August 2, 2022, the Verkhovna Rada of Ukraine appealed to the world community to recognize the Russian Federation as a terrorist state and to take effective measures for its comprehensive international isolation by ending all types of cooperation with it in order to undermine its economic capacity to continue the war against Ukraine and build new imperial plans. The Diet of Latvia was the first to recognize Russia as a state sponsor of terrorism.

The United States and a number of other countries are considering the possibility of such recognition with its legal consequences. The Russian Federation has a chance to join forces with Cuba, North Korea, Iran and Syria as a terrorist state.

Terrorism should be outside the law and human morality.

The key question is the issue of the effectiveness of the international law system: does international law remain a guarantor of international security under these conditions? Can international law find appropriate legal mechanisms for national and collective self-defense against aggression?

In order to confirm the accusation that the Russian Federation is waging an aggressive war of aggression, and not a mythical and incomprehensible to the international community, a fictional "special military operation" in Ukraine and the Russian Federation's commission of a crime against international peace, we will refer exclusively to the current international law recognized by the civilized world.

I. DEFINITION OF THE AGGRESSION AND THE AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE

In 2014, Russia annexed the Ukrainian Crimea and started an aggressive war in Donbas. The annexation of Crimea began on February 26, 2014, when Russian military units began arriving in Crimea under various pretexts. On the night of February 27, "unknown armed men" of the Russian military, who were later nicknamed the "little green men", seized the buildings of the Verkhovna Rada and the Council of Ministers of Crimea, placing Russian flags there.

Over the following weeks, the gradual blockade and seizure of military facilities, public government buildings, airports, and communications facilities continued. At the same time, the Russian military was sometimes disguised as a civilian population. On March 1, the Russian Federation Council gave Vladimir Putin permission to use the army abroad. On March 16, an illegal "referendum" on the status of Crimea took place in Crimea.

The referendum was not recognized by Ukraine and the international community, and there were no independent international observers at the polling stations. Voting took place with

numerous violations, in particular, it was possible to get a ballot several times and with a Russian passport. Evidence of falsifications is the fact that, according to the "official" data of the occupiers, the turnout for the "referendum" was more than 84%, and support for joining Russia was more than 96%. According to the Mejlis of the Crimean Tatar people, the turnout during the referendum was 30-50%, of which about half voted for joining Russia. On March 17, the Crimean parliament announced the creation of the "Republic of Crimea" with Sevastopol as part of it. On March 18, Vladimir Putin signed an agreement on the acceptance of Crimea into Russia. The document was ratified on March 21.

The hostilities of the war in Donbas began on April 12, 2014, with the seizure of the Ukrainian cities of Sloviansk, Kramatorsk and Druzhkivka by Russian units led by officers of the Russian special services, where Russian saboteurs armed local collaborators with weapons seized from the Ministry of Internal Affairs and recruited them into their ranks. As of the end of 2021 – the beginning of 2022, more than 3,600 Ukrainian military personnel and more than 3,900 civilians became victims of the war in Donbas. Almost two million people were forced to change their place of residence because of the war.

On February 24, 2022, an open military attack, a full-scale invasion of the Russian Federation on the territory of Ukraine, began. The UN General Assembly in its resolution dated March 2, 2022 by an overwhelming majority of 141 against 5 (Russia, Belarus, North Korea, Eritrea and Syria) strongly condemned the actions of Russia, called them aggression against Ukraine in violation of paragraph 2 of Article 4 of the UN Charter and called for the immediate withdrawal of troops from Ukraine, including the de-occupation of Crimea and Donbas and abide international law.

On December 14, 1974, the General Assembly of the United Nations adopted a universally known Resolution 3314 (XXIX) «Definition of Aggression» where clearly defined: “A war of aggression is a crime against international peace”. "Aggressive war" is a "crime against international peace". Article 2 of the resolution

provides that the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. Article 5 distinguishes between aggression, which gives rise to international responsibility, and aggressive war, which is a "crime against international peace". According to the text of the article “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility”. Paragraf 3 of Article 5 emphasizes that no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 3 is important for the indisputable qualification of the actions of the Russian Federation as acts of aggression on the territory of Ukraine. In particular, it emphasizes the following: “Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof, (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State”.

Without exception, all of the listed aggressive actions are carried out by the armed forces of the Russian Federation in Ukraine. Only since 24.02.2022, the beginning of the active war with the Russian Federation, as of 27.08.22, according to the Office

of the Prosecutor General of Ukraine, 20,877 crimes against Ukraine were registered, including 14,193 crimes of aggression and war crimes and 6,684 crimes against national security. As of September 11, the 200th day of the full-scale armed aggression of the Russian Federation, more than 1,130 children were injured in Ukraine. According to the official information of the juvenile prosecutors, 380 children died and more than 737 were injured of various degrees of severity.

These numbers are not final, as work is ongoing to establish them in places of active hostilities, in temporarily occupied and liberated territories. Russian war crimes in Ukraine multiply every hour, and missile and artillery strikes and bombings hit nuclear power plants, civilian facilities, enterprises, hospitals, schools, residential buildings and even entire cities, killing thousands of civilians and children . Each of the mentioned criminal acts is actually recorded, documented and investigated by the justice authorities of Ukraine.

Par. (f) of art. 3 of the Resolution emphasizes “The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State”, by content, it also recognizes Belarus as an aggressor state.

The Rome Statute of the International Criminal Court devoted a long time to the issue of defining the concept of "aggression”. The jurisdiction of the ICC extends to the most serious international crimes committed after July 1, 2002. It is limited to crimes of genocide, aggression, crimes against humanity and war crimes. William Anthony Schabas is a Canadian academic specialising in international criminal and human rights law remarked on this matter “There are a number of complex issues, including the definition to be adopted, the role of the United Nations and more particularly the Security Council, and the relevance of other provisions of the Statute concerning issues such as complicity in prosecutions for the crime of aggression”.

As a result of almost a decade of discussion and debate, in 2010,

at the Kampala Review Conference, the member States of the International Criminal Court agreed on a definition of the concept of the "crime of aggression" and the conditions for exercising jurisdiction over this crime.

The question was agreed with accepted Resolution RC/Res.6 “The crime of aggression”, which adopted at the 13th plenary meeting, on 11 June 2010, by consensus. The Rome Statute of the International Criminal Court was added with Article 8 bis “Crime of aggression”. Paragraph 1 article 8 bis of enshrines that “For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. Within the understanding of this paragraph, the “crime of aggression” means the planning, preparation, initiation or execution, by a person…”, that is, responsibility for the activities of individuals. Individual criminal responsibility for the crime of aggression was established for the first time in international law in Art. 6 (a) of the Statute of the Nuremberg Tribunal, which recognized the "crime against peace".

Paragraph 2 Article 8 bis of the above act enshrines, in particular, that “For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by

a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein". Thus, the act of aggression is not carried out by individuals, but by the criminal activity of the state.

As of 2020, 155 states have signed the Rome Statute, but 122 states have ratified it. On January 20, 2000, Ukraine signed the Rome Statute of the International Criminal Court, but did not ratify it. And although Ukraine is not a state party to the Statute, this did not prevent it from applying to the International Criminal Court, because the Rome Statute provides for such an opportunity for countries that have signed it. During the armed aggression, Ukraine submitted 15 informational reports to the criminal court regarding the most serious war crimes and crimes against humanity. Ukraine also submitted two statements for consideration by The Hague Tribunal. The first is the events on the Maidan. The second is Crimea and Donbas. Ukraine's ratification of the Rome Statute will be an important event for creating real prerequisites for holding its military to account for all crimes committed on the territory of Ukraine since 2014.

Russia, after the occupation of Crimea and the start of an aggressive war in Donbas, in order to avoid international legal responsibility in the ICC, in 2016 withdrew its signature under the Rome Statute. This action of the Russian Federation will not exempt it from punishment in international criminal courts in the future, as was the case with murderers at the Nuremberg and Tokyo tribunals.

We should note that par. 5 art. 15 bis of the Statute emphasizes that in respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. Therefore,

unfortunately, Ukraine has limited opportunities to use the mechanism of the International Criminal Court to hold the Russian political and military leadership accountable for the act of aggression against Ukraine.

II. DEFINITION OF THE WAR CRIMES AND RUSSIA'S WAR CRIMES AGAINST UKRAINE

Modern experts thoroughly cover the issue of the definition of "war crimes". Commonly known Antonio Cassese the professor of international law an Italian jurist, the first President of the International Criminal Tribunal for the former Yugoslavia and the first President of the Special Tribunal for Lebanon Carrie emphasizes that a war crime is a violation of the laws of war that gives rise to individual criminal responsibility for actions by combatants in action, such as intentionally killing civilians or intentionally killing prisoners of war, torture, taking hostages, unnecessarily destroying civilian property, deception by perfidy, wartime sexual violence, pillaging, and for any individual that is part of the command structure who orders any attempt to committing mass killings including genocide or ethnic cleansing, the granting of no quarter despite surrender, the conscription of children in the military and flouting the legal distinctions of proportionality and military necessity.

McDougall is a Senior Lecturer at the University of Melbourne offers an exhaustive and sophisticated legal analysis of the crime's definition, as well as the provisions governing the International Criminal Court's exercise of jurisdiction over the crime. International lawyer Mykola Gnatovskyy, judge of the European Court of Human Rights from Ukraine, notes that war crimes are serious violations of international humanitarian law, for which international law provides for the criminal responsibility of specific individuals. The Institute of War Crimes has an interdisciplinary nature, as it belongs simultaneously to international humanitarian law (which recognizes relevant primary norms) and international

criminal law (which recognizes secondary norms regulating the criminal responsibility of individuals). The expert notes that war crimes have undergone a long evolution since art. 6 of the Statute of the Nuremberg Tribunal to art. 8 of the Rome Statute . Provisions on serious violations became the main stages of normative consolidation of war crimes in four Geneva Conventions for the Protection of War Victims of 1949 (common articles 49-50, 129-130, 146-147) and Additional Protocol I to them of 1977. The most complete codification of the institution of war crimes, containing more than 50 of their individual components, is Art. 8 of the Rome Statute. It is necessary to add to the listed acts The Hague Conventions of 1899 and 1907 for international war.

The article 8 of the Rome Statute has a title "War crimes". Par. 1 of art. 8 stated "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Par. 2 of art. 8 determines that for the purpose of this Statute, "war crimes" means: determines that for Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial. Further, subsection (b) contains a list of other 25 other serious violations of the laws and customs applicable in international armed conflict.

The 1949 Geneva Conventions have been ratified by majority of the Member States of the United Nations, while the Additional Protocols and other international humanitarian law treaties have not yet reached the same level of acceptance. The Geneva Conventions legally defined new war crimes and established that

states could exercise universal jurisdiction over war criminals. The third Geneva Convention applies to prisoners of war. The Convention establishes the conditions and places of captivity were more precisely defined, particularly with regard to the labour of prisoners of war, their financial resources, the relief they receive, and the judicial proceedings instituted against them. It establishes the principle that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

As a shocking example of a war crime, abuse of people and international law, the terror in the captured village of Olenivka in Donetsk region in Ukraine shows. On July 29, 2022, 53 Ukrainian defenders who were in Russian captivity were killed in an explosion in the occupied Olenivka. Most of them are legendary defenders of Mariupol from Azovstal. According to Ukrainian intelligence, the order to attack the prison was personally given by the owner of the private military company "Wagner", retired lieutenant colonel of the Russian Armed Forces Dmytro Utkin. His subordinates executed him. Representatives of the Red Cross requested access to Olenyvka. The ICRC was ready to provide support for the evacuation of the seriously injured to medical facilities and medicines. The organization also planned to help with the identification of dead Ukrainian soldiers and organize the return of the remains of the dead to their families. However, the Russians, once again violating the Geneva Conventions, refused to allow representatives of the Red Cross to the scene of the crime.

The fourth Geneva Convention affords protection to civilians, including in occupied territory. The bulk of the Convention deals with the status and treatment of protected persons, distinguishing between the situation of foreigners on the territory of one of the parties to the conflict and that of civilians in occupied territory. It spells out the obligations of the Occupying Power vis-à-vis the civilian population and contains detailed provisions on humanitarian relief for populations in occupied territory. It also contains a specific regime for the treatment of civilian internees. It has three annexes containing a model agreement on hospital and safety zones, model

regulations on humanitarian relief and model cards.

During half a year of Russia's full-scale invasion of Ukraine, human rights activists and law enforcement officers recorded tens of thousands of crimes committed by the Russian military against Ukrainians, which can be classified as war crimes, crimes against humanity, and genocide. This is the mass intentional killing of civilians in occupied cities and towns (Bucha, Mariupol, Irpin, Chernihiv Oblast, Kharkiv Oblast, Kherson Oblast, etc.), kidnapping and torture of people, killing of prisoners of war, destruction and looting of property, sexual violence, forced deportation and infiltration camps, use of weapons indiscriminate damage, shooting of green corridors, etc. Currently, Ukraine is investigating almost 20,000 such criminal cases.

Based on these facts, the President of Ukraine, Volodymyr Zelenskyi, will inform the world community that people, the entire local government, are being tortured, they are all in basements, they died or they were tortured specifically for people, the Middle Ages! He emphasized that the Russian military operates according to the same scheme, as according to the "methodology of the Nazis".

According to the testimony of the Prosecutor General of Ukraine, Iryna Venediktova, the dire situation regarding the mass murders committed by the Russian military in the Kyiv region – in Borodyanka. There is documentary evidence that the killings of civilians were carried out on the orders of the military leadership. The Russian military creates danger for nuclear facilities on the territory of Ukraine – they fire at nuclear power plants, destroy nuclear waste storage facilities, creating a deadly threat not only to the country's residents, but also to all of Europe. War crimes of the Russian Federation – war crimes committed by representatives of the authorities, the leadership of the armed forces, the regular army of the Russia and illegal armed formations organized and financed by the Russian Federation.

The High Representative of the EU for foreign and security policy, Josep Borrell, condemned the atrocities of the Russians in Ukraine, the city of Izyum in the Kharkiv region, and supports the

prosecution of the political leadership. «Russia's war of aggression against Ukraine has been leaving a trail of blood and destruction across Ukraine. Thousands of civilians have been already murdered, many more tortured, harassed, sexually assaulted, kidnapped, or forcibly displaced. This inhuman behaviour by the Russian forces, in total disregard of international humanitarian law and the Geneva conventions, must stop immediately. Russia, its political leadership, and all those involved in the ongoing violations of international law and international humanitarian law in Ukraine will be held accountable. The EU supports every effort in this regard», – the head of the European diplomacy said . The President of Poland Andrzej Duda also emphasized that whoever kills and violates international law must bear full responsibility for it .

Important is the provision that under the Nuremberg Principles, war crimes are different from crimes against peace. Crimes against peace include planning, preparing, initiating, or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances. Because the definition of a state of "war" may be debated, the term "war crime" itself has seen different usage under different systems of international and military law. It has some degree of application outside of what some may consider being a state of "war", but in areas where conflicts persist enough to constitute social instability.

III. OPPORTUNITIES OF THE UN INTERNATIONAL COURT OF JUSTICE AND OTHER INTERNATIONAL JUDICIAL INSTITUTIONS TO PUNISH THE RUSSIAN AGGRESSOR

To protect itself from the invasion and military occupation of the Russian Federation, Ukraine also appeals to international judicial institutions to bring the aggressor to justice. The dispute between Ukraine and the Russian Federation regarding the interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was initiated at the UN International Court of Justice on February 26, 2022 at the request

of Ukraine. In particular, in its Application, Ukraine "respectfully requests the Court to: (a) adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine; (b) adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine; (c) adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention; (d) adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention; (e) require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide; (f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide" . Ukraine also explained that that the "special military operation" of the Respondent is an aggression undertaken "under the guise" of the duty to prevent and punish genocide.

In its Order, in particular, the UN International Court of Justice noted that the context in which the present case comes before the Court is well-known. On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he had decided to conduct a "special military operation" against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply

concerned about the continuing loss of life and human suffering.

Par. 81 of the Order underscore "The Court considers that, with regard to the situation described above, the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the "Donetsk People's Republic" and the "Lugansk People's Republic" had turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also ensure that any military or irregular armed units which may Order allegations of genocide under the Convention on the prevention and punishment 0f the crime of genocide (Ukraine v. Russian Federation) 16 March 2022 be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations".

The Order of the ICJ of the UN is legal binding in accordance with the norms of international law. The occupiers do not comply with the Court's order, but such a decision is strategically important, as it is the legal basis for the international community to take political, economic and military decisions against the aggressor state. The fact that 13 judges voted for the introduction of these temporary measures, and two judges – representatives of Russia and China – voted against such a decision is indicative. In the Order Ukraine contends that the "special military operation" of the Respondent is an aggression undertaken "under the guise" of the duty to prevent and punish genocide.

The most common rhetoric in the context of the aggressive war of the Russian Federation against Ukraine is the question of the legal regime and the demarcation of the grounds, order and procedure of conducting commonly used in the practice of states: "UN peacekeeping operations", "special operations" and the Russian-Putin hybrid "special military operation". as the implementation of an aggressive war of aggression (crime of aggression).

The practice of the UN has enriched the important international experience of resolving modern armed conflicts of a diverse nature. The activities of the UN Security Council and the UN Secretary General in this area began to be carried out under the name "UN peacekeeping operations". Special military operation – in general, it is another form of conducting military operations by operational (operational-strategic) units of the armed forces of a state or a group of states. What is legitimate only in the case of application of Art. 51 of the UN Charter – the inalienable right to individual or collective self-defense in the event of an armed attack on a Member of the Organization.

Such operations can also be carried out to support international peace and security under the mandate of the United Nations, as was the case with the use of armed forces in the Persian Gulf region to restore peace there. Such actions of the USA were sanctioned by Resolution No. 665 of August 25, 1990 and provided the troops of Western countries with a UN mandate to conduct military operations in this region.

They also differ Special operations (S.O.) – military activities conducted, according to NATO, by specially designated, organized, selected, trained, and equipped forces using unconventional techniques and modes of employment. And Special operations warfare, unconventional military actions against enemy vulnerabilities that are undertaken by specially designated, selected, trained, equipped, and supported units known as special forces or special operations forces (SOF). All these measures have nothing to do with conducting "special military operations", the aggressive war and aggression of the Russian Federation.

Russia consistently mocks the world community by disguising war as such operations. This is clearly seen in the following examples. The Russian way of naming the use of its armed forces: “operation on the restoration of the constitutional order in Chechnya” (the First Chechen War), “counter-terrorist operation on the territory of Northern Caucasus region” (the Second Chechen War), “peace enforcement operation” (the Russian invasion of

Georgia in 2008), and now “special military operation.” Russia does not fight wars, it conducts “operations,” because wars can only be fought with equals.

The Russian dictator announced the beginning of a "special military operation" against the "Kyiv regime" and explained to the Russians and the whole world why it was launched: to protect the so-called DNR and LNR, whose independence the occupier recognized in violation of current international law; with the aim of forcing Ukraine to a neutral status – to protect Russia itself from a fictitious and mythical invasion of Ukrainian on its territory; for the demilitarization and denazification of Ukraine (disarmament of a sovereign state and genocide against its people), with the global goal of "guaranteeing security for all mankind." In addition, another practical task was announced: the elimination of threats posed to Russia by NATO's eastward advance.

What does all this reveal about Russia’s in these plans, of course, have nothing to do with prevention of genocide or protection of Russian-speaking population in Ukraine (which suffers most from this war). Russia is trying to rebuild its empire, and the language of “special military operation” is a reflection of this goal.

Hypocritically hiding behind the definition of its actions as conducting a "special military operation", the Russian Federation is waging a bloody war on the territory of Ukraine, unnecessarily trying to avoid responsibility for the violation of Clause 4, Art. 2 of the UN Charter, which stipulates the obligation of states to refrain in international relations "from the threat of force or its use, both against the territorial integrity or political independence of any state, and in any other way, incompatible with the goals of the United Nations." The Russian Federation grossly violates the UN Charter and threatens Ukraine and Europe with nuclear weapons.

In this meaning, the investigation of war crimes and bringing the perpetrators to justice is not only an obligation of the state under international humanitarian law, that is, the law that regulates armed conflict, but it is also an obligation under the European Convention on Human Rights. As of September 2022, five interstate

cases were pending at the ECtHR. Two of them – "Ukraine v. Russia (regarding Crimea)" and "Ukraine v. Russia (regarding Donbas)" – refer to human rights violations in the annexed Crimea and in the territories of Donetsk and Luhansk regions not controlled by Kyiv.

Other appeals to the Court relate to the facts of abduction of orphans and disabled children in the Donetsk and Luhansk regions and their illegal or actual transfer to the territory of Russia, violation of the rights of Ukrainian political prisoners and captured Ukrainian sailors. These statements cover Ukraine's complaints about the violation of the following rights: the right to life, the prohibition of torture, the right to liberty and personal integrity, freedom of thought, conscience and religion, freedom of expression, the prohibition of discrimination, the limits of the application of restrictions on rights, proceedings, the protection of property rights, the right to free elections.

However, the Council of Europe excluded Russia from its membership immediately after the large-scale invasion of the Russian army into the territory of Ukraine. On February 25, 2022, the membership of the Russian Federation in the organization was suspended, and on March 15, at the initiative of Ukraine and Poland, the Council of Europe adopted such a final decision. Russia ceased to be a member of the European Court of Human Rights and ECHR from September 16, 2022. This means that the European Court will accept and consider applications against Russia for violations that took place before that date, and the Russian Federation will absolutely ignore all its decisions. The court will have to decide how exactly to act in relation to the approximately 18,000 applications that are currently pending against the RF. The court chooses a possible strategy for this situation.

A number of cases have been referred to Investment Arbitrations. These cases concern individual or class actions by Ukrainian state-owned and private companies regarding compensation for the value of property lost in Crimea due to Russian annexation. In total, there are up to 10 such cases, both from state and private companies, as well as from private investors.

The International Court of Justice, the European Court of Human Rights, various arbitrations provide for the responsibility of the state. Ukraine wants attract all Russian occupiers to criminality, as if they were accountable for driving Ukrainians to tortur. All political ceramics, military ceramics, a special warehouse, the most settled individuals of the Russian Federation, are calling for an early warning on the imposition of a wickedness of war on an aggressive foreign war. The essential task is to bring to criminal responsibility all the Russian occupiers who are involved in the murders and torture of Ukrainians. All political leaders, military leaders, and the highest officials of the Russian Federation are subject to punishment on the basis of committing the crime of waging an aggressive war of aggression. And above all, the highest political and military leadership of Russia, all who initiate, plan and direct war crimes and acts of aggressive war.

On March 15, 2022, the US Senate unanimously passed a resolution calling for an investigation into Russian President Vladimir Putin as a war criminal . On March 23, the Sejm of Poland recognized Putin as a war criminal . Unfortunately, the Russian Federation is still a permanent member of the UN Security Council and blocks any opposition to its illegal actions by other members of the organization. The European Convention on Human Rights has lost full jurisdiction over the Russian Federation and is unable to consider complaints from individuals regarding the violation of their rights by the aggressor state under the European Convention on Human Rights and its Protocols.

The question of creating a special (military) tribunal to punish Russian criminals during the Russian Federation's war against Ukraine justifiably arises. Modern history has a number of illustrative examples of the creation and operation of such judicial institutions. Among such international tribunals, the Nuremberg Military Tribunal was the first. He worked from November 1945 to October 1946 and tried Nazi criminals who acted during the Second World War. During the Nuremberg trial, the following were considered: crimes against peace – planning, preparation, initiation and conduct of an aggressive

war and war in violation of international agreements and agreements; war crimes – violation of the laws and customs of war, murder, torture, abduction into slavery, murder and torture of prisoners of war, murder of hostages, looting of private or public property, destruction of settlements; crimes against humanity – murders, enslavement, exile, persecution for racial, religious, political reasons. The Nuremberg Tribunal sentenced 12 defendants to the death penalty, seven to prison terms, and three were acquitted.

Only European war criminals of the Second World War were tried at the Nuremberg Trials. Japan was an ally of Hitler's Germany. And to punish its criminals, the Tokyo Tribunal was created. Charges were brought against 29 representatives of the leadership of Japan, among which: 7 received the death sentence, 16 were sentenced to life imprisonment, 2 received long prison terms, 1 committed suicide on the eve of arrest. From 1993 to 2017, the International Tribunal for Yugoslavia existed: in more than 20 years, 161 people were charged and 90 of them were convicted. The International Tribunal for Rwanda – existed in 1994-2015, a subsidiary body of the United Nations, established to prosecute those responsible for the genocide committed on the territory of Rwanda and Rwandan citizens responsible for the genocide committed on the territory of neighboring states. The Tribunal handed down a life sentence to former Prime Minister Jean Cambande for crimes against humanity and other leaders for war crimes.

Since the beginning of the full-scale war of the Russian Federation against Ukraine, the question of the need to create a Special International Tribunal for the trial of the main war criminals of the Russian Federation has been raised. In an interview In to ZN.UA, an international lawyer, Ambassador-at-Large of the Ministry of Foreign Affairs of Ukraine Anton Korynevich noted that several options for the creation of a Special Tribunal are being considered. The first is on the basis of a multilateral international treaty between Ukraine and other states. The second is a hybrid court based on an agreement between Ukraine and the United Nations. The third option is a hybrid court based on an agreement

between Ukraine and a European regional organization (the European Union or the Council of Europe). However, the choice of a specific court model depends on the political will of our partners. The speed of creation of the Special Tribunal and the level of its legitimacy depend on this .

On this issue, Volodymyr Zelenskyy the President of Ukraine in his address of September 22, 2022 at the General Debate of the 77th session of the UN General Assembly emphasized: "A Special Tribunal should be created to punish Russia for the crime of aggression against our state. This will become signal to all "would-be" aggressors, that they must value peace or be brought to responsibility by the world. We have prepared precise steps to establish such Tribunal. They will be presented to all states. Ukraine will appeal to the UN General Assembly to support an international compensation mechanism" .

It is clear from the above that there are grounds for recognizing Russia as a state sponsor of terrorism or a terrorist state. A while ago, Javaid Rehman Professor of Human Rights Law, and Head of the Law School, Brunel University stated that thrughout the twenties centuri, the rise of nationalism, totalitarian ideologies such as Nazism and Stalinism, and the upsurge of racial, religious and linguistic extremism have all been accompanied by terrorism. In the aftermath of the Second World War, State-sponsored terrorism was deployed to resist granting the right of self-determination to many of the oppressed nations and peoples . Today, in the twenty-first century, modern Putinism implements not only the mentioned anti-people regimes, but goes further and tries to deny the existence of an independent, sovereign country.

CONCLUSIONS

Taking in consideration the above, it should be stated that the so-called "special military operation" of the Russian Federation on the territory of Ukraine is the war crime, the crime of aggression and the crime against international peace.

The Rome Statute of the International Criminal Court was

added with Article 8 bis "Crime of aggression". Paragraph 1 article 8 bis of enshrines that "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. Crime of aggression provides also responsibility for the activities of individuals.

Paragraph 2 Article 8 bis of the above act enshrines, in particular, that act of aggression means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Thus, the act of aggression is not carried out by individuals, but by the criminal activity of the state. After the occupation of Crimea and the start of an aggressive war in Donbas, the Russian Federation withdrew its signature under the Rome Statute in 2016 in order to avoid international legal responsibility in the International Criminal Court. This action will not exempt her in the future from punishment in international criminal justice institutions, as was the case with the murderers in the Nuremberg and Tokyo tribunals.

A war crime is a violation of the laws of war that gives rise to individual criminal responsibility for actions by combatants in action, such as intentionally killing civilians or intentionally killing prisoners of war, torture, taking hostages, unnecessarily destroying civilian property, deception by perfidy, wartime sexual violence, pillaging, and for any individual that is part of the command structure who orders any attempt to committing mass killings including genocide or ethnic cleansing, the granting of no quarter despite surrender, the conscription of children in the military and flouting the legal distinctions of proportionality and military necessity.

War crimes are committed by the political leadership, representatives of the authorities, the leadership of the armed forces, the regular army of the Russian Federation, and illegal armed formations organized and financed by the Russian Federation. Tens

of thousands of crimes committed by the Russian military against Ukrainians, which can be classified as war crimes, crimes against humanity, and genocide. This is mass intentional killing of civilians in occupied cities and towns, kidnapping and torture of people, killing of prisoners of war, destruction and looting of property, sexual violence, forced deportation and filtration camps, use of weapons of indiscriminate destruction, etc. Currently, Ukraine is investigating more than 20,000 such criminal cases.

To protect itself from the invasion and military occupation of the Russian Federation, Ukraine also appeals to international judicial institutions to bring the aggressor to justice. The dispute between Ukraine and the Russian Federation regarding the interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was initiated at the UN International Court of Justice on February 26, 2022 at the request of Ukraine.

In its Order, in particular, the UN International Court of Justice noted that the a "special military operation" against Ukraine is that there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court considers that the RF must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.

Hiding behind the definition of its actions as conducting a "special military operation", the Russian Federation is waging a bloody war on the territory of Ukraine, unnecessarily trying to avoid responsibility for the violation of par. 4, art. 2 of the UN Charter 9 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation") as well as the Principle D ("The territorial integrity and political independence of the State are inviolable") of the 1970 Declaration on Principles of International Law .

Ukraine has repeatedly appealed to the European Court of

Human Rights. There are five interstate cases pending before the European Court of Human Rights. Others relate to the facts of the abduction of orphans and disabled children in the Donetsk and Luhansk regions and their illegal or actual transfer to the territory of Russia, violation of the rights of Ukrainian political prisoners and captured Ukrainian sailors. These statements cover Ukraine's complaints about the violation of the following rights: the right to life, the prohibition of torture, the right to liberty and personal integrity, freedom of thought, conscience and religion, freedom of expression, the prohibition of discrimination, the limits of the application of restrictions on rights, proceedings, the protection of property rights, the right to free elections. However, Russian Federation ceased to be a party to the European Convention on Human Rights and the European Court of Human Rights from September 16, 2022 and will definitely ignore all without exception the Court's decision.

All Russian occupiers who are involved in killing and torturing Ukrainians and above all the highest political and military leadership of Russia, all who initiate, plan and manage war crimes and acts of aggressive war must be brought to criminal responsibility. There is a priority, objective need to create a Special International Tribunal for the trial of war criminals of the Russian Federation Several options for creating a Special Tribunal are being considered. It should be noted that of the three options considered above, taking into account that the Russian Federation is a permanent member of the UN Security Council and will not judge itself, and not only European states are interested in the creation of such an international judicial body, the first option is more realistic – the creation of a Special Tribunal on the basis of a multilateral international treaty between Ukraine and other interested states.

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SANCTIONS IN INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

The commission of a wrongful act entails the criminal liability and the application of appropriate enforcement actions and sanctions to the guilty ones, or, as lawyers often call them, punishment. The influence on the offender by means of appropriate enforcement measures has been discussed extensively in the legal literature since the early 19th century. However, it goes back centuries. As late as the 17th century, Hugo Grotius proclaimed the foundations of cosmopolitan jurisprudence: each state is obliged either to punish an offender itself, or deliver him up the state pursuing him (Chapter XXI "On the Communication of Punishment", pp. 508-513) [1][1]. Subsequently, this idea was developed in the theory of the universal operation of legal laws, which focused on the inevitability of punishment. At the same time, any crime was considered as an act of obvious trespass against the universal world legal order. Therefore, the idea of complete unification of the criminal legislation of states on the basis of the international criminal code was brought to the forefront. In this regard, it should be pointed out that in the 21st century, the international community has not achieved such coherence in the development of a unified international criminal code, however, a number of treaties have been adopted at the international universal and regional levels that criminalize wrongful acts in various areas (military, security, environmental, economic, etc.).

[1] Гуго Гроций О праве войны и мира /по ред. С.Б. Крылова; перевод А.Л. Саккетти. М.: Юрид. Лит., 1956. 867 с.

I. THE CONCEPT AND PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW

Proceeding to the research, it should be noted that the international legal acts providing for liability for the commission of criminal offenses do not contain the concept of punishment, indicating only some of its features (The Convention on the Prevention and Punishment of the Crime of Genocide (Art. 2), The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Art. 1), The International Convention Against the Taking of Hostages (Art. 1), The International Convention for the Suppression of Acts of Nuclear Terrorism (Art. 2), etc.); the statutes of ad hoc international military and criminal tribunals and courts constitute no exception (Statute of the International Tribunal for the former Yugoslavia, Statute of the International Criminal Tribunal for Rwanda, Statute of the Special Tribunal for Lebanon, Statute of the Special Court for Sierra Leone, Statute of the International Criminal Court, etc.). The only exception is the legislative criminal international legal act of advisory nature – the Model Criminal Code for the Member States of the Commonwealth of Independent States (hereinafter, the "Model Criminal Code of the CIS"). Art. 45 (1) of the above act enshrines that "punishment is a measure of national enforcement (penalty) imposed by a court verdict. It shall be applied to a person found guilty of a crime and provide for the deprivation or restriction of the rights and freedoms of this person provided for by criminal law" [2][2].

Theoretical definitions of the concept of punishment are more typical for national researchers in the area of national criminal law. The legal literature defines that a punishment a) is a measure (means) of enforcement, i.e. a measure forcing the observance of law and order (to the extent that is determined by the norms of criminal law); b) punishment itself is implemented regardless of the will and

[2] Модельный Уголовный Кодекс для государств – участников Содружества Независимых Государств. URL: https://www.icrc.org/ru/doc/assets/files/other/crim.pdf.

desire of the offender, that is, compulsorily. Therefore, when defining punishment as an "enforcement measure", first of all, its function is reflected ("enforcement to the criminal legal order"), and when describing it as an "enforcement measure", the mechanism for its implementation is shown, which in turn is regulated by law (Criminal Code, Code of Criminal Procedure and the Correctional Code) and subordinate legislation (when enforced) (p. 26) [3][3]. It should be noted that, despite the fact that the provisions of the convention norms that criminalize international crimes and crimes of an international nature are implemented in the national criminal legislation of many countries, and the current Criminal Code of Ukraine is no exception, which enshrines the norms on the prohibition of torture (Art. 127), human trafficking (Art. 149), hostage-taking (Art. 147), terrorist act (Art. 258), illegal handling of weapons, ammunition or explosives (Art. 263), criminal offenses in the area of circulation of narcotic drugs, psychotropic substances, their analogues or precursors (Articles 305-320), criminal offenses against peace, security of mankind and international law and order (Chapter XX), etc. [4][4], however, when giving the theoretical definition of punishment, the scholars do not actually reflect the signs of punishment from international criminal law.

According to the researcher in the area of international criminal law Farooq Hassan, "...deterrence or retribution, or both of these theories may lie behind the notion of international criminal punishment" (p. 51) [5][5].

Regarding the purposes of punishment, it should be noted that they are widely covered in international human rights acts, in

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[3] Уткин В.А. Проблемы теории уголовных наказаний: курс лекций. Томск: Издательский Дом Томского государственного университета. 2018. 240 с.

[4] Кримінальний кодекс України. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[5] Farooq Hassan. The Theoretical Basis of Punishment in International Criminal Law. Case Western Reserve Journal of International Law. 1983. Volume 15. Issue 1. Pp. 39-60.

particular, the International Covenant on Civil and Political Rights of 1966 (hereinafter, the "ICCPR"), the comments of the UN Human Rights Council, the case-law of the European Court of Human Rights (hereinafter, "ECtHR"), as well as a number of decisions of international bodies of criminal jurisdiction, UN Security Council resolutions, and documents containing standards for the treatment of persons who have committed a crime. Among such purposes are: correction, retribution, deterrence, reintegration of the accused into society, social rehabilitation, protection of society, ending impunity, promoting reconciliation, restoring peace and justice.

In particular, the ICCPR notes that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (Art. 10(3) **[**6][6]. The Human Rights Council, in its General Comment on this article, indicated that "no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner" (para. 10) [7][7].

According to European Prison Rules (hereinafter, "EPP"), "all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty" (rule 6); in addition, the document emphasizes that "the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life" (rule 102.1) [8][8].

The ECtHR has increasingly argued in its case-law that "while punishment remains one of the aims of imprisonment, the

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[6]International Covenant on Civil and Political Rights. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[7] UN Human Rights Committee (HRC), CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992. URL: https://www.refworld.org/docid/453883fb11.html [accessed 27 May 2022].

[8] European Prison Rules. URL: https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

emphasis in European penal policy is now on the rehabilitative aim of imprisonment, especially towards the end of a long custodial sentence" [9][9].

Most of these purposes of punishment are directly defined on the basis of the decisions of the UN Security Council and the statutes of the international bodies of criminal jurisdiction. Guided by the provisions of Resolution 827 (1993) of the UN Security Council, one can state that the purposes of sentencing by the International Criminal Tribunal for the former Yugoslavia are: prosecution of suspected persons responsible for violations of international humanitarian law; establishing justice for victims; prevention of new crimes; contributing to the restoration of peace by *promoting* reconciliation in the former Yugoslavia [10][10].

The aforementioned Model Criminal Code of the CIS provides for the restoration of social justice as the purpose of punishment, as well as the correction of the convicted person and the prevention of the commission of new crimes by both convicted and other persons (Article 45 (2)) [2].

An analysis of international legal acts suggests that the purposes of punishment differ depending on the age of the liable party (pp. 57-61) [11][11] and focus on purposes that take into account the peculiarities of the status this category of persons. For instance, the ICCPR states, "in the case of juvenile persons, the

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[9] European Court of Human Rights, *Vinter and Others v. the United Kingdom, Grand Chamber, Nos 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013.* URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-7652%22]}.

[10] Резолюция 827 (1993), принятая Советом безопасности на его 3217-ом заседании 25 мая 1993 года. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/306/30/PDF/N9330630.pdf?OpenElement

[11] Сыроед Т.Л. **К вопросу о возрасте уголовной ответственности несовершеннолетних: международно-правовой аспект.** *//Материалы за IX международна научна практична конференция «Новини на научния прогресс – 2013» (София, 17-25 августа 2013 г*). Том 3. Закон**. История.** София «Бял ГРАД-БГ» ООД . 104 с. С.57-61.

procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation" (Article 14 (4)) [12][12]. The African Charter on the Rights and Welfare of the Child notes that "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation" (Art. 17 (3)) [13][13]. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) specify the purpose of juvenile justice as ensuring the well-being of the juvenile and ensuring that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence (5.1) [14][14].

The purposes of sentencing in international criminal law generate considerable interest for scholars. Professor Fulvio Palombino notes, "bearing in mind the traditional domestic theories of punishment, justifications for the latter mainly include: i) retribution (since the offender harmed society, society is entitled to inflict harm in return); ii) deterrence (the threat of punishment deters people from engaging in illegal acts); and iii) rehabilitation (the punishment changes the offender in order to make him a better citizen afterwards). Remarkably, as far as international criminal law is concerned, one gets the clear impression that while punishment fulfills the first two functions (even though it is not

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[12] International Covenant on Civil and Political Rights. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[13]African Charter on the Rights and Welfare of the Child. URL: https://www.achpr.org/public/Document/file/English/achpr_instr_charterchild_eng.pdf.

[14] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile.

clear which of the two is to be prioritized), the same is not true concerning the third one, i.e. the function to rehabilitate the offender"... "more in detail, the rehabilitative function of punishment is one of the most important" [15][15].

II. TYPES OF PUNISHMENTS IN INTERNATIONAL CRIMINAL LAW

When it comes to the types of punishments, it should be pointed out that the present international treaty practice has evolved from the adoption of international treaties providing for the wrongfulness of an act and not providing for the specific types of punishments applicable to crimes under international law [16][16] (for example, The Convention on the Prevention and Punishment of the Crime of Genocide of 1948, The International Convention for the Suppression of Counterfeiting Currency of 1929, etc.) and to the adoption of treaties providing for appropriate sanctions (for example, The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, The United Nations Convention against Transnational Organized Crime, etc.). A while ago, professor Cherif Bassiouni stated that none of the 315 acts of international criminal law developed between 1815 and 1988 contains punishments for conduct which is qualified by these instruments as crimes under international law. This aspect is left to the discretion of national legislation and international bodies of criminal jurisdiction

[15]Fulvio Maria Palombin. Cumulation of offences and purposes of sentencing in international criminal law: A troublesome inheritance of the Second World War. International Comparative Jurisprudence. 2016. Volume 2. 89-92 p.

[16] International Law and the Fight Against Impunity. A Practitioners Guide Copyright International Commission of Jurists, 2015. 536 p. URL: https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf.

(p. 111) [17][17]. From this perspective, it should be noted that there is a tendency towards change, and each international act criminalizing certain wrongful acts requires a detailed analysis in terms of whether this act imposes obligations on Member Countries to provide for in their legislation the types of punishments in accordance with national law, or recommends the application of explicit types of punishments (imprisonment, payment of fines to the injured party, etc.), which, in our opinion, ensures that the same types of punishments are applied to offenders for committing wrongful acts, regardless of the place they were committed. This is important in relation to grave crimes committed the result of which is highly detrimental to society, the state, individuals (for example, crimes against humanity, war crimes, terrorism, human trafficking, etc.).

The study of international legal acts suggests that they provide for a wide range of punishments, which are divided into criminal (basic) and non-criminal (additional/alternative). In particular, the statutes of ad hoc international military tribunals and courts, the Statute of the International Criminal Court exercising their jurisdiction over the persons who have committed international crimes, provide for the following criminal (basic) types of sanctions (penalties): imprisonment; deprivation of freedom for determined period; life imprisonment (Art. 24 of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Art. 23 of the Statute of the International Criminal Tribunal for Rwanda; Art. 24 of the Statute of the Special Tribunal for Lebanon; Art. 19 of the Statute of the Special Court for Sierra Leone; Art. 77 of the Statute of the International Criminal Court, etc.).

Death penalty stands distinctive among the penalties, and its existence is more an exception than a well-established practice, since the right to life is jus cogens and is protected by international and regional treaties, customary international law and national

[17] M. Cherif Bassiouni. Crimes Against Humanity in International Criminal Law. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992. Pp. xxxv, 802.

legal systems. Such exceptions are the Charter of the Nürnberg Tribunal of 1945 (Article 27) and of the Tokyo Military Tribunal of 1946 (Article 16) [18][18].

It should be noted that the norms prohibiting the death penalty are also enshrined in fundamental human rights treaties. For instance, the International Covenant on Civil and Political Rights of 1966 (hereinafter, the "ICCPR") focuses on the fact that the right to life is the inherent right of every person, which is protected by law, and that no one shall be arbitrarily deprived of life (Art. 6). [19][19]. The Second Optional Protocol to the ICCPR obliges each State Party to take all necessary measures to abolish the death penalty within its jurisdiction [20][20]. The Convention on the Rights of the Child of 1989 obliges States Parties to ensure that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age (Art. 37(a)) [21][21].

As far as the international universal level is concerned, a number of specialized acts have also been adopted in this area, among which the following should be mentioned: General Assembly Resolution 2857 (XXVI) of 20 December 1971 Capital Punishment; ECOSOC Resolution 1984/50 of 25 May 1984 Safeguards guaranteeing protection of the rights of those facing the death penalty; ECOSOC Resolution 1989/64 of 24 May 1989 Implementation of the safeguards guaranteeing protection of the

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[18]Сыроед Т.Л. Международное уголовно-процессуальное право: документы и комментарии. Харьков : ПРОМЕТЕЙ-ПРЕС, 2007. 588 с.

[19] International Covenant on Civil and Political Rights. URL: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[20]Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/second-optional-protocol-international-covenant-civil-and.

[21]Convention on the Rights of the Child. URL: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

rights of those facing the death penalty; ECOSOC Resolution 1996/15 of 23 July 1996 Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, etc.

It should be stated that the prohibition of the death penalty in these international acts is a strong evidence of the desirability of its abolition and the presence of an imperative norm on a practical level regarding the non-application of the death penalty, under any circumstances, in relation to persons under eighteen years of age and pregnant women.

The types of punishments that are not related to imprisonment, in particular, additional ones that can be imposed with the main types of punishments cause considerable interest. Such punishments are enshrined in international treaties that provide for the criminalization of certain acts and the statutes of international bodies of criminal jurisdiction. For instance, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 provides for the following additional penalties: pecuniary sanctions and confiscation (Article 3(4)a) [22][22]. Punishment through seizure and confiscation are provided for in Art. 37 of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 [23][23]. Seizure or confiscation is provided for Article 3 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 [24][24]. Under Article 12 of the Convention for the Protection

[22] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. URL: https://www.unodc.org/pdf/convention_1988_en.pdf.

[23]The Single Convention on Narcotic Drugs of 1961 with Additional Protocols Amending the Convention on Narcotic Drugs, 1961. URL: https://treaties.un.org/doc/Treaties/1975/08/19750808%2006-05%20PM/Ch_VI_18p.pdf.

[24] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

of Submarine Telegraph Cables, 1884, the High Contracting Parties undertake to apply to those guilty of offenses under the Convention, either imprisonment or fine, or both measures [25][25]. Several enforcement actions (imprisonment, fine, confiscation, and reinstatement of the environment) are provided for in Articles 6 and 7 of the Convention on the Protection of the Environment through Criminal Law, 1998 [26][26].

The Statute of the International Criminal Court provides that, in addition to imprisonment, the Court may also impose a fine, forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties (Art. 77(2)) [27][27]; the Statutes of the International Criminal Tribunal for the Former Yugoslavia (Art. 24(3)) [28][28] and the International Criminal Tribunal for Rwanda (Art. 23(3)) [29][29] provide for the return of any property and proceeds acquired by criminal conduct, including by means of duress; the Statute of the Special Court for Sierra Leone provides for forfeiture of the property, proceeds and any assets acquired

[25] Convention for the Protection of Submarine Telegraph Cables. (Paris, 14 March 1884). URL: https://www.iscpc.org/documents/?id=13.

[26] Convention on the Protection of the Environment through Criminal Law. URL: https://rm.coe.int/168007f3f4.

[27] Rome Statute of the International Criminal Court. URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

[28] Updated Statute of the International Criminal Tribunal for the former Yugoslavia. URL: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[29] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons

unlawfully or by criminal conduct (Art. 19(3)) [30][30].

The international community also pays attention to the development of guidelines (standards) for the introduction (application) of alternative types of punishment, primarily in relation to imprisonment, which can have negative consequences both for the convict and for the society into which the person is integrated after serving the sentence.

For example, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) provide that sentencing authorities may dispose of cases in the following ways: verbal sanctions, such as admonition, reprimand and warning; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; a community service order; referral to an attendance center; house arrest; any other mode of non-institutional treatment; some combination of the measures listed above (Rule 8.2) [31][31].

The Kadoma Declaration on Community Service Orders and the recommendations of the seminar entitled "Criminal Justice: the Challenge of prison Overcrowding" emphasize the need to limit the use of imprisonment and use it as a measure of last resort and advocate the adoption of effective measures, in particular, through the introduction of community service. The document states that community service should be applied effectively under supervision, and it should include a community service program under which the offender is required to work a certain number of hours for the

[30]Statute of the Special Court for Sierra Leone. URL: https://www.refworld.org/docid/3dda29f94.html.

[31] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). URL: https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf.

benefit of the community at his or her own expense [32][32].

The basic principles for the use of restorative justice programs in criminal matters promote the use of a "restorative process" that provides for active participation in the joint resolution of matters arising from the crime, usually through a third party, victims and offender, and, where appropriate, any other individuals or community members affected by a crime. Restorative processes may include joint mediation, conferencing and sentencing activities. The result should be reaching an appropriate agreement. Restorative outcomes may include measures and programs such as compensation, restitution and community service to meet the individual and collective needs and obligations of the parties, and to achieve reintegration of the victim and the offender.

Restorative justice programs may be applied at any stage of proceedings within the criminal justice system, subject to national law.

Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. In addition, the victim and offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations [33][33].

In the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems,

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[32]Кадомская декларация об общественно-полезных работах и рекомендации семинара по теме «Уголовная юстиция: проблема переполненности тюрем», состоявшегося в Сан-Хосе, Коста-Рика, 3-7 февраля 1997 года //Сборник стандартов и норм Организации Объединенных Наций в области предупреждения преступности и уголовного правосудия. ООН. Нью-Йорк, 2016. С. 101-103. URL: https://www.unodc.org/documents/justice-and-prison-reform/compendium/R_ebook.pdf.

[33] UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. URL: https://www.refworld.org/docid/46c455820.html.

the States Members noted the need to increase the use of alternatives to imprisonment, which may include restorative justice measures [34][34].

In its resolution 2016/17 titled "Restorative justice in criminal matters", ECOSOC encourages Member States, where appropriate, to facilitate restorative justice processes, in accordance with national law, including through the establishment of procedures or guidelines on the conditions for such services; to assist one another in the exchange of experiences on restorative justice, the development and implementation of research, training or other programmes and activities to stimulate discussion, including through relevant regional initiatives (paras. 3, 4) [35][35].

A number of acts on this matter have been adopted at the international regional level. Thus, the Resolution of 1976 No. (76) 10) adopted by the Committee of Ministers of the Council of Europe "On certain alternative penal measures to imprisonment" recommended the governments of member state: to examine their legislation with a view to removing legal obstacles to imposing alternatives to imprisonment; to study new methods of probation including the increasing use of residential facilities for probationers which have been tried out in some member states, with a view to their possible adoption; to ensure that fines can be used as sanctions on a broad basis and that there are methods making it possible to adjust such fines to the offender's financial resources, and that methods of enforcing

[34] Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World. URL: https://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador_Declaration/Salvador_Declaration_E.pdf.

[35] Resolution adopted by the Economic and Social Council on 26 July 2016 [on the recommendation of the Commission on Crime Prevention and Criminal Justice (E/2016/30)]
2016/17. Restorative justice in criminal matters. URL: https://www.refworld.org/pdfid/57c57ebd4.pdf.

payment are such as to avoid whenever possible recourse to imprisonment; to look into the possibility of imposing various deprivations (such as withdrawal of driving license) as well as confiscation as independent substitutes for prison sentences; to study various new alternatives to prison sentences with a view to their possible incorporation into their respective legislations, and in particular: to consider the scope for penal measures which simply mark a finding of guilt but impose no substantive penalty on the offender; to consider the expediency of deferment of sentence after guilt has been established so as to enable a sanction to be imposed which will take account of the offender's progress after his conviction; to look into the advantages of community work and more especially the opportunity it provides: for the offender to make amends by doing community service, for the community to contribute actively to the rehabilitation of the offender by accepting his co-operation in voluntary work; to develop arrangements for associating the judiciary with the continuing process of developing measures alternative to imprisonment, etc [36][36].

Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring draws attention to the need to use electronic monitoring as an alternative execution of a prison sentence, in which case its duration shall be regulated by law (para. 23) [37][37].

Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters promotes standards for the use of restorative justice in the context of the criminal procedure, and seeks to safeguard participants' rights and

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[36] Resolution (76) 10 on certain alternative penal measures to imprisonment (Adopted by the Committee of Ministers on 9 March 1976 at the 255th meeting of the Ministers' Deputies). URL: https://rm.coe.int/16804feb80.

[37] Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring. URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c64a7.

maximize the effectiveness of the process in meeting participants' needs. This document aims to encourage the development of innovative restorative approaches – which may fall outside of the criminal procedure – by judicial authorities, and by criminal justice and restorative justice agencies [38][38].

The actual implementation at the national level of alternative punishments can be supported by the statistics of the Council of Europe, according to which the total number of probationers decreased from 1,511,887 to 1,302,781 from January 2020 to January 2021, when comparing 30 probation agencies which provided data for two years and use the person as the counting unit, i.e. there is a decrease of 14%. However, this is largely due to a sharp decline in Turkey, where the number of probationers fell from 521,151 in 2020 to 333,365 in 2021. With Turkey excluded, the total number of probationers in Europe decreased by only 2.2%. 60% of probation accounts for three countries: Russia (470,736; 27%), Turkey (333,365; 19%) and Poland (243,901; 14%) [39][39].

III. ENFORCEMENT ACTIONS AND SANCTIONS APPLIED TO CERTAIN CATEGORIES OF PERSONS (CHILDREN, WOMEN, PERSONS WITH MENTAL ILLNESS, ELDERLY PEOPLE, DRUG ADDICTS)

Enforcement actions and sanctions imposed on minors require special consideration. For instance, the United Nations Convention on the Rights of the Child of 1989 emphasizes the need for an urgent search for alternatives to the imprisonment of children; in

[38]Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters. URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3.

[39] Sanctions and measures without deprivation of liberty in Europe: annual statistics for 2021. URL: https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680a6f8b2.

particular, the document states that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Art. 37, paragraph b)); the need to prioritize the rehabilitation and reintegration of a convicted juvenile is established (Art. 40, paragraph 1) [40][40].

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) indicate that, a large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include: care, guidance and supervision orders; probation; community service orders; financial penalties, compensation and restitution; intermediate treatment and other treatment orders; orders to participate in group counseling and similar activities; orders concerning foster care, living communities or other educational settings; other relevant orders (rule 18.1) [41][41].

The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice state that an important and highly effective way to reduce the number of children coming into contact with the justice system is the application of alternatives to detention mechanisms, such as extrajudicial and restorative justice measures, the adoption of strategies for the reintegration of children who are former offenders, and respect for the principle that the deprivation of liberty of children shall be used only as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pretrial

[40]Convention on the Rights of the Child. URL: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[41] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). URL: https://www.ohchr.org/sites/default/files/beijingrules.pdf.

detention for children (para. 7) [42][42].

The application of an alternative to imprisonment for women remains an urgent matter. In particular, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("The Bangkok Rules") explicitly encourage the development and use of gender-responsive non-custodial alternatives to pre-trial detention and imprisonment (not least because of the growing number of female prisoners worldwide).

It is recognized in the Bangkok Rules that many women in conflict with the law do not constitute a danger to society, and imprisonment often has a disproportionately negative impact on their rehabilitation and the lives of their children.

Non-custodial measures and sanctions that take into account the special needs of women allow women to fulfill their caregiving responsibilities while serving their sentences and can be much more effective in addressing the fundamental causes of their offenses than time spent in prison [43][43].

Persons with mental illness represent another category in respect of which issues of application of alternative measures of punishment are raised. Generally, the treatment of mentally ill persons is more effective outside of prison. Ideally, such persons should be in the community in which they live, in accordance with the principle recognized in the adopted Principles for the Protection of Persons with Mental Illness and the Improvement of

[42] 69/194. United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice. URL: https://www.refworld.org/docid/54cf56124.html.

[43] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary. https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.

Mental Health Care [44][44]. If they need treatment in a mental health facility, this facility shall be located as close as possible to their home. However, prisons are not an acceptable substitute for mental health facilities. Sometimes persons with mental illness do commit crimes. The principles emphasize that such persons should receive the best available mental health care, which shall be part of the health and social care system (Art. 20(1)); the observance of fundamental human rights shall be guaranteed to them, namely: they shall be treated with humanity, respect for the inherent dignity of the human person; they shall have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment; there shall be no discrimination on the grounds of mental illness; they shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights; they shall be entitled to be represented by a personal representative or a counsel (Art. 1).

International legal acts also focus on the application of alternative penalties for drug-related offences. In most countries, offenders imprisoned for drug-related offenses make up a significant proportion of prisoners. In particular, this is due to national and international efforts to combat the illegal drug trade.

However, not all offenders in this group are key players in the drug trade. Often these individuals commit crimes because they are drug-addicted persons. For many of the offenders in this group, a more effective approach could be taken, which would provide for alternatives to incarceration addressing drug abuse. This paradox is recognized in major international documents, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, and the United Nations General Assembly Declaration on the Guiding Principles of Drug Demand Reduction, 1999. Although these acts focus mainly on fighting the

[44] Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care. URL: https://www.refworld.org/docid/3ae6b3920.html.

drug trade, they call on governments to take multifaceted initiatives in which alternatives to imprisonment are a key element. Thus, according to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Art. 3(7)), the Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph (l) of this article and the circumstances enumerated in paragraph (5) of this article when considering the eventuality of early release or parole of persons convicted of such offences [45][45].

The Declaration on the Guiding Principles of Drug Demand Reduction notes that "in order to promote the social reintegration of drug-abusing offenders, where appropriate and consistent with the national laws and policies of Member States, Governments should consider providing, either as an alternative to conviction or punishment, or in addition to punishment, that abusers of drugs should undergo treatment, education, aftercare, rehabilitation and social reintegration. Member States should develop within the criminal justice system, where appropriate, capacities for assisting drug abusers with education, treatment and rehabilitation services. In this overall context, close cooperation between criminal justice, health and social systems is a necessity and should be encouraged" (Art. 14) [46][46].

The alternative forms of punishment for drug addicts is at the center of attention of the Organization of American States, which has introduced programs that offer drug treatment courts as an alternative to imprisonment for criminal offenders who have an underlying substance abuse disorder driving their criminal conduct. Appropriate programs allow choosing treatment and rehabilitation under the supervision of the court instead of imprisonment. By

[45] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. URL: https://www.unodc.org/pdf/convention_1988_en.pdf.

[46] Resolution Adopted by the General Assembly S-20/3. Declaration on the Guiding Principles of Drug Demand Reduction. URL: https://digitallibrary.un.org/record/261563?ln.

focusing on treating the underlying substance abuse disorder, these programs address the underlying cause of the criminal behavior rather than the symptoms. Therefore, alternatives to incarceration can help break the cycle of criminal behavior, substance abuse disorder, and incarceration. Courts are aimed at: 1) reducing criminal recidivism; 2) reducing the costs of the criminal justice system; and 3) improving outcomes for participants (including improved relationships with their families and communities). These programs generally use a multisectoral approach, bringing together expertise from the criminal justice system, public health, and social reintegration services (p. 73-74) [47][47].

In some countries, the removal of illicit drug users from the criminal justice system is formalized and implemented through drug education and treatment programs for first-time offenders.

For more heavily drug-addicted offenders who have a broader criminal record, the courts operating in the United States and Australia which consider sending drug addicts to treatment as an alternative to imprisonment suggest an intensive therapeutic approach aimed at eliminating addiction and preventing related criminal acts. Such courts provide ongoing monitoring by the judge and the court's multidisciplinary team, treatment plan, and reinforcement and encouragement, including reduced program participation if the regimen is maintained, and sanctions, including short-term imprisonment, for failure to maintain it. As a rule, in order to successfully complete a relevant program, a participant must refrain from abusing drugs for a specified period of time and achieve treatment goals (p. 19) [48][*48*].

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[47] Drug Treatment Courts: An International Response to Drug Dependent Offenders. URL: http://www.cicad.oas.org/fortalecimiento_institucional/dtca/publications/DTC_FINAL_PUBLICATION.pdf.

[48] Меры, связанные и не связанные с лишением свободы Альтернативы тюремному заключению. Организация Объединенных Наций Нью-Йорк, 2010 год. 47 с. URL: https://www.unodc.org/pdf/criminal_justice/10-52547_3_Custodial_3_ebook.pdf.

The provision of access to alternative sanctions in certain systems for overrepresented groups, in particular, indigenous peoples, ethnic, religious or racial minorities and foreign citizens due to the predominance of these categories of persons in prisons also remains a pressing issue. It should be noted that the right to non-discrimination is enshrined in the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 26), the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Article 14), and the Additional Protocol No. 12 to the American Convention on Human Rights (Articles 1, 24), the Arab Charter of Human Rights (Article 2), and the Universal Islamic Declaration of Human Rights (Article III). Further to this, there are a number of treaties on non-discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention concerning Discrimination in Respect of Employment and Occupation, the Declaration on the Elimination of All Forms of Racial Discrimination (Durban Declaration) and Programme of Action, etc. In General Comment No. 18 on non-discrimination, the Human Rights Committee defined the right to non-discrimination as "a basic and general principle relating to the protection of human rights" (para. 1). At the same time, the Human Rights Committee recognizes that differentiation can be made between people, if the criteria for such differentiation are "reasonable and objective", and the aim is to achieve a purpose which is legitimate under the Covenant (para. 18) [49][49].

In some countries, the proportion of minorities in crime statistics and in prisons is too high. This situation may be caused by a biased opinion that members of such groups pose a greater threat to public safety and therefore alternative measures cannot be considered a (better) adequate option. However, discrimination is prohibited by law in most countries. Even where law enforcement

[49] General comments № 18 on non-discrimination of the Human Rights Committee. URL: https://www.refworld.org/docid/453883fa8.html.

policies and practices have not been designed to be discriminatory or biased, the impact of such policies and practices on minority groups may be out of proportion. For example, it may be caused by the presence in urban areas where there is a higher crime rate and where minority groups may be concentrated, increased number of police officers, which increases the likelihood of detecting criminals. In other cases, the criteria allowing for alternatives to imprisonment may not reflect the factors that allow members of an overrepresented minority to participate in the program. The concept of equal protection under the law requires constant review of policy and practice to determine whether the same public safety goals can be achieved through other strategies that are less harmful to minorities, and the implementation of such strategies.

In many countries, a significant proportion of prisoners are foreign citizens. Sometimes, for one reason or another, it is wrongly assumed that alternatives to the imprisonment cannot be applied to them. For example, any foreign prisoner may be assumed to be capable of escaping, so that under no circumstances can any such prisoner be discharged conditionally. In other cases, the criteria allowing for alternatives to imprisonment may not reflect the factors that allow members of an overrepresented minority to participate in the program.

Technical assistance in this area may include: public awareness campaigns to reduce bias at the community; the inclusion of issues related to the overrepresentation of minorities in the criminal justice system, and especially in prisons, in the basic training of police officers, judges and prosecutors; and developing initiatives throughout the criminal justice system to develop strategies to reduce overrepresentation of certain groups (pp. 20-21) [50][50].

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[50] Меры, связанные и не связанные с лишением свободы. Альтернативы тюремному заключению. Организация Объединенных Наций Нью-Йорк, 2010 год. 47 с. URL: https://www.unodc.org/pdf/criminal_justice/10-52547_3_Custodial_3_ebook.pdf.

CONCLUSIONS

Taking in consideration the above, it should be stated that punishment in international criminal law has the following features: punishment in international criminal law is a measure of enforcement to comply with the rule of law depending on the type of crime (international law and order in the case of international crimes; domestic law and order in the case of international/transnational crimes); the enforcement measures applied to an offender in most cases are applied not on behalf of and at the initiative of the victim, but on behalf of and at the initiative of the community, in particular, in the case of international crimes; the essence of punishment under international criminal law is the restoration of justice in relation to victims of crimes, which may be individuals, groups of individuals, states in case of international crimes (for example, war crimes, aggression, genocide, terrorism, etc.) and transnational crimes, damaging the economy of states (for example, money laundering; prohibition of the use of the death penalty as punishment; humane treatment of the guilty persons regardless of the severity of the wrongful act committed by him or her).

International criminal law has a wide range of purposes of punishment, including: correction, retribution, deterrence, reintegration of the accused into society, social rehabilitation, protection of society, ending impunity, promoting reconciliation, restoring peace and justice, etc.; in our opinion, as an alternative, the prevention of crimes should be an ultimate purpose in the future. It can be achieved if, after serving the sentence and returning to normal life in society, the offender is ready and able to comply with current laws and maintain his existence. To achieve this purpose, the penitentiaries should use all means and types of assistance at its disposal (educational, correctional, moral, spiritual, etc.) that it considers appropriate, applying them taking into account the needs of the rehabilitation of each prisoner; guided by generally acceptable international standards, enshrined in both universal and regional international treaties, and the Statute of the International Criminal Court and its procedural acts (pp. 259-260)

[51][51]. At the same time, we note that the purposes of punishment differ depending on the liable party, which is important when it comes to minors, persons with mental illness, drug addicts.

International legal acts that criminalize wrongful acts, the statutes of international bodies of criminal jurisdiction contain basic, additional/alternative punishments. The basic types of punishment include: imprisonment; deprivation of freedom for determined period; life imprisonment. Additional measures (fines, confiscation, payments, etc.) are applied with the basic types of punishment and mainly aimed at restoring the financial situation of crime victims, compensation for moral harm, etc. The main purpose (underlying premise) of alternative measures is to reduce the negative impact of punishment on a person, replace imprisonment, restore a person for society, reduce recidivism, take into account the characteristics (status) of persons who have committed a crime (for example, minors, women, persons with mental illness, elderly people, drug addicts). Alternatives to the basic type of punishment can be applied for the crimes that are not socially dangerous or grave, and they also should be used to the maximum in cases indicating the unintentional commission of a wrongful act. The application of alternative punishment should be based on the consent of the crime victims.

It should be noted that criminal international legal sanctions allow for the possibility of applying additional and alternative types of punishment as the basic ones, depending on the severity of the crime and taking into account the characteristics of the liable party, for example, a minor.

The death penalty is an exceptional punishment, because the right to life is jus cogens and is protected by international law and national legislation. Specifically, international acts of a universal

51. Сыроед Т. Л. Субъекты (участники) международных уголовно-процессуальных отношений: понятие, виды, специфика правового статуса : монография. Харьков: ФИНН, 2010. С. 259-260. 584 с.

and regional level focus on the prohibition of the death penalty and the gradual abandonment of it; mandatory prohibition of the death penalty against a certain category of persons, in particular the vulnerable ones (minors, pregnant women, mothers with recently born children), and the prohibition of death penalty against the elderly people, persons with mental illness and mentally retarded persons or persons with extremely limited mental abilities; conducting a thorough investigation of each case to exclude cases of allegedly unlawful deprivation of life; observance of the rules for the treatment of persons sent to death row in order to minimize their suffering. It should be noted that the current international acts criminalizing wrongful acts do not provide for the specified punishment; the exceptions are the Charter of the Nürnberg Tribunal (Article 27) and Charter of the Tokyo Military Tribunal (Article 16) [52][52], which applied this norm practically.

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THE SYSTEM OF PRINCIPLES OF INTERNATIONAL FINANCIAL LAW

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INTRODUCTION

A significant feature of the present international community is, above all, the legal orderliness of both its structure and the relationship between its interconnected components. The factors of interaction and interdependence are mainly expressed in the form of the universal basics of the international legal system. The latter basics create a peculiar legal unity and are equally essential and acceptable for all states despite the difference in economic systems, ideology, level of development, etc. The system-forming factor and the basis of any legal system are the principles that consolidate the initial, leading provisions of a universal nature, which apply to all or most of the norms of law.

In the present-day system of international law, the principles occupy a particular place. They directly ensure the genetic, functional, and structural unity of its constituents, as well as facilitate the achievement of a high degree of organization in the course of normative-legal regulation of international relations in all fields. A hierarchical structure, with the basic principles of international law at its top, is also very important in terms of systemic elaboration of the principles of international law. The above principles are able to permeate all fields of international law, acting thereby as a generalizing-integrating center and a legal base. In other words, they perform a function of the "constitution" of the entire system of international law and are the normative-legal basis of its branches.

Within the system of international financial law, as within any

other field of international law, the basic principles of international law are of primary importance. In international legal science, both western and post-Soviet, the issue of the principles of international law has always been insufficiently investigated due to scholars' lack of attention to international financial law as a branch of international public law. This issue has mostly been mentioned only superficially in some textbooks. The principles were claimed to exist in some form; however, neither the substantiation of their existence nor the description of the sources of their origin has been set forward. They have been frequently presented as a "financial" constituent of the principles of international economic law.[53]

I. THE SIGNIFICANCE OF THE BASIC PRINCIPLES OF INTERNATIONAL FINANCIAL LAW IN ENSURING THE INTERNATIONAL FINANCIAL, LEGAL ORDER

In the scientific international legal sources, the basic principles of international law have always been given a lot of attention, whereas the issue of their legal origin, essence, juridical relevance, and quantity has often caused dispute throughout the past decade. They were marked with numerous epithets, like basic, fundamental, most significant, generally-accepted, peremptory, universal, mandatory, stable, of higher legal force, and many others. The lexical filing of the above words indicates that these norms are aimed at the broadest range of addressees and are crucial for the system of international law.

Without delving into the history of the evolution of scientific views on the essence, number, and definition of the basic principles of international law in numerous world schools of law, it would be expedient to specify only the peculiarities of their formation, as well as the features, assigned to them in international legal, judicial practice and international acts. The UN Charter contains the following seven principles: 1) the principle of sovereign equality of

[53] Лазебник Л. Л. Міжнародне фінансове право : навч. пос. Київ : Центр учбової літератури, 2008. С.58

states; 2) the principle of not applying threat or use of force; 3) the principle of non-interference in the internal affairs of states; 4) the principle of peaceful resolution of disputes; 5) the principle of peaceful cooperation of states; 6) the principle of faithful fulfillment of international obligations; 7) the principle of equal rights and self-determination of peoples.[54] The introduction of the basic principles to the Charter of such a universal organization as the UN has emphasized their significance as a legal base of the relationships between all existing states, without any exception. Today, the legitimateness of various acts and actions of the states, as well as their compliance with modern international law and the tasks regarding international peace and safety, is assessed by the international community in terms of their compatibility with the principles of the UN Charter.[55]

The legal authority and significance of the UN Charter principles in a normative-legal plane have been consolidated through the adoption of the Vienna Convention on the Law of International Treaties (1969), a set of provisions aiming at the mandatory compliance of all international agreements with the peremptory norms of general international law (*jus cogens*). In accordance with Article 53 of the Convention, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted…".[56] The normative content of the above provisions has become a "concentrated reflection" of the legal consciousness of the international community of that time, as well as has led to the understanding by its members of the fact that the limits of the actions of states must have clear boundaries (including the juridical ones). The violation of these boundaries is

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[54] Статут Організації Об'єднаних Націй і Статут Міжнародного Суду від 26.06.1945 р. URL: http://zakon3.rada.gov.ua/laws/show/995_010

[55] Мовчан А. П. Международный правопорядок. Москва : Междунар. отнош., 1996. С.43.

[56] Віденська конвенція про право міжнародних договорів від 23.05.1969 р. URL: https://zakon.rada.gov.ua/laws/card/995_118

inadmissible and illegal, and might harm not only the interests of states but also the entire international community and world order. Consequently, an appropriate legal qualification of the basic, generally-recognized principles of international law, which function as the legal norms of international life and shall not be violated (peremptory norms *jus cogens*), has made up for ensuring and enhancing a unified legal order in the international community.

Other important events on the way to improving and developing the basic principles were the adoption on the basis of consensus at the UN of the Declaration on Principles of International Law (1970)[57] and, within the framework of the Conference on Security and Cooperation in Europe (CSCE), – the Declaration on Principles the Member States Shall Rely on in Mutual Relations (1975)[58]. The provisions of the CSCE Final Act of 1975 have supplemented the list of the basic principles with the following: 1) the principle of respect for human rights and fundamental freedoms; 2) the principle of territorial integrity; 3) the principle of inviolability of the state borders[59].

The basic principles of international law administer a considerable impact on both international relations and the system of international law. Nevertheless, they are essential for the sectoral legal systems, especially those where the legal framework contains gaps in legal regulation. Or for such sectoral legal systems as the international financial, legal system, whose normative-legal component contains a significant number of "soft" norms, which creates the need for a "hard" legal framework for sectoral legal norms.

According to V. Shumilov, the principles of international

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[57] Декларація про принципи міжнародного права, що стосуються дружніх відносин та співробітництва між державами відповідно до Статуту Організації Об'єднаних Націй : Резолюція Генеральної Асамблеї ООН 2625 (XXV) від 24.10.1970 р. URL: https://zakon.rada.gov.ua/laws/card/995_569

[58] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

[59] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

financial law derive from the special principles of international economic law. Regardless of the similarity between the subject bases of these two types of international law, the former has its own specifics and requires a separate study of its sectoral principles without direct and unconditional extrapolation of the achievements of the science of international economic law. Undoubtedly, the economic principles apply to the field of international financial relations as well. Therefore, in those aspects where the doctrinal approaches of researchers of international economic law are applicable to financial relations, they need to be borrowed for the purpose of their further "sectoral-financial" development. On the other hand, despite the relatively significant attention of scientists to the issue of the principles of international economic law,[60] there is no unanimity of views even in this field of research.

In the system of international financial law, its principles perform the function of a system-forming core of international legal regulation of international financial relations. They have been enshrined in such international acts as the UN General Assembly Resolution of 1974 (which contains the Declaration on the Establishment of a New International Economic Order),[61] the

[60] Войтович С. А. Принципы международно-правового регулирования межгосударственных экономических отношений. Киев : УМК ВО, 1988. 127 с.; Кучер Б. И., Войтович С. А. Система принципов международно-правового регулирования межгосударственных экономических отношений. *Вестник Киевского ун-та. Международные отношения и международное право*. 1984. № 18. С. 14-18; Міжнародне економічне право : підручник / В. Опришко, А. Коста, К. Квінтано та ін. Київ : КНЕУ, 2006. 496 с.; Харчук О. О. Принципи міжнародного економічного права в умовах глобалізації світових господарських відносин : дис. … канд. юрид. наук : 12.00.11 / Інститут держави і права імені В. М. Корецького. Київ, 2010. 209 с.

[61] Декларація про встановлення нового міжнародного економічного порядку : Резолюція 3201 (S-VI) від 1.05.1974 р. URL: http://zakon3.rada.gov.ua/ laws/show/995_339

Charter of Economic Rights and Duties of States of 1974,[62] the CSCE Final Act of 1975, the charters of international financial organizations and others, where the basic principles of interstate cooperation in the financial area have been set.

In the system of international financial law, the sectoral principles act as a legal basis, affecting its political-legal and economic-legal essence. Most of these principles basically continue the action of the basic principles of international law in the field of international financial law. Consequently, they might be regarded as a criterion of legitimateness of all other norms in the field of international financial relations. Initially, they are reflected in the norms of international law and then acquire specific sectoral significance.[63]

II. The peculiarities of implementing the basic principles of international law in the international financial, legal order

The principle of sovereign equality of states is a fundamental idea of international law – the communication of equal states. Historically, the principle of sovereign equality has evolved, resting on two normative constituents: respect for the sovereignty of all states and recognition of their equality in international relations. Both constituents are regarded as fundamental in the institution of international legal personality in determining the state's status as a subject of international law.[64] In compliance with the principle of sovereign equality, all states shall respect each other's sovereign equality and uniqueness, as well as all rights inherent in and covered by their sovereignty. They include, in particular, the rights of the state to legal equality, territorial integrity, freedom, and political

[62] Хартія економічних прав і обов'язків держав від 12.12.1974 р. URL: http://zakon3.rada.gov.ua/laws/show/995_077

[63] Міжнародне економічне право : підручник / В. Опришко, А. Коста, К. Квінтано та ін. Київ : КНЕУ, 2006. С.82.

[64] Буткевич В. Г., Мицик В. В., Задорожній О. В. Міжнародне право. Основи теорії : підручник / за ред. В. Г. Буткевича. Київ : Либідь, 2002. С.222.

independence, the choice and development of its political, social, *economic* and cultural systems, to the adoption of its laws, and administrative rules. Here also belong the right to carry out relations with other states at the state's own discretion, the right to change state borders, the right to belong to international organizations, the right to be participants in bilateral and multilateral international treaties, the right to neutrality (the CSCE Final Act of 1975).

The principle of sovereign equality of states in the field of international financial relations has been enshrined in the 1974 Charter of Economic Rights and Duties of States. According to Article 10 of the Charter, "all states are legally equal and as equal members of the international community have the right to fully and effectively participate in the international decision-making process for the settlement of world economic, financial and currency problems…".[65] Among the principles that lie in the foundation of a new international economic, legal order, the Declaration on the Establishment of a New International Economic Order of 1974 highlights the principle of sovereign equality of states as the main principle of international law. Besides, the Declaration enshrines the full permanent sovereignty of every state over its natural resources and all economic activities, for the protection of which each state has the right to exercise control (paragraph 4. e).

The principle of sovereign equality of states in the field of the international financial, legal order means the equal legal personality of states in international financial, legal relations, as well as the state's sovereignty in terms of national finance and financial system. According to the state's financial sovereignty, the state (as a subject of the international financial, legal order) has the right to independently carry out its foreign and domestic financial policy, thus ensuring its foreign and domestic financial state sovereignty.

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[65] Хартія економічних прав і обов'язків держав від 12.12.1974 р. URL: http://zakon3.rada.gov.ua/laws/show/995_077

At first sight, the compliance with the principle of sovereign equality of states in modern international financial, legal order causes no doubts. Nevertheless, certain aspects of implementing this principle in the practice of international financial, legal relations (what is more, even certain provisions of international acts) make scholars question its "unexceptional" observance in the international financial, legal order.

Among the basic principles of a new international economic order, the Declaration also contains the principle of "securing favorable conditions for the transfer of financial funds to developing countries" (paragraph 4.o).[66] In its turn, Article 22 of the Charter of Economic Rights and Duties of States of 1974 imposes on developed countries the obligation to contribute to "increasing the net inflow of financial funds from official sources to developing countries".[67] Of course, preferential treatment has the right to exist. However, in this case, a "non-reciprocal way" of granting it has been outlined (paragraph 4. n of the Declaration, Article 19 of the Charter). This type of delimitation of the legal status of the subjects of the international financial, legal order gives an impression of violating equality between states, not to mention the complete annihilation of the principle of economic profit – one of the essential principles of a market economy.

The analysis of the reasons why this alleged "inequality" of states emerged, as well as its formal expression in international legal acts, enables us to believe that neither systemic connections nor coherence between the enshrined principle of preferences, on the one hand, and the principle of sovereign equality of states, on the other hand, has been violated. Firstly, the principle of granting developing states preferential and non-reciprocal treatment has

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[66] Декларація про встановлення нового міжнародного економічного порядку : Резолюція 3201 (S-VI) від 1.05.1974 р. URL: http://zakon3.rada.gov.ua/ laws/show/995_339

[67] Хартія економічних прав і обов'язків держав від 12.12.1974 р. URL: http://zakon3.rada.gov.ua/laws/show/995_077

been stated in such a verbal form that it is more like an appeal (or call) to developed states to implement such preferences. The absence of any hint of the peremptoriness of this norm has been caused by the usage of the word "endeavor" instead of "exercise" (Article 22 of the Charter) and, which is crucial, the phrase "wherever feasible and whenever possible" (paragraph 4. n of the Declaration). Secondly, the principle of granting preferences to developing states does not actually violate the principle of economic profit. Protection of financial sovereignty, as well as promotion of the developing states' financial systems on the part of the international community, can be explained not only by considerations of justice but also, above all, by an understanding of economic benefits in the future. Due to the rapid development of globalization in the international financial system, which has led to the interdependence of both state currencies and national financial systems, the financial crisis in one world area (owing to the updated technological possibilities of financial operators) instantly spreads to the international financial system. This requires not only close and coordinated cooperation between countries. The international community has admitted that its prosperity depends on the prosperity of its components – all states. The stability of all national financial systems (including developing states) is economically beneficial to all countries of the world (including developed states).

Another disputable point regarding the principle of sovereign equality of states (in particular, in relation to their sovereign right to independently pursue their foreign and domestic financial policy) is the implementation by states of the provisions envisaged by the statutes of international financial organizations. For instance, in accordance with Article VII of the Agreement of the International Monetary Fund (IMF), states are obliged "not to impose restrictions on making payments and transfers on current international operations without the approval of the Fund".[68] In

[68] Статті Угоди Міжнародного валютного фонду від 22.07.1944 р. URL: http://zakon2.rada.gov.ua/laws/show/995_921/page.

this way, the states renounce a part of their jurisdiction in compliance with the Agreement, which may be considered as a voluntary self-limitation of sovereignty, carried out in the course of globalization.

When states delegate their sovereign powers in the field of finance within the framework of international financial organizations, it questions the completeness of the sovereign rights of such states in the financial sphere. It is important in this context that states voluntarily grant the bodies of these organizations the right to make decisions in the field of finance in accordance with the statutory goals and objectives of the organization in order to maintain the safe functioning of the global financial system and their national systems. In this way, states protect their financial interests from various financial imbalances. What is more, when delegating a part of their competence to international organizations, states do not limit their sovereignty but exercise their sovereign right to voluntarily conclude agreements with other subjects of international law. O. Trahniuk believes that international obligations do not reduce the universal legal competence of a state, whereas the restriction of the state's actions (which derives from its international legal obligations) is not a limitation of its sovereignty but a limitation of the state's legal competence. In other words, it is a restriction in exercising certain sovereign rights.[69] Therefore, within the frameworks of international financial organizations, as well as in the course of concluding international treaties, there occurs only a limitation of a state's sovereign rights and not its sovereignty.[70]

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[69] Трагнюк О. Я. Політико-правовий зміст державного суверенітету в міжнародному праві. *Державний суверенітет в умовах європейської інтеграції* : монографія / за ред. Ю. П. Битяка, І. В. Яковюка. Київ : Ред. журн. «Право України», 2012. С.162.

[70] Трагнюк О. Я. Політико-правовий зміст державного суверенітету в міжнародному праві. *Державний суверенітет в умовах європейської інтеграції* : монографія / за ред. Ю. П. Битяка, І. В. Яковюка. Київ : Ред. журн. «Право України», 2012. С.164.

As to the issue of complying with the international principles of recognizing a state's sovereignty and not intervening in its matters within the domestic jurisdiction, it is important to outline the following peculiarities of such a limitation of sovereign rights. Firstly, it is absolutely voluntary. When exercising their sovereign right to make decisions of this kind, states voluntarily consent to it. Secondly, such a limitation is not permanent. A state always has the right to terminate its membership in one or another international financial organization. Supra-nationalism is impossible in its pure form because as long as the member states of a supranational entity retain their sovereignty, they can terminate their membership in it at any time, and it is impossible to withdraw such a right. Thirdly, a state does not lose its powers completely in those matters in which sovereign rights are limited, although these powers are subordinated to a certain extent. A state voluntarily delegates its powers to some international financial organization without losing its legal competence in delegated issues. Fourthly, the purpose, for the sake of which a country agrees to limit its sovereign rights in certain financial situations, corresponds to its interests and facilitates the stability of the national financial system. Thus, in the international financial, legal order, there occurs a so-called "transition" of states' sovereign rights on financial matters to international financial organizations, with the aim of centralizing and more professional coordination of the states' actions in international financial relations.

Another controversial issue in the context of implementing the principle of sovereign equality in the international legal order is the principle of member states' "weighted voting" in international financial organizations, whereby the number of votes of a member state depends on the criteria specified in the statutory documents. For example, in the IMF, such criteria include the number of a member state's quota in the authorized capital of the Fund (1 vote is added for every 100,000 SDR), the amount of net sales of the member state's currency from the Fund's general resources (1 vote

is added for every 400,000 SDR), the amount of net purchases of the member state's currency by the Fund (1 vote is deducted for every 400,000 SDR).[71] It is quite obvious that such criteria for assessing the member state's "weight" in the course of voting may result in less financially powerful states receiving poor voting results, which provokes unequal positions for the member states.

The above problem may be solved in two ways: economic and legal. From the point of view of economics, the acquisition of voting rights by states in proportion to their contributions is financially expedient since, with this principle of vote distribution, states risk in proportion to their contributions (a similar voting principle is popular among the participants of any financial institution whose assets are formed by unequal shares of participants, for example, owners of shares). Taking into account the interrelationship between the national currencies of the states and their financial systems, the interests of financially stronger states suffer more losses due to the adoption of an economically erroneous decision.

From the point of view of law, the non-violation of the principle of sovereign equality of states in international financial organizations by the principle of "weighted voting" may be secured by means of Article 10 of the Charter. It runs that "all States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, inter alia, through the appropriate international organizations in accordance with their existing and evolving rules, and to share in the benefits resulting therefrom"[72]. In addition to the states' right to participate equally in the solution of international economic problems, Article 10 of the Charter also suggests states' cooperation within international organizations, but in accordance with the *existing*

[71] Статті Угоди Міжнародного валютного фонду від 22.07.1944 р. URL: http://zakon2.rada.gov.ua/laws/show/995_921/page.
[72] Хартія економічних прав і обов'язків держав від 12.12.1974 р. URL: http://zakon3.rada.gov.ua/laws/show/995_077

rules of the organization.

Moreover, the charters of international financial organizations are multilateral international treaties. Their provisions correspond to the principles of international law. Otherwise, in accordance with Article 53 of the Vienna Convention on the Law of International Treaties of 1969, such treaties would have been deemed null and void[73]. It would be possible to assume that since the Convention does not have a retroactive effect (Article 4), it cannot be applied to the Charters of the IMF and the IBRD (the International Bank for Reconstruction and Development) which were adopted in 1944-1945. However, after 1969, there were founded multiple international financial organizations with the principle of "weighted voting". This proves the principle's compliance with the principle of sovereign equality of states. In accordance with Article 29 of the Agreement establishing the European Bank for Reconstruction and Development of 1990 (EBRD), "the voting power of each member shall be equal to the number of its subscribed shares in the capital stock of the Bank…".[74]

The above speculations indicate that, on the one hand, international financial organizations act as banks that provide loans with interest; in other words, they act as business entities. In this respect of their activities, the principle of "weighted voting" is absolutely appropriate. On the other hand, international financial organizations (especially the IMF) are entrusted with other functions related to maintaining the stability of the entire international financial system, promoting economic development in all countries, etc. Member states' "weighted" participation in solving such significant issues for the international community does not provide them with equal influence in voting. Even in the

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[73] Віденська конвенція про право міжнародних договорів від 23.05.1969 р. URL: https://zakon.rada.gov.ua/laws/card/995_118

[74] Угода про заснування Європейського банку реконструкції та розвитку від 29.05.1990 р. URL: http://zakon2.rada.gov.ua/laws/show/995_062/page

case of rapid economic growth, it is difficult for a country with a small territory to achieve equal "weight" of votes with large countries. The mechanism of "weighted voting" *a priori* does not guarantee equal starting opportunities. The above-mentioned peculiarities of implementing the principle of sovereign equality of states in practice lead to a situation of different legal possibilities. As V. Butkevych points out, when it comes to the equality of states, it is necessary to keep in mind *juridically equal potential opportunities* for solving issues in unsettled areas of international relations, which *de facto* are far from being equal[75] (highlighted by the author – O.V.). It seems that the differentiated possibilities of states (depending on their financial power) to participate in the resolution of international financial issues within the framework of international financial organizations dominate the international financial, legal order.

The principle of not applying threat or use of force belongs to the peremptory norms *jus cogens* in the system of the basic principles of international law. According to the UN Charter, "All members of the United Nations shall refrain in their international relations from the threat or use of force, both against the territorial integrity or political independence of any state and in any other manner incompatible with the purposes of the United Nations".[76] Despite the fact that military force (which was meant when this principle was created), at first glance, is not directly related to the international financial, legal order, the experience of observing international financial relations shows the opposite.

In the course of the formation of this principle, states ensured their military interests by means of force, while the international relations of the XX century relied on a "military balance" between

[75] Буткевич В. Г., Мицик В. В., Задорожній О. В. Міжнародне право. Основи теорії : підручник / за ред. В. Г. Буткевича. Київ : Либідь, 2002. С.225.

[76] Статут Організації Об'єднаних Націй і Статут Міжнародного Суду від 26.06.1945 р. URL: http://zakon3.rada.gov.ua/laws/show/995_010

powerful states, or rather two military-political blocs. Today, such bipolarity has turned into multi-polarity, and force has not left international law, but is only changing its form – it is gradually transforming into economic might. The rivalry between states has moved into the economic field, whereas the wars between states are acquiring an economic nature rather. Apart from that, one may witness the economic growth of certain countries or certain integration associations (the EU, the CIS, the League of Arab States, etc.). To put it differently – accumulation by certain states or groups of states of powerful economic force, which they can use at any time.

It is interesting that even without violating the norms of international law, financially powerful states (if they want it) can exert financial pressure on less developed countries due to the specifics of "weighted voting" in the bodies of international financial organizations. The only legal precautionary factors that are able to prevent it are the interdependence of states' financial systems (because of which the default of one country cannot but affect all others) and the principle of cooperation in the field of finance (enshrined in numerous international acts).

A state can use force in various forms. For example, it can use "financial force" to prevent the normal functioning of the national financial system of another country by influencing the decision on its financing in international financial organizations, etc.

Another way of applying force to the state's national financial system has arisen as the result of the development of IT technologies. The latter has made it possible to damage national financial systems through cyber-attacks on the computer programs of banking systems. The problem of cybercrime has long been the subject of discussion both at the international legal level and in the field of science.[77] At present, cyber-attacks are increasingly

[77] Конвенція про кіберзлочинність від 23.11.2001 р. URL: www.crimeresearch.org/library/Conven.htm; Голубєв В. О. Правові проблеми захисту інформаційних технологій. *Вісник Запорізьк. юрид. ін-ту.* 1997. № 2. С. 35-40; Мережко О. Проблеми кібервійни та

qualified not only as a crime against informational resources but also as the use of force against a state. The possible consequences of cyber-attacks are theft of information constituting a state secret, violation of the state's life maintenance system, including destruction of the anti-missile defense system, which is a threat to the state, and a violation of the basic principles of international law.

Due to the serious threats that modern informational technologies pose to the states' security,[78] scientists define cyber war as an armed conflict,[79] with all juridical consequences that follows (including the right to self-defense), whereas cyber-attack is referred to as a contemporary form of aggression.[80] Among the types of cyber threats identified by scientists,[81] the most significant for the international financial, legal order are the cyber-attacks against the resources of national importance, like informational and technological resources that secure the functioning of the national financial system.

The inviolability of international legal order is determined by

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кібербезпеки в міжнародному праві. URL: http://www.justinian.com.ua /article.php?id=3233; Тимченко Л. Д., Кононенко В. П. Міжнародне право : навчальний посібник. Київ : Знання, 2012. 631 с.; Schmitt M.N. Tallinn Manual on the International Law Applicable to Cyber Warfare. N.Y.: Cambridge University Press. 2013. 215 p. URL: http://csef.ru/media/articles/3990/3990.pdf; Schreier F. On Cyberwarfare. Dcaf Horizon. Working paper. 2015. № 7. 132 p. URL: https://www.dcaf.ch/sites/default/files/publications/documents/OnCyberwarfare-Schreier.pdf

[78] Тимченко Л. Д., Кононенко В. П. Міжнародне право : навчальний посібник. Київ : Знання, 2012. С.323.

[79] Мережко О. Проблеми кібервійни та кібербезпеки в міжнародному праві. URL: http://www.justinian.com.ua /article.php?id=3233

[80] Ventre D. Cyberespace et acteurs du cyberconflict. Paris : Hermes-Lavoisier, 2011. P.312.

[81] Schreier F. On Cyberwarfare. Dcaf Horizon. Working paper. 2015. № 7. 132 p. URL: https://www.dcaf.ch/sites/default/files/publications/documents/OnCyberwarfare-Schreier.pdf

the balance of both military-political and financial forces. This considerably updates the significance and necessity (in both financial and legal respects) of keeping to the principle that states shall refrain from the threat or use of force (including financial force) in relation to the national financial system of any country.

It is essential that in interstate relations, the states' finance can be used not only as a *means* of applying force or a *target* of applying force but also as a *cause* for applying force. In the XIX century, there were numerous cases of European countries' intervention in the states of Latin America under the pretext of collecting the debts from their subjects in the governments of these states. The Calvo Doctrine (according to it, national governments cannot be held responsible for the damage caused to foreigners as a result of internal disturbances or civil wars) was added to a number of treaties between Latin American and European countries. After being supplemented with the Drago Doctrine, the Calvo Doctrine acquired its final version and became the basis of the principle of not allowing diplomatic or armed intervention of states to collect international debts from their subjects.

For a certain period of time, the above principle has been regarded as an international legal custom, and in 1907, it was enshrined in the II Hague Convention Restricting the Use of Force to Recover on Contract Claims.[82] The Convention applies to debt obligations between governments. However, it does not extend to cases when the debtor state refuses to settle the dispute through arbitration (Article 1 of the Convention). Later, this principle was "absorbed" by the peremptory principle that states shall refrain from the threat or use of force, which prohibits any use of force, except in cases of self-defense (Chapter VII of the UN Charter).

Thus, the *violation* of the principle of not applying threat or use of force in the international financial, legal order may have the

[82] ІІ Конвенція про обмеження застосування сили у разі стягнення договірних боргових зобов'язань від 18.10.1907 р. URL: https://zakon.rada.gov.ua/laws/card/ 995_444/sp:max25

following forms: 1) the application of financial force by a state with the purpose of damaging the financial system of another state; 2) the application of force in the form of cyber-attacks against the informational and technological resources that secure the functioning of the state's national financial system, which threatens state's security and sovereignty; 3) the application of military force against a state due to its non-fulfillment of financial obligations (almost never found in the modern practice of international relations).

The principle of non-interference in the internal affairs of states means that states have to refrain from any interference, direct or indirect, individual or collective, in domestic or foreign affairs that belong to the inner jurisdiction of another country, no matter what the interrelationships between these states are.[83] This principle is closely related to the principle of sovereign equality of states, particularly in terms of one of its most essential constituents – respect for state sovereignty.

The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States of 1981 dwells on the rights and duties of which the principle of non-interference in the internal affairs of states is composed. In accordance with the Declaration, every state has an inalienable right to choose its economic system and to exercise inherent sovereignty over its natural resources in accordance with the will of the people, without external intervention, interference, subversion, coercion, or threat in any form; the duty of a state is to ensure that its territory is not used in such a way as to disturb the economic stability of another state; the duty of the state in carrying out its international economic relations is to refrain from any measures that may represent intervention or interference in the internal or external affairs of another state, in particular, the duty of the state is not to use its programs of external economic assistance and not to apply any

[83] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

economic reprisals or blockades, as well as to prevent the use of transnational corporations under its jurisdiction as a means of political pressure or coercion against another state, in violation of the UN Charter.[84]

The sectoral principle of international financial law of non-interference in the internal affairs of states consists of two components: 1) non-interference through political or other influence in the financial system of a state; 2) non-interference in the internal affairs of the state (political, military, economic, scientific and technical, etc.) through financial influence.

The second component comprises the actions of states that, using their financial power, directly or indirectly affect state sovereignty. For example, at one time, the Soviet Union intervened in the internal and external policy of the countries of the so-called "socialist camp" in various ways (ideological, military, cultural, etc.), among which the main role was assigned to the financial one – "financial infusions" into the economies of socialist states. A similar policy of intervention (including financial influence) in the internal affairs of states is currently pursued by the USA, the Russian Federation, and other countries. Such examples are a widespread negative world phenomenon, but in most cases, they occur due to mutual consent and do not become the subject of disputes.

Currently, the principle of non-interference in the internal affairs of a state by means of financing is of primary importance for the international financial, legal order. In compliance with paragraph VI of the CSCE Final Act of 1975, as a part of the implementation of the principle of non-interference in internal affairs, states shall "refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another

[84] Декларація про недопущення інтервенції та втручання у внутрішні справи держав : Резолюція ГА ООН 36/103 від 09.12.1981 р. URL: https://zakon.rada.gov.ua/laws/card/995_a33

participating state".[85]

The principle of peaceful resolution of international disputes suggests the resolution of disputes between states peacefully, without endangering international peace and security.[86] The principle of peaceful resolution of disputes is extremely important for those areas of international law, where bilateral contractual cooperation is of quantitative significance. For the international financial, legal order, interstate treaties, especially bilateral ones (on the avoidance of double taxation, economic cooperation, investments, loans, etc.), constitute a considerable part of bilateral treaties of international law as a whole. Therefore, the principle of peaceful resolution of financial disputes is the basis of peaceful cooperation of states in this field.

The above principle is closely associated with the principles of non-interference in internal affairs, cooperation between states, and (more than with the previous two) the principle of not applying threat or use of force. As it has already been mentioned, an international legal custom regarding the inadmissibility of diplomatic and armed interference by foreign countries in order to collect debts from the state, based on the Latin American doctrine of K. Calvo and L. Drago, was later enshrined in the II Hague Convention Restricting the Use of Force to Recover on Contract Claims of 1907.[87] Today, the principle of peaceful resolution of interstate disputes on financial issues is a financial constituent of the basic international law principle of peaceful regulation of disputes.

The principle of peaceful cooperation of states binds states to develop their cooperation with one another and with all states in all fields in accordance with the purposes and principles of the

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[85] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

[86] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

[87] ІІ Конвенція про обмеження застосування сили у разі стягнення договірних боргових зобов'язань від 18.10.1907 р. URL: https://zakon.rada.gov.ua/laws/card/ 995_444/sp:max25

Charter of the United Nations (the CSCE Final Act, Article IX), in particular, with the purpose of solving international problems in the economic area (Article 55 of the UN Charter).

The financial constituent of the principle of interstate cooperation lies in the fact that states are obliged to cooperate in the following directions:

1) the cooperation of states in counteracting financing of terrorism. The need "to enhance international cooperation among states in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators" has been enshrined in the Preamble of the International Convention for the Suppression of the Financing of Terrorism of 1999;[88]

2) the cooperation of states in eliminating the disparities of financial development between the countries of the world. The Declaration on the Establishment of a New International Economic Order suggests the necessity of "the strengthening, through individual and collective actions, of mutual financial cooperation among the developing countries on a preferential basis" (paragraph 4.s);[89]

3) the cooperation of states regarding the unification of national legal regimes in the field of finance for the development of the cross-border economic cooperation, protection of the legal status of private individuals in the financial field (for example, avoidance of double taxation), supervision of transnational companies, etc.;

4) the cooperation of states within international financial organizations, with the purpose of maintaining the safe functioning of the international financial system, preventing global financial crises, eliminating systemic financial risks, providing loans to states

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[88] Міжнародна конвенція про боротьбу з фінансуванням тероризму від 09.12.1999 р. URL: http://zakon0.rada.gov.ua/laws/show/995_518

[89] Декларація про встановлення нового міжнародного економічного порядку : Резолюція 3201 (S-VI) від 1.05.1974 р. URL: http://zakon3.rada.gov.ua/ laws/show/995_339

in order to support the national financial system, etc.

As a result of the negotiations at the summits of the Group of 20, the most powerful world countries have admitted that "amid serious challenges to the world economy and financial markets" they "are determined to enhance their cooperation and work together to restore global growth and achieve needed reforms in the world's financial systems" (paragraph 1 of the Declaration of the Summit on Financial Markets and the World Economy of November 10, 2008)[90]. In the declarations of the summits of the Group of 20, interstate cooperation in preventing financial crises suggested a number of reforms: strengthening transparency and accountability, enhancing prudential oversight over banks, enhancing oversight over credit ranking agencies, bolstering investor protection, enhancing regulators' cooperation across all segments of financial markets.[91] Such a broad range of reforms, which began after 2008, has initiated the formation of another sectoral principle of international financial law (it is valid only for international financial relations) – the ***cooperation of states in preventing global financial crises***. The importance of cooperation in this direction has been highlighted by western researchers of international financial law.[92] They refer to this cooperation as one of the most effective forms of rescuing the international community from global financial crises. V. Shumilov

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[90] Declaration summit on financial markets and the world economy. November 15, 2008. URL: https://www.mofa.go.jp/policy/economy/g20_summit/2008/declaration.pdf

[91] Declaration summit on financial markets and the world economy. November 15, 2008. URL: https://www.mofa.go.jp/policy/economy/g20_summit/2008/declaration.pdf

[92] Brummer C. How International Financial Law Works (and How it Doesn't). *The Georgetown Law Journal.* 2011. Vol. 99. P. 257-327; Simmons B. Compliance with International Agreements. The Annual Review of Political Science. 1998. P. 75-93. URL: https://scholar.harvard.edu/files/bsimmons/files/Simmons1998.pdf

articulates the need for cooperation in the above field as the principle of coordinated actions aimed at preventing financial crises.

The principle of faithful fulfillment of international obligations is one of the oldest basic principles of international law, which emerged in the form of an international legal custom *pacta sunt servanda* at the early stages of the development of statehood. According to Articles 26 and 27 of the Vienna Convention on the Law of International Treaties of 1969, "every treaty in force is binding upon the parties to it and must be performed by them in good faith"; "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[93]

The principle of fulfilling international treaties in good faith is a criterion of legitimateness of the international financial, legal order, whereas its implementation by subjects of international financial law in practice is the main condition for the stability and effectiveness of the international financial, legal order. Over the years of its evolution, international law has elaborated relatively effective institutional mechanisms for complying with the principle of fulfilling international treaties in good faith in the form of mutual consultations, negotiations, court trials, etc. For the field of the international financial, legal order, states' reputational risks are an additional but very powerful factor in the implementation of both international agreements and recommendations in the financial sphere. The peculiarity of international financial relations lies in the fact that the failure to comply with statute provisions (or even recommendations) of international financial organizations, as well as the failure to comply with other international legal, financial norms, creates a negative reputation for countries. Consequently, there follows a refusal to cooperate with them in the financial and economic sphere. K. Brammer believes that reputational risk is, perhaps, the most important tool for preventing the non-fulfillment

[93] Віденська конвенція про право міжнародних договорів від 23.05.1969 р. URL: https://zakon.rada.gov.ua/laws/card/995_118

of the norms of international financial law.[94]

The principle of equal rights and self-determination of peoples guarantees the right of all peoples to freely (without any outer interference) determine their political status, as well as to carry out their *economic*, social, and cultural activities.[95] If applied in the field of international financial relations, this principle suggests the right of every people to effective control over its national financial system, the right to dispose of financial resources at their own discretion, and the right to determine its internal and external national financial policy.

The principle of respect for human rights and fundamental freedoms plays a crucial role in the promotion of democratic foundations of the international legal order. Besides, the field of human rights is more normatively and institutionally secured today than any others. It is the duty of states and international organizations to take all possible measures in order to comply with this principle. In the field of international financial law, appropriate compliance with the principle of respect for human rights and fundamental freedoms lies in ensuring the absence of controversies between the norms of international treaties in the area of finance, on the one hand and the principle itself – on the other. Economic rights and freedoms of a person generate the following principles, which are actively functioning in the field of finance: freedom of participation of private individuals in the foreign exchange market in accordance with national legislation; freedom of payments in foreign trade; protection of foreign investments from the actions of the bodies of state power etc.

The principle of territorial integrity imposes on states the

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[94] Brummer C. How International Financial Law Works (and How it Doesn't). *The Georgetown Law Journal.* 2011. Vol. 99. P. 284-289.

[95] Декларація про принципи міжнародного права, що стосуються дружніх відносин та співробітництва між державами відповідно до Статуту Організації Об'єднаних Націй : Резолюція Генеральної Асамблеї ООН 2625 (XXV) від 24.10.1970 р. URL: https://zakon.rada.gov.ua/laws/card/995_569

obligation to refrain from actions incompatible with the objectives and principles of the UN Charter regarding territorial integrity, political independence, and indivisibility of any state, as well as concerning the transformation of a state's territory into an object of appropriation, directly or indirectly, with the use of force in violation of international law. In accordance with the Declaration on the Establishment of a New International Economic Order of 1974, "the new international economic order should be founded on full respect for the following principles: … inadmissibility of the acquisition of territories by force, territorial integrity …".[96]

The consequence of the violation of the state's territorial integrity is the impossibility of extending state jurisdiction (including financial jurisdiction) to the entire territory. For instance, one of the mandatory tasks of the state's universal taxation-legal system is to ensure within its taxation-legal territory the work of a single legal mechanism for every tax and each of its elements.[97] In addition, the loss of territories reduces the economic power of the country and its attractiveness to investors and creditors (for example, the annexation of Crimea and the lack of control over a part of the territories in the East of Ukraine have caused a decrease in the investment attractiveness of Ukraine, the instability of the national currency and other negative consequences for the national financial system).

The essence of ***the principle of inviolability of the state borders*** consists in respect on the part of a state or another subject of international relations for the borders of other states that were established according to international law. The establishment of distinct borders is essential for the international financial, legal

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[96] Декларація про встановлення нового міжнародного економічного порядку : Резолюція 3201 (S-VI) від 1.05.1974 р. URL: http://zakon3.rada.gov.ua/ laws/show/995_339

[97] Гаврилюк Р. О. Основний податково-правовий режим держави (за законодавством України). *Науковий вісник Чернівецького університету: збірник наукових праць*. Вип. 154. Правознавство. Чернівці : Рута, 2002. С. 88.

order, as they outline the territorial limit of the spread of the state's financial sovereignty. R. Havryliuk supposes that "an important feature of the legal space of the state is that it is *territorially limited*, determined by the territorial boundaries of the state and cannot go beyond its borders".[98] In the case of the absence of clearly outlined state borders, there is no point dwelling on the effective functioning of the national financial, legal order and the recognition of financial sovereignty by other subjects of international financial law.[99]

III. THE PRINCIPLES INHERENT EXCEPTIONALLY IN THE FIELD OF INTERNATIONAL FINANCIAL RELATIONS

Apart from the basic principles of international law, which maintain international financial law and constitute its normative-legal basis, the international financial, legal order is also marked by some peculiar principles that act exceptionally in the field of international financial law and are of a purely financial nature.

In addition to the relatively long-established principles of mutual benefit, transparency of financial policy, and others, among such peculiar and exclusive principles of international financial law are the *principle of cooperation of states in preventing global financial crises* (it has been considered in the previous chapter) and ***the principle of prohibiting the financing of terrorist activities***. The peculiarities of the formation of the latter will be regarded in more detail, for in the conditions of today's Russian military aggression against Ukraine, this issue is of primary significance.

The growth of terrorist activities and armed conflicts in the world over the past years has endangered the security not only of

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[98] Гаврилюк Р. О. Поняття податково-правової території України. *Науковий вісник Чернівецького університету: збірник наукових праць*. Вип. 147. Правознавство. Чернівці : Рута, 2002. С. 85.

[99] Харчук О. О. Принципи міжнародного економічного права в умовах глобалізації світових господарських відносин : дис. … канд. юрид. Наук : 12.00.11 / Інститут держави і права імені В. М. Корецького. Київ, 2010. С.85-86.

certain states but of the whole international community. In order to counteract these negative phenomena, an international legal mechanism was created to combat terrorism in all its manifestations. The most significant components of this mechanism are the international organizations aiming to combat the financing of terrorism, as well as the corresponding international acts. In this relation, particular emphasis should be laid on the activities of the international organization FATF (Financial Action Task Force on Money Laundering). Its major tasks are to establish international standards and to promote the effective application of legal and operative measures in combating money laundering, financing terrorism, and financing the proliferation of weapons of mass destruction.[100] Besides, there have been adopted conventions on regulating the counteraction to both terrorisms (The European Convention on the Suppression of Terrorism of 1977, the Council of Europe Convention on the Prevention of Terrorism of 2005) and the *financing* of terrorism (the International Convention for the Suppression of the Financing of Terrorism of 1999).

The work of FATF and other international organizations, which aim at complying with the set of international legal norms in the field of combating the financing of terrorism, relies on the principle *of prohibiting the financing of terrorist activities*. Regardless of the fact that, except for the financial area, this principle is also applied to the field of international security, it is still of financial-legal nature. The control over its compliance requires that states should introduce certain changes into their national financial (especially banking) legislations. Therefore, the Convention of 1999 contains such notions as funds and revenues, while the crime itself (financing of terrorism) is regarded as a financial transaction.

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[100] Рекомендации ФАТФ. Международные стандарты по противодействию отмыванию денег, финансированию терроризма и финансированию распространения оружия массового уничтожения / пер. с англ. Москва : Вече, 2012. 176 с.

The principle of prohibiting the financing of terrorist activities applies to the entire field of international financial law (credit relations, relations in the banking sphere, relations in the sphere of securities, relations in the sphere of investments, and others). Because of the fact that *the principle of prohibiting the financing of terrorist activities* corresponds to such criteria as the importance for the international community and prevalence in the field of international relations, it may be referred to as the universal sectoral principles of international financial law. Taking into consideration that "the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain", and "the financing of terrorism is a matter of grave concern to the international community as a whole" (the Preamble of the Convention of 1999), the above principle may be regarded as *peremptory*. Its peremptory nature has been stipulated by the fact that international peace and security depend on its observance. Besides, it is mutually determined by the two other peremptory principles of international law – the principle of not applying threat or use of force and the principle of not interfering in internal affairs. Unlike some other principles of international law, the principle of prohibiting the financing of terrorist activities shall not be violated due to the agreements between states. Almost all countries of the world have recognized their obligation to combat the financing of terrorism, which is officially confirmed by the status of the International Convention for the Suppression of the Financing of Terrorism of 1999 (as of 2010, it was recognized by about 180 states).[101] Not always the formation of the basic principle of international law results from a chronologically continuous process. Sometimes, from an idea to its normative expression, there is a sufficiently short period of time.

In order to prevent the arbitrary construction of the principles

[101] Статус Международной конвенции о борьбе с финансированием терроризма (Нью-Йорк, 9 декабря 1999 г.). URL: https://zakon.rada.gov.ua/ laws/show/995_c84

of international law, V. Butkevych offers three criteria, which every basic principle of international law should meet: 1) juridical content; 2) the field of application; 3) the mechanism of application.[102] In relation to these criteria, *the juridical content* of the principle of prohibiting the financing of terrorism derives from the CSCE Final Act of 1975, the International Convention for the Suppression of the Financing of Terrorism of 1999, the UN Convention against Transnational Organized Crime of 2000, the FATF Recommendations and other international acts containing the list of states' actions in the field of finance that are qualified as a crime. The *field* of application of the principle is the space of international financial transactions, where states (necessarily adhering to this principle) shall prevent accomplishing those transactions that aim at the financing of terrorist activities. The *mechanism* of application of this principle should contain a normative constituent (international standard in the field of counteracting the financing of terrorism) and an institutional constituent (international organizations which elaborate international standards, monitor their execution, as well as apply sanctions to violator states).[103]

The principle of ***mutual benefit*** is crucial for the field of financial and economic relations in terms of its economic nature. Obtaining certain benefits from international cooperation is one of the primary motives for states entering into international relations. Moreover, in economic relations, this motive is particularly apparent.[104] It was

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[102] Буткевич В. Г., Мицик В. В., Задорожній О. В. Міжнародне право. Основи теорії : підручник / за ред. В. Г. Буткевича. Київ : Либідь, 2002. С.212-214.

[103] Рекомендации ФАТФ. Международные стандарты по противодействию отмыванию денег, финансированию терроризма и финансированию распространения оружия массового уничтожения / пер. с англ. Москва : Вече, 2012. 176 с.

[104] Яковлев В. В. Принцип взаємної вигоди у міжнародному економічному праві. *Збірник наукових праць Харківського*

enshrined in the Declaration on the Establishment of a New International Economic Order of 1974,[105] in the Charter of Economic Rights and Duties of States,[106] in the CSCE Final Act.[107] The principle of mutual benefit is closely related to the principles of sovereign equality and the cooperation of states. In international legal, scientific sources, this principle is recognized as "one of the key principles of international financial law"[108] and a universal sectoral principle of international financial law[109] "because the desire to obtain benefits has always been and still is one of the most important goals of international economic relations between the parties", whereas "obtaining certain benefits from international cooperation is the primary motive for states' entering into international relations".[110]

The recognition of the principle of mutual benefits by states as a basis of international financial-economic cooperation has been enshrined: 1) in national normative-legal acts. For instance, Article 18 of the Constitution of Ukraine outlines: "… mutually beneficial international cooperation is the basis of Ukraine's foreign

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національного педагогічного університету імені Г. С. Сковороди «ПРАВО». 2012. Випуск 19. С. 180.

[105] Декларація про встановлення нового міжнародного економічного порядку : Резолюція 3201 (S-VI) від 1.05.1974 р. URL: http://zakon3.rada.gov.ua/ laws/show/995_339

[106] Хартія економічних прав і обов'язків держав від 12.12.1974 р. URL: http://zakon3.rada.gov.ua/laws/show/995_077

[107] Заключний акт Наради з безпеки та співробітництва в Європі від 1.08.1975 р. URL: http://zakon2.rada.gov.ua/laws/ show/994_055

[108] Яковлев В. В. Принцип взаємної вигоди у міжнародному економічному праві. *Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди* «ПРАВО». 2012. Випуск 19. С. 180.

[109] Лазебник Л. Л. Міжнародне фінансове право : навч. пос. Київ : Центр учбової літератури, 2008. С.58.

[110] Яковлев В. В. Принцип взаємної вигоди у міжнародному економічному праві. *Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди* «ПРАВО». 2012. Випуск 19. С. 180.

policy…".[111] Article 1 of the Law of Ukraine "On Principles of Foreign and Domestic Policy" of July 1, 2010, defines mutually beneficial cooperation of states as a principle of foreign policy; Article 11 of the same Law emphasizes that one of the basics of Ukraine's foreign policy is "the support of trade-economic, scientific-technical and investment cooperation of Ukraine with foreign countries on the basis of mutual benefit";[112] 2) in the texts of international treaties (for example, Article 1 of the Agreement between Ukraine and Turkmenistan on long-term trade and economic cooperation of September 12, 2011, claims that the parties express their readiness to carry out long-term economic cooperation on the basis of equality, mutual benefit, faithful fulfillment of the obligations assumed by states[113]).

Serving as a universal criterion for satisfying the pragmatic interests of states, the principle of mutual benefit outlines the range within which the parties may definitely have common and equal benefits. This principle determines the boundaries of equality of benefits, indicating where the legal equality of the parties will be justified by the equivalence of the expected benefits that they guarantee to provide to each other.[114] However, the formal application of the principle of mutual benefit in practice does not always ensure its actual implementation. Sometimes it happens that due to the difference in the economic development of two states, the norms, which they enshrined in bilateral treaties on equally mutual benefits (like the regime of investments), are not equally beneficial in practice. Therefore, scholars point out that the

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[111] Конституція України від 28.06.1996 р. URL: http://zakon3.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[112] Про засади зовнішньої і внутрішньої політики : Закон України від 01.07.2010 р. URL: https://zakon.rada.gov.ua/laws/ show/2411-17

[113] Договір між Україною та Туркменістаном про довгострокове торговельно-економічне співробітництво від 12.09.2011 р. URL: https://zakon.rada.gov.ua/laws/show/795_065

[114] Радзівілл О. А. Загальноправові принципи як джерела міжнародного економічного права. *Юридична наука.* № 2/2014. С. 56.

criteria for compliance of certain interstate economic relations with the principle of mutual benefit are not only the formal manifestation of equality of benefits but also the real comprehensive mutual benefit of these relations for specific states in a specific situation, with due regard to the real economic state of countries. The principle of mutual benefit envisages that states shall achieve both formal and practical mutually beneficial balance of their common interests in the field of finance, as well as shall be able to maintain this balance in the course of their cooperation.

The principle of transparency of financial policy of states is purely sectoral and belongs exceptionally to international financial law. It implies open access to all information with regard to financial institutions and financial transactions, which is necessary for international financial organizations in order to ensure the security and inviolability of the international financial system. The above principle is enshrined in the acts and statutes of nearly all international financial organizations that perform their activities in the fields of currency (IMF), credits (IMF, IBRD), banking services (the Basel Committee on Banking Supervision), insurance (the International Association of Insurance Supervisors), circulation of securities (the International Organization of State Securities Commissions), and others. Besides this principle is also mentioned in the acts of the Group of 20 and the Financial Stability Council, which administer interstate coordination in the financial-economic sphere.

In accordance with the IMF Charter, member states shall provide the Board of Governors of the Fund with detailed information on their national economy and finance. The Code of Good Practice on Transparency in Monetary and Financial Policy: Declaration of Principles of 1999[115] (adopted by the Interim Committee of the IMF) contains the recognition of the principle of transparency of financial policy of states as a fundamental principle of the activities of states'

[115] Кодекс належної поведінки по забезпеченню прозорості у грошово-кредитній та фінансовій політиці: декларація принципів від 26.09.1999 року. URL: https://zakon.rada.gov.ua/laws/show/995_950

central banks and financial bodies. The recognition of this principle is a great progress on the way to enhancing financial cooperation of states since it facilitates the stability of the world financial system. The principle of transparency is an essential element of a whole legal mechanism for counteracting systemic financial risks and global financial crises.

In international law, apart from the universal sectoral principles that apply to its entire field, there also exist the special sectoral principles that apply to a narrower sphere. It is interesting that in the works by numerous scientists, the list of the special sectoral principles of both international financial and international economic law is different due to the arbitrarily chosen criteria for their differentiation, whereas no distinct typological classification has been offered at all. While revising scholastic accomplishments on this issue, V. Shumilov highlights certain shortcomings of the already existing classifications: the obsolescence of the criteria for dividing the principles of international economic law into universally binding and contractual ones (because today, it is mostly impossible to compare these concepts); the inappropriateness of differentiation into principles that arise from the basic principles of international law and those arising from treaties.

L. Lazebnyk distinguishes the following special principles of international financial law: "the principle of developing international financial and international economic relations between states; the principle of juridical equality and inadmissibility of economic and financial discrimination in international payments; the principle of states' sovereignty over their resources and their financial activities; the principle of the utmost facilitation; the principle of national treatment".[116]

The special principles of international financial law comprise (thanks to their regulatory abilities) states' prior financial relations. She distinguishes the following special principles of international

[116] Лазебник Л. Л. Міжнародне фінансове право : навч. пос. Київ : Центр учбової літератури, 2008. С.58.

investment law: the liberalization of international investment relations; states' duty to promote international investment relations; the state and international control over investment flows; not causing damage to the economy of the host state by investments; the "territoriality" of regulating foreign investments; the non-discrimination; the most favored nation; granting national treatment to foreign investments. In most cases, the above-mentioned special principles are enshrined in bilateral treaties on cooperation in the field of investment activities,[117] mutual recognition and protection of investments[118], etc.

The special sectoral principles of international financial law are mostly interconnected because of their substantive financial affinity. What is more, they are subject to the universal sectoral principles of international financial law, being the latters' supplements in the respective fields. They are regarded as core system-forming norms in the respective normative-legal systems that regulate a relatively separate type of international financial relations. The list of the special sectoral principles may vary depending on the development of a certain institution of international financial law or the adoption of new international legal acts, in which they acquire formal confirmation.

When considering the system of the sectoral principles of international financial law, it is also important to outline that the universal principles are "an independent source of international law" and "common for all fields of law".[119] Besides, they are a prerequisite for the functioning of any legal order, including the

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[117] Див., наприклад: Угода про співробітництво в галузі інвестиційної діяльності від 24.12.1993 р. URL: https://zakon.rada.gov.ua/laws/show/997_144

[118] Див., наприклад: Угода між Урядом України та Урядом Держави Ізраїль про взаємне сприяння та захист інвестицій від 24.11.2010 р. URL: https://zakon.rada.gov.ua/ laws/show/376_045

[119] Київець О. В. У пошуках міжнародного права: переосмислюючи джерела. Кам'янець-Подільський : ПП «Видавництво «Оіюм», 2011. С.37.

international one (sometimes they are applied in international law under the title the universal principles, recognized by civilized nations). Their legal nature is different from that of the basic principles of international law. The practice of international relations indicates that the universal principles of law include the principles enshrined in national legislation (from the constitution to court decisions).

The universal principles of international law acquire particular significance when there arises a new branch of international law. In this case, they perform their main function – to close the gaps in international legal regulation.[120] They include the principles of good faith, justice, non-abuse of law, liability for offenses, equality before the law, legitimateness, priority of a special law,[121] etc. The above-mentioned principles are equally applied in all fields of international law, including international financial law.

CONCLUSIONS

1. The system of principles of international financial law is comprised of:

I. The universal sectoral principles of international financial law:

A) the principles, which "financially" constitute the basic principles of international law (their action in the international financial legal order has certain peculiarities): 1) the principle of sovereign equality of states in international financial legal relations (equal legal personality of states in international financial legal relations and state sovereignty in terms of national finance and national financial system); 2) the principle of not applying threat or

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[120] Київець О. В. У пошуках міжнародного права: переосмислюючи джерела. Кам'янець-Подільський : ПП «Видавництво «Оіюм», 2011. С.83.

[121] Буткевич В. Г., Мицик В. В., Задорожній О. В. Міжнародне право. Основи теорії : підручник / за ред. В. Г. Буткевича. Київ : Либідь, 2002. С.204.

use of force in international financial relations (finance may be used as a means of applying force, may be regarded as a target of applying force, may be a cause for applying force); 3) the principle of non-interference in the internal affairs of a state (its domestic and foreign financial policy); 4) the principle of peaceful resolution of disputes on financial issues; 5) the principle of cooperation of states in the field of finance; 6) the principle of faithful fulfillment of international obligations assumed by states in the field of finance; 7) the principle of equal rights and self-determination of peoples; 8) the principle of respect for human rights and fundamental freedoms in the field of finance; 9) the principle of territorial integrity of states; 10) the principle of inviolability of state borders.

B) the principles inherent exceptionally in the field of international financial relations: the principle of prohibiting the financing of terrorist activities; the principle of cooperation of states in preventing global financial crises, the principle of mutual benefit; the principle of transparency of financial policy of states.

II. The special sectoral principles, which apply to certain types of international financial, legal relations, the latter being the subject of legal regulation of international financial law.

2. *The principle of sovereign equality of states* in the international financial, legal order implies the equal legal personality of states in international financial, legal relations and state sovereignty in terms of national finance and national financial system. The specifics of international financial legal relations (in the aspect of complying with the above principle) lie in the following peculiarities of its implementation:

1) enshrining in international acts the provisions on granting the developing states certain preferences in the field of finance on a "non-mutual" basis does not violate the principle of sovereign equality because a) this norm is not peremptory but presents a strategically desirable guideline for states' actions in terms of their capabilities; b) the stability of national financial systems (including those of the developing countries) is economically beneficial to all countries of the world;

2) delegating by states of their sovereign financial powers to international financial organizations is not a restriction of financial sovereignty. On the contrary, it is the implementation of the sovereign right to conclude international treaties. The restriction of states' sovereign rights in the field of finance (within the framework of their membership in international financial organizations) is administered under the following conditions: voluntariness; temporality; partiality (a state does not lose all its powers on the issues, regarding which sovereign rights are limited); the restriction is exercised in the financial interests of a state;

3) the rule of "weighted voting" in international financial organizations (whereby the number of votes of member states depends on the economic criteria specified in the statutory documents) does not provide the states with equal influence in decision-making. In this case, in the international financial, legal order, there is an internationally standardized differentiation of the potential opportunities of states (depending on their financial power) to participate in solving important financial issues within the framework of international financial organizations.

3. The analysis of international financial relations in the context of *the principle of not applying threat or use of force* enables us to draw a conclusion that the failure to comply with this principle happens in the international financial, legal order when financial resources perform the functions of: *a means* of applying force; *a target* of applying force; *a cause* for applying force. The principle of not applying threat or use of force in the system of the international financial, legal order suggests the following: 1) not applying financial force with the purpose of inflicting damage to the financial system of a certain state; 2) not applying force in the form of cyber-attacks against the informational and technological resources that secure the work of the national financial system (thus endangering the state's financial security and state's sovereignty as a whole); 3) not applying military force to a state because of the non-fulfillment of financial obligations.

4. Due to the considerable growth of terrorism in the world, the

international community faced an urgent need to devise instruments for combating the financing of terroristic activities within the framework of complying with the principle of non-interference in states' internal affairs. The above need was juridically enshrined in the provisions of numerous international conventions, as well as in the activities of the respective international financial organizations (like FATF and others). The main system-forming factor of the above normative-legal array and the institutional mechanism is *the principle of prohibiting the financing of terrorist activities*. It belongs to the universal sectoral principles of international financial law since it applies to the entire field of international financial law; it is recognized by nearly all countries of the world; it is of primary importance for the whole international community – international peace and security completely depend on its compliance; it is mutually determined by the two other peremptory principles of international law – the principle of not applying threat or use of force and the principle of not interfering in the internal affairs.

5. After the world financial crisis of 2008, the international community began a series of reforms in the institutional structure of the international financial, legal order (the foundation of new international financial institutions), as well as in its normative-legal constituent (the adoption of a number of international financial standards). The reforms were introduced in order to strengthen the mechanism of counteracting systemic risks and led to the formation of one of the sectoral principles of international financial law – *the principle of cooperation of states in preventing global financial crises.*

6. *The principle of mutual benefit* in the international financial, legal order suggests that states should achieve a balance between their common interests in the field of finance in the course of cooperation. The formal enshrining of the principle of mutual benefit in international treaties on financial issues should correspond to the actual mutual benefit in practice. *The principle of transparency of financial policy of states* implies open access to all information on states' financial policy, as well as on decisions of

financial institutions and financial transactions, which is necessary for international financial organizations to ensure the security and inviolability of the international financial system.

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THE WAR IN UKRAINE AND THE VIOLATION OF INTERNATIONAL LAW

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INTRODUCTION

The purpose of international law is to seek and maintain peace. When there is war, there is a clear demonstration that international law has failed. The war in Ukraine clearly demonstrates that the success of international law in keeping the peace depends on an international arrangement that adjusts the diverse interests and forces that operate in the field of international relations. When the harmony between the main political forces breaks down, the instability of international law is one of the consequences. A crisis situation begins, which will require an international institutional rearrangement, in order to build a new environment of lasting peace, at least among the main international political actors.

This article intends to reflect on the violation of international law by the Russian aggression against Ukraine. It addresses the issue of territorial integrity of States in international law, describing the

violation of international law based on information from the place of conflict and considering the international recognition of the Ukrainian territory, as well as reflecting on the role of international law in overcoming war and in maintaining peace.

The first topic addresses the meaning of territory for the modern State, as well as the international norms that guarantee the territorial integrity of States. In the second topic, it starts from the international recognition of the Ukrainian territory, especially how it was defined after the end of the USSR in 1991. It understands the legitimacy of the Ukrainian choices, that is, the recognition of Ukraine as a sovereign State and the right of the Ukrainian people to decide on their future without external intervention. It also brings elements of the violation of international law from information from the place of the conflict. Finally, in the third and last topic, the role of international law in guaranteeing peace and avoiding war is addressed. When there is war, there is a demonstration that international law has failed. History gives many examples of this. Peace in Ukraine and in the world, to be guaranteed by international law, depends on a new international law that regulates the new correlations of forces in the world.

I. THE TERRITORIAL INTEGRITY OF STATES IN INTERNATIONAL LAW

According to international law, the State is characterized by imposing a lasting and effective order in a given territory, for a given people, without the interference of other States. In this sense, the State is a territorial corporation, that is, there is no nomadic State. This characteristic of the State is supported by the classical theory of the three elements of the State: people, territory and sovereignty.[122]

Territory is the jurisdiction of a State, the spatial projection of its sovereignty and authority. The world is thus divided into political entities within which state power is exercised. In order to exercise

[122] Geiger, Rudolf. *Grundgesetz und Völkerrecht*. 2ª ed. München: Beck, 1994, p. 21-22.

power, the State began to control the political order valid for all those who live within the limits of the State's territory. The territory is the product of the enclosure of the geographic space, the political unit is the territory. The fundamental fact of political geography is the enclosure of the world. The formation of the territory went through three stages: (i) the formation of density, with the creation of the Greek polis and the hydraulic societies of Egypt and Mesopotamia; (ii) the universal Empire of the Constitution of Alexander and the Roman Empire and; (iii) the period of the modern Territorial State, which came with the end of feudalism.[123]

The modern State cannot be conceived without a territory, since the territory is the physical basis of the State, its constitutive element. For political science, territory brings with it the idea of empire power, while for law, territory emphasizes the aspect of jurisdiction.[124] According to the classical understanding of the theory of the State, the territory constitutes the spatial limit within which the State effectively and exclusively exercises the power of empire over people.[125] Likewise, the understanding that the territory is the space on which the relations proper to the life of the State are developed, a space understood from the underground to the air space.[126]

International law in the 19th century essentially had the function of legally regulating the relations between sovereign States. This definition still remains valid today, although it needs to be expanded to adequately describe the growing role of the system of international relations.[127] In this new international institutional arrangement, international law leaves the position of mere regulator of the

[123] Cataia, Marcio A. Political territory: basis and foundation of the State. In. *Sociedade & Natureza*, vol. 23 (1), 2011, p. 117-118.
[124] Figueiredo, Marcelo. *Teoria Geral do Estado*. 2ª ed. São Paulo: Atlas, 2001, p. 36.
[125] Groppali, Alexandre. *Doutrina do Estado*. São Paulo: Saraiva, 1953, p. 150.
[126] Mejía, Hugo Palácios. *Introducción a la Teoria del Estado*. Bogotá: Temis, 1980, p. 37.
[127] Geiger, Rudolf. *Grundgesetz und Völkerrecht*, p. 1.

coexistence of sovereign States, to assume an increasingly cogent power. This consists in the development of a law of cooperation between States in the face of increasing interdependence between them and the creation of communities of States.[128]

The Hague Convention of 1907, which created the International Prize Court, was the first international text to establish a list of sources of Public International Law. According to art. 7 of this Convention, "if a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said Treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity".

With the creation of the International Court of Justice in 1945, the list of sources of Public International Law is contained in art. 38 of the Statute of the International Court of Justice. According to this article, the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Despite the inadequacy of the expression "civilized nations", which refers to an imperialist epoch, in which a few nations were entrusted with a civilizing mission over other peoples, the general principles of law currently accepted are those that States, in their

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[128] Häberle, Peter. Der Kooperative Verfassungsstaat. In: *Verfassung als öffentlicher Prozess. Materialien zu einer Verfassungstheorie der offenen Gesellschaft*. Berlin: Duncker & Humblot, 1978, p. 442.

together, they understand as legitimate forms of expression of Public International Law. International practice shows that these principles are often applied in different contexts and in the most varied forms, when it comes to identifying a rule of international law not expressed in a treaty and not recognized by custom.[129]

The general principles of law, as referred to in art. 38 of the Statute of the International Court of Justice differ from the fundamental principles of international law. The first ones refer to the generalized legal conviction, contained in the main legal systems of the different nations. They come from state law and ascend to the international order when are applied in a case by the International Court of Justice. The fundamental principles of international law, in turn, have their origin in treaties or international custom. Examples are the principles of self-determination of peoples, non-intervention, non-interference in the particular affairs of States and, in particular, for the purposes of this article, the principle of prohibiting the use of force against territorial integrity. In this sense, article 2, number 4 of the United Nations Charter: "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

States' duty of non-intervention represents a restriction on national sovereignty and independence. According to Bevilacqua, "States are obliged to respect the sovereignty and territorial integrity of others".[130] According to Mazzuoli, the duty of non-intervention "was initially elaborated in the Latin American regional context, due to the multiple North American and European interventions in the continent throughout the 19th century. That is why the Charter of the Organization of American States of 1948

[129] Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*. 13ª ed. Rio de Janeiro: Forense, 2020, p. 168-169.
[130] Bevilaqua, Clovis. *Direito Público Internacional. Asynthese dos princípios e a contribuição do Brasil*. Tomo I. 2ª ed. Rio de Janeiro: Livraria Editora Freitas Bastos, 1939, p. 99.

expressly established (art. 2, paragraph b) that one of its essential purposes is to promote and consolidate representative democracy, respecting the principle of non-intervention".[131] The principle of non-intervention was incorporated in several United Nations resolutions and is now an internationally recognized principle.

States are legally equal, that is, they enjoy the same rights and the same duties. The rights of each State do not depend on the power, in fact, that the States possess, but stem from the State's condition as a legal person under international law. The State, as a subject of international law, has international legal capacity and personality.

Territorial integrity is one of the inherent elements of equality between States, as defined in Resolution 2625 (XXV) of October 24, 1970, which approved the Declaration on the Principles of International Law Relating to Friendship and Cooperation between States in accordance with the Charter of Nations United. In accordance with this Resolution, it is the duty of every State to abstain from the use of force against the territorial integrity of any other State and that no territory shall be occupied or acquired through the use of force. Respect for the territory of States is also reinforced by Resolution 1514 (XV) of December 14, 1960, which became known as the Decolonization Charter, for which any attempt to partially or totally disrupt the national unity and territorial integrity of a country is illegitimate.

The sovereignty of the State means its freedom to act independently at the international level, excluding any external coercion or interference. State sovereignty is manifested by its ability to impose and protect, within the borders of its territory and ultimately, its decisions (internal sovereignty).[132] According to Bevilaqua, "territorial sovereignty is a legal relationship of a political nature, expressing the superior authority of the State over

[131] Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*, p. 717.
[132] Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*, p. 699-700.

the people and things that are found in its territory".[133] Sovereignty also means the State's ability to maintain relations with foreign States and participate in international relations on an equal footing with other actors in international society (external sovereignty). Thus, there is no absolute sovereignty (without limits) at the international level, as States are legally equal under international law. The sovereign State is also subject to law, and treaties approved by States cannot be reduced to mere intentions. In international relations, States, in accordance with art. 2, par. 1 of the UN Charter, are in a situation of sovereign equality.[134]

II. THE WAR AND THE VIOLATION OF UKRAINIAN TERRITORIAL SOVEREIGNTY

Sovereignty as a legal idea, legal concept and philosophical-legal category has always been in the center of attention of legal scholars. Its problems are dealt with by representatives of various branches of law, as well as related fields: political science, philosophy, history, etc. As justifiably noted by G.V. Fedushchak-Paslavska: "State sovereignty... is one of the most important problems of legal science. It deals with the general theory of the state and law, special legal disciplines, in particular the sciences of constitutional and international law. Relevant aspects of sovereignty are studied by historical and legal, political sciences, etc. Therefore, many scientific works from various fields of knowledge are dedicated to the study of the idea of state power."[135] As emphasized by K.M. Manukyan, historically, the sovereignty of states was initially formed not as a legal, but as a political category,

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[133] Bevilaqua, Clovis. *Direito Público Internacional*, p. 207.

[134] Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*, p. 699-700.

[135] Федущак-Паславська Г.М. Політико-правова ідея суверенітету державної влади та її реалізація в державотворенні України: Автореф. дис... канд. юрид. наук: 12.00.01 / Г.М. Федущак-Паславська ; Львів. нац. ун-т ім. І.Франка. Л., 2000. С. 3.

and only later did its legalization take place.[136]

At the same time, despite the fact that the issue of state sovereignty is being studied by scientists from various fields of science, its legal nature, in all cases, remains unconditional. For example, S.V. Chernichenko emphasizes that: "State sovereignty is an exclusively legal concept, regardless of the interpretation given to the term "sovereignty" in general".[137]

If we talk about the historical retrospective of the development of the concept of "sovereignty" and its normative content, legal scholars note that this phenomenon has undergone a long evolution. As indicated by V.D. Ludwik: "...the phenomenon of sovereignty arises together with the state as its political and legal attribute...".[138] At the same time, it should be noted that in this case it should be emphasized separately that in this period there was no definition of this concept and the term itself did not exist, and those individual elements of it that took place were significantly different from the modern meaning of this concept.

During the Middle Ages, the problem of sovereignty as political independence and the right to equal participation in international legal relations became particularly relevant in Europe. This was due to the confrontation between the emperors of the Holy Roman Empire and the Pope for supreme power in the territory of a large part of Western Europe, as well as the desire of individual monarchs to centralize power in the territories of their states, which at that time were experiencing a period of feudal fragmentation.

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[136] Манукян К.А. Принцип равноправия государств в международном праве / К.А. Манукян; Ред.: Есаян А.А. Ереван: Изд-во Ереван. ун-та, 1975. С. 19.

[137] Черниченко С.В. Теория международного права: В 2-х томах. Т. 2: Старые и новые теоретические проблемы. / С.В. Черниченко. М.: НИМП, 1999. С. 27.

[138] Людвік В.Д. Принцип народного суверенітету в історії політико-правової думки, теорії права та політичній практиці: автореф. дис... канд. юрид. наук: 12.00.01 / В.Д. Людвік ; Харк. нац. ун-т внутр. справ. Х., 2009. С. 5.

J. Bodin (1530-1596), a French jurist and thinker, is considered to be the author of the very concept of "sovereignty" and its theoretical foundations. In his work «The Six Books of the Republic" (1576), he set out his main views on the issue of state sovereignty, which became his key contribution to legal science.[139]

The issue of sovereignty is especially relevant in the context of the globalization processes of the beginning of the 21st century. It does not lose its importance for building international legal relations. As rightly noted by Y.S. Hobby: "...in the conditions of globalization, the content and signs of sovereignty undergo significant changes, but the presence of sovereignty in a state should not be questioned, because it is determined by international law, which under modern conditions has become increasingly widespread and, in turn, is based on the principle of state sovereignty", and also that: "...the framework of the concept of state sovereignty in the context of other principles of international law remains unchanged".[140]

The concept of sovereignty has always occupied a special place in international law. First of all, this is related to the importance it has for the implementation of international legal relations. It is sovereignty that enables states to be full-fledged subjects of international law, to demand respect for the rights inherent in it, and also serves as a guarantee of the very existence of the state and the observance of their rights in the international arena.

These facts determine the role of sovereignty in international law. International lawyers constantly emphasize its importance in the theory and practice of international law. In particular, as

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[139] Бабкіна О.В. Боден / О.В. Бабкіна // Юридична енциклопедія: В 6 т. Т. 1: А - Г. / Редкол.: Ю.С. Шемшученко (гол. ред.) та ін. К.: "Українська енциклопедія", 1998.

[140] Хоббі Ю. С. Міжнародно-правова регламентація взаємовідносин Європейського Союзу з державами-членами (проблематика модифікації державного суверенітету в умовах євроінтеграції): автореф. дис. ... канд. юрид. наук : 12.00.11 / Ю. С. Хоббі ; Ін-т законодавства ВР України. К., 2011. С. 9.

indicated by O.M. Sivash: "The issue of state sovereignty occupies a special place in the history and theory of international law. Changes in the understanding of this fundamental concept are associated with turning points in the history of international law."[141]

In our opinion, from the point of view of international law, the sovereignty of the state should be considered in two contexts: as a quality (characteristic, ability) of the state and as a basis for the emergence of the state's rights arising from this ability. In the first case, we are talking about the ability of states to acquire rights and bear obligations under international law, to be the subject of international legal relations. At the same time, in the second case, it is implied that on the basis of sovereignty arise those rights that are inherent to the state as a subject of international law: to political independence, territorial integrity, etc.

The fact that territorial integrity is an integral component of the principle of sovereign equality of states is constantly emphasized in the theory and practice of international law. It is closely related to sovereignty, of which territorial supremacy is one of the most important factors. As rightly noted by O.V. Zadorozhnyi, territory: "is the most important component of state sovereignty, because in the state-legal aspect, territory is closely related to sovereignty".[142] In turn, violation of the principle of territorial integrity of the state is simultaneously a violation of the principle of sovereign equality of states...".

The interrelatedness of both of these principles is also indicated by the content of international legal acts. Thus, in the

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[141] Сіваш О.М. Розвиток українськими і російськими юристами-міжнародниками вчення про державний суверенітет (XVIII - початок XX ст.): автореф. дис. ... канд. юрид. наук : 12.00.11 / О.М. Сіваш ; Нац. юрид. акад. України ім. Ярослава Мудрого. Х., 2010. С. 2.

[142] Задорожній О.В. Питання кордонів в україно-російських міждержавних відносинах в період від розпаду СРСР до підписання Договору про дружбу,співробітництво та партнерство 1997 року / О.В. Задорожній. Український часопис міжнародного права. 2012. №1-2. С. 8.

Declaration on the Principles of International Law of 1970, the elements of sovereign equality include, among other things, "inviolability of territorial integrity".[143] In the Final Act of the CSCE of 1975, the right of each state to territorial integrity is also included in the list of rights inherent in sovereignty.[144]

Legal science emphasizes the important role of the principle of sovereign equality of states in realizing their right to territorial integrity. For example, Y.P. Bityak and I.V. Yakovyuk, analyzing the provisions of the UN Charter, including those that enshrine the principle of sovereign equality of states, conclude that: "every state has the right to protect its territorial integrity and sovereignty, and no country has the right to violate them" [145], but at the same time they indicate that the principle of sovereign equality of states has never had an absolute nature, since in international law there is a possibility of violating the sovereignty of a state in the event that it poses a threat to the world legal order.

In the science of international law, it is also constantly emphasized that sovereign equality actually presupposes non-interference in internal affairs. For example, E.R. Aliyev claims that respect for the right to political independence, which is known to be included in the list of sovereign rights of states, is: "...inextricably linked with the obligation... of subjects of international law... not to interfere in the internal and external affairs of others" , that is, with the principle of non-interference.[146] Unfortunately, very often this principle and,

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[143] Декларація про принципи міжнародного права, що стосуються дружніх відносин та співробітництва між державами відповідно до Статуту Організації Об'єднаних Націй від 24.10.1970 р. URL: https://ips.ligazakon.net/document/MU70012 .

[144] Заключний акт Наради з безпеки та співробітництва в Європі від 01.08.1975. // Офіційний вісник України від 11.02.2005.№ 4. стор. 403, стаття 266, код акту 31515/2005.

[145] Державний суверенітет: теоретико-правові проблеми: монографія / За ред. Ю.П. Битяка, І.В. Яковюка. Х.: Право, 2010. С. 220.

[146] Алиев Э.Р. Особенности государственного суверенитета в современном международном праве / Э.Р. Алиев // Науковий вісник

accordingly, the principle of sovereign equality of states are violated. Such problems are especially relevant for Ukraine.

The essence of the principle of territorial integrity is the recognition of the right of states to territorial integrity as the most important right inherent in sovereignty, which means the realization by the state of all rights in their entirety and exclusively in the space defined by state borders.[147]

The UN Declaration on the Principles of International Law of 1970 stipulates the obligations of states regarding territorial integrity, in particular, to refrain in their international relations from the threat of force or its use against the territorial integrity or political independence of any state; refrain from the specified actions as a means of settling international problems; refrain in their international relations from military, political, economic or any other form of pressure directed against the political independence or territorial integrity of any state; not to make attempts aimed at the partial or complete destruction of the national unity and territorial integrity of the state or their political independence, as incompatible with the purpose and principles of the Charter. The aforementioned Declaration on the Principle of Equality and Self-Determination of Peoples contains the following caveat: "Nothing in the above paragraphs shall be construed as authorizing or encouraging any action which would lead to the dismemberment or to the partial or total destruction of the territorial integrity or political the unity of sovereign and independent states...".[148]

Національного університету державної податкової служби України (економіка, право). 2011. № 3. С. 305.

[147] Остроухов Н. В. Территориальная целостность государств в современном международном праве и её обеспечение в Российской Федерации и на постсоветском пространстве: автореф. дисс. ... д-ра юрид. наук: спец. 12.00.10 / Н. В. Остроухов. М.,2010. 61 с.

[148] Декларация о принципах международного права, касающихся дружественных отношений и сотрудничества между государствами в

In the Declaration on the State Sovereignty of Ukraine dated July 16, 1990 and the appeal of the Verkhovna Rada of Ukraine "To the Parliaments and Peoples of the World" (December 5, 1991), it was emphasized that a new state would like to join the family of civilized countries, which would guarantee the free development of Ukrainian people, every citizen of Ukraine regardless of his ethnicity.[149]

The Independence Day of Ukraine was celebrated for the first time on July 16, 1991 – in memory of the fact that a year ago – on July 16, 1990 – the Verkhovna Rada of the Ukrainian SSR adopted the Declaration on the State Sovereignty of Ukraine. At the same time, on July 16, 1990, the Verkhovna Rada of the Ukrainian SSR adopted a resolution "On the Day of Proclamation of Independence of Ukraine." It states: "Taking into account the will of the Ukrainian people and their eternal desire for independence, confirming the historical significance of the adoption of the Declaration on State Sovereignty of Ukraine on July 16, 1990, the Verkhovna Rada of the Ukrainian Soviet Socialist Republic decrees: To consider July 16 as the Day of Proclamation of Independence of Ukraine and annually celebrate it as a national public holiday of Ukraine."[150]

The proclamation of the act of independence of Ukraine on August 24, 1991 opened a new page in the history of the formation of the state of Ukraine. The Verkhovna Rada of the Ukrainian SSR, expressing the will of the people of Ukraine, striving to create a democratic society, based on the needs of the comprehensive provision of human rights and freedoms, respecting the national

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соответствии с Уставом ООН (24 октября 1970 года) URL: https://ips.ligazakon.net/document/MU70012

[149] Декларація про державний суверенітет України: Прийнята Верховною Радою Української РСР 16 липня 1990 р., №55-XII // Відомості Верховної Ради Української Радянської Соціалістичної Республіки. 1990. -№31. Ст..429.

[150] Про проголошення незалежності України: Постанова Верховної Ради Української РСР від 24 серпня 1991 р., №1427-XII // Відомості Верховної Ради України. 1991. №38. Ст. 502.

rights of all peoples, taking care of the full-fledged political, economic, social and spiritual development of the people of Ukraine, recognizing the need to build a rule of law , with the aim of confirming the sovereignty and self-government of the people of Ukraine, proclaimed the state sovereignty of Ukraine as the supremacy, independence, completeness and indivisibility of the power of the Republic within its territory and independence and equality in external relations. The basis of Ukraine's relations with the former Soviet republics was clearly defined, they are "built on the basis of agreements concluded on the principles of equality, mutual respect and non-interference in internal affairs."

On August 24, 1991, the Verkhovna Rada of Ukraine adopted a historical document of exceptional importance for the fate of the Ukrainian people – the Act of Proclamation of Independence of Ukraine. It stated: "Based on the mortal danger that hung over Ukraine in connection with the coup d'état in the USSR on August 19, 1991, continuing the thousand-year tradition of state-building in Ukraine, based on the right to self-determination provided for by the UN Charter and other international legal documents, implementing the Declaration on the State Sovereignty of Ukraine, the Verkhovna Rada solemnly proclaims the independence of Ukraine and the creation of an independent Ukrainian state – Ukraine. The territory of Ukraine is indivisible and inviolable. From now on, only the Constitution and laws of Ukraine are valid on the territory of Ukraine. This act enters into force from the moment of its approval."[151]

The absolute majority of Verkhovna Rada deputies voted for the Act. The Ukrainian SSR ceased to exist. A new independent state – Ukraine – appeared on the geopolitical map of the world.

An important stage of state formation is the adoption by the fifth session of the Verkhovna Rada of Ukraine on June 28, 1996 of the Constitution – the Basic Law of Ukraine. This event ended the

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[151] Акт проголошення незалежності України: Від 24 серпня 1991 р. // Відомості Верховної Ради України. 1991. №38. Ст. 502.

period of state formation and established the legal foundations of Ukraine's independence. Ukraine has really become an integral part of the European and world community.

The independence and sovereignty of the state created favorable conditions for democratic transformations in the country, which significantly influenced the further development of human and citizen rights and freedoms, provided wide international recognition: a series of political and economic agreements were signed with other states, which determined our place in the world community and helps political and economic development of independent Ukraine. The system of human and citizen rights and freedoms, guaranteed by the Constitution, corresponds to generally recognize democratic standards established by international legal acts. According to the Basic Law, the establishment and provision of rights and freedoms is a priority direction of the state.

Ukraine is an active participant in international legal relations. The Ukrainian Soviet Socialist Republic, whose legal successor is Ukraine, became one of the founding states of the UN and was represented in a number of international organizations. At the same time, the sovereignty of the Ukrainian SSR cannot be considered complete under the conditions of being part of the USSR. After gaining independence, the international legal personality of Ukraine became full and it is the subject of international cooperation both at the universal, regional and local levels. Europe went through an extremely difficult and long path, during which there were numerous wars for territories, which led to million victims, before the principle of territorial integrity and inviolability of borders has established itself as the basis of peace and security continent by nullifying the enormous efforts of the states of the region, made to establish and strengthen these principles, the Russian Federation, without exaggeration, endangers the future of Europe".[152]

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[152] Задорожній О.В. Порушення агресивною війною Російської Федерації протии України основних принципів міжнародного права : монографія / О.В. Задорожній. К. : К.І.С., 2015. С. 236.

III. WAR, PEACE AND INTERNATIONAL LAW

Sovereign territory as a shelter lost its meaning in the face of nuclear technology, planes and satellites, the intensification of trade, migratory movements and technological interdependence. The changes that accelerate the movement of people and things put the old denomination of territorial state in doubt. Security, much more than shelter, has become a global issue.[153]

The territory leaves its condition of "shelter" to present itself as a "resource", as a platform for political and commercial expansion. Multinationals, diasporas, religious sects and international organizations animate the world by putting capital, people and ideas into circulation. All this contests the idea of the territory as a closed political compartment, since the map of the compartments is juxtaposed with the map of networks.[154]

Territory as a shelter, based on exclusive sovereignty where each State reigns in its territory, gradually gives way to a world with rights of interference. Security, due to the unification of the world, is no longer exclusive to each compartment.[155]

However, understanding the territory as a material condition of the modern State, as an expression of its sovereignty in the defense of a given society, remains fundamental and indispensable, especially in the face of conflicts associated with the exploitation of strategic resources and the differential valuation of territories.[156]

It is in this complex context that international law is inserted with its objective of seeking and maintaining peace. According to Haesbaert, there is a myth of deterritorialization consistent with the idea that man can live without territory, that society and space can be dissociated. However, the geographic territory is integrative,

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153 Cataia, Marcio A. Political territory, p. 118.

154 Cataia, Marcio A. Political territory, p. 118. On the network society, see Castells, Manuel. *A Sociedade em Rede. A Era da Informação: Economia, Sociedade e Cultura*. Vol. 1. São Paulo: Paz e Terra, 2008

155 Cataia, Marcio A. Political territory, p. 118

156 Cataia, Marcio A. Political territory, p. 119.

territorialization is the political and economic domain and the symbolic and cultural appropriation of space by human groups. The current dilemma, however, would not exactly be deterritorialization, but the phenomenon of multi-territoriality, the possibility of experiencing different territories at the same time, with the permanent reconstruction of one's own.[157]

The basic rights of States stem from the common feeling of their indispensability for the balance and stability of international relations. The basic rights of States can be summarized in the State's right to exist, that is, in the State's right to exist and continue to exist as a sovereign entity. From this right of existence derive all other state rights, such as, for example, the right of conservation and defense.[158]

The right of conservation and defense comprises all state measures necessary for the conservation and defense of the State, notably against dangers that may compromise its integrity. It should be noted that the State's right to protect and develop its existence does not authorize it to perform unjust acts against another State.[159] The main purpose of the right of defense is to protect the State from aggressions and armed conflicts that could break the inviolability of its territory.[160]

According to Daulenov, "given the importance of international community interests that are protected by jus contra bellum, the prohibition of the use of force can be regarded as a norm of jus cogens. The inherent right of states to self-defence is not covered by the scope of the prohibition of the use of force and cannot be

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[157] Haesbaert, Rogério. *O Mito da Desterritorialização. Do "Fim dos Territórios" à Multiterritorialidade*. 3ª ed. Rio de Janeiro: Bertrand Brasil, 2007.

[158] Mazzuoli, Valério de Oliveira. *Curso de Direito Internacional Público*, p. 696.

[159] Russomano, Gilda Maciel Corrêa Meyer. *Direito internacional público*. I. Rio de Janeiro: Forense, 1989, p. 333-334.

[160] Mazzuoli, Valério de Oliveira. Curso de Direito Internacional Público, p. 698.

understood as a derogation from the jus cogens norm. (…) Unilateral declarations of states may also have the effect of creating certain legal obligations in the context of jus contra bellum".[161]

The right of defense must be exercised within reasonable limits, using moderately the indispensable means to put an end to the unjust, current or imminent aggression. Public International Law admits not only the exercise of individual self-defense, but also the exercise of collective self-defense. According to article 51 of the UN Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

The role of the UN Security Council as an institution responsible for world security and the fact that the aggression against Ukrainian territory was perpetrated by Russia, which is a permanent member of the Council with the right to veto, makes the Ukrainian war unique, posing challenges for international law.

The role of international law is to guarantee peace and prevent war. When there is war, there is a demonstration that international law has failed. The war in Ukraine is part of a larger problem, which is a new correlation of forces in the world. Peace in Ukraine and in the world depends on how international law will regulate this new correlation of forces. The effectiveness of international law depends on a political agreement that forms a consensus on

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[161] Daulenov, Miras. The Legal Nature of States' Obligations Towards Ukraine in the Context of Jus Contra Bellum. In. Sergey Sayapin and Evhen Tsybulenko (eds.) *The Use of Force against Ukraine and International Law. Jus Ad Bellum, Jus In Bello, Jus Post Bellum*. Dordrecht: Springer, 2018, p. 3.

international law. Russia, by invading Ukraine, violated international law to demonstrate to the world that its geopolitical interests must be respected. By doing this with the use of force, Russia provoked a reaction not only from the affected Ukraine itself, but also especially from the United States and its allies, which symbolize the prevailing international order. It is also important to note that this reaction also includes several Eastern European countries, which have historically been under Russian hegemony and who see the territorial aggression of Ukraine as a potential future risk to themselves.

Current international law was built after the Second World War, a conflict that projected a new world order that developed under the so-called cold war. With the peaceful end of the Soviet Union in 1991, a new world order emerged, based on the hegemony of the United States. This new order, however, formally maintained the arrangement of the victorious forces of the Second World War, especially in the composition of the Security Council.

The vertiginous Chinese economic growth and the military modernization of Russia modified the correlation of forces in the world. The decisive military factor that built the world today is still that of the Second World War. The events of 1991, which imposed a new world order, did not nullify Russia's position in the world. If after 1991, Russia weakened, the war in Ukraine seeks to demonstrate that it is strong again to impose its conditions on the world. Likewise China, which sees its military strength grow in proportion to its economic strength. The rearmament of Germany[162] and Japan[163] also demonstrates that the world is moving towards a new geopolitical arrangement, with a multipolar

[162] See: Germany commits €100 billion to defense spending In. https://www.dw.com/en/germany-commits-100-billion-to-defense-spending/a-60933724 Accessed on August 25, 2022

[163] See: Japan calls for defence spending hike in policy paper, notes threats to Taiwan In. https://www.reuters.com/business/aerospace-defense/japan-calls-defence-spending-hike-policy-paper-notes-threats-taiwan-2022-06-07/ Accessed on August 25, 2022

characteristic, with different centers of power exerting influence in the political, economic and military fields.

This new reality will demand a new international law, capable of guaranteeing peace in the world. In this new context, many questions remain open. If this new order will be, in fact and in law, the order that will replace the one that emerged after the end of the Second World War, what will be the fate of the United Nations and of the entire institutional apparatus linked to it? Will reforms in existing institutions accommodate this new world? What role will the European Union play in this new reality? Will this new order be based on sovereign national states? Will international stability be guaranteed by some powers? Will it be possible to control the arms race, especially nuclear military power?

Russia's aggressiveness against Ukraine is posing new questions for the security of Europe and the world. If Russia justifies the war in Ukraine as necessary for the defense of its interests, this also provokes reactions in other countries, which also feel threatened. This is a clear situation in which international law loses its status as an instrument for regulating international relations, which creates a field of tension that can only be controlled by a new international arrangement.

CONCLUSIONS

States are legally equal, that is, they enjoy the same rights and the same duties. The rights of each State do not depend on the power, in fact, that the States possess, but stem from the State's condition as a legal person under international law. The State, as a subject of international law, has international legal capacity and personality.

Annexation of part of the territory of Ukraine by the Russian Federation – The Autonomous Republic of Crimea in March 2014 and the war against Ukraine are a clear violation of the basic principles of international rights enshrined in the UN Charter and other international laws documents, as well as the obligations of the Russian Federation under bilateral international treaties and the

Budapest Memorandum of 1994 and, accordingly, a huge challenge for the entire international legal order.

International law is one of the most stable legal systems. Thanks to him, the consequences for violators always followed, although not always immediately. International security is based, first of all, on compliance with the basic principles and norms of international law.

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HYBRID AGGRESSION AS THE GREATEST DANGER, THREAT AND CHALLENGE OF INTERNATIONAL SECURITY IN MODERN INTERNATIONAL RELATIONS

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INTRODUCTION

The phenomena of war and peace have existed since the beginning of state formation, have been the focus of rulers and the military. War is a real part of the world around us and a part of human existence, respectively. Compared to other social phenomena, only war appeared almost out of nowhere and could last a very long time. According to historians human civilization has existed without armed conflict for only 250 years. And now, unfortunately, this shameful phenomenon has not been eradicated from the practice of international relations. In the last century, World Wars I and II shook the whole world with cruelty, the number of mutilated destinies and casualties. Armed conflicts in the former Yugoslavia, in Chechnya, Afghanistan, Transnistria, Libya, and in Syria have also once again demonstrated the consequences of an armed confrontation. The statistics are impressive. The international community, united within the framework of the United Nations, has made significant progress in countering acts of force or threatening its use in international relations, enshrining this provision as an imperative rule of international law (basic principle of international law), however, it is known that this has not completely eradicated the phenomenon of war from the practice of resolving interstate conflicts. Thanks to scientific and technical progress, the latest weapons are emerging, the means and methods of warfare are being

improved, along with the very concept of «war», which already provides the latest, more perfect forms, is changing. One such new forms of war is the hybrid aggression (war), which is increasingly practiced by strong states against the weaker as a form of global confrontation in the international arena, the Transnistrian conflict, the Russian-Georgian war, war in the territory of Donbass, etc. Unfortunately, our state is also a victim of hybrid aggression by the Russian Federation. Today, Ukraine is in a full-scale war, which began in 2014 with the use of Russian military hybrid methods of warfare and therefore new research on this phenomenon is now extremely necessary.

Given this state, we believe that these issues are relevant and require quite meticulous attention from both scientists and legal practitioners. Only a thorough analysis of this phenomenon, starting with the very concept of war and peace and concluding by outlining ways to counter and prevent acts of hybrid aggression, can create a truly effective warning mechanism, countering and ending acts of aggression that will ultimately bring humanity closer to the idea of eternal peace.

I. WAR AND PEACE AS COMPONENT PARTS THE ENVIRONMENTAL WORLD AND HUMAN BEING

As you know, the problems of war and peace – are such eternal philosophical and legal maxims that have troubled humanity since the beginning of its existence. They were conceived by ancient thinkers – Thucydides, Herodotus, Democritus, Socrates, Plato, Aristotle, Cicero, who in their treatises tried to justify the justice and injustice of the use of force, emphasized that, that in the process of evolution, peoples are constantly fighting for survival and a place under the sun, and therefore war – is a natural state of human existence that allows to resolve conflicts and contradictions.

For the first time in history, Thucydides looked at war with «human» eyes. Herodotus wrote about her in terms of divine providence, and Thucydides distinguished between the causes and

the reason for war, perhaps he first raised the question of the connection between war and politics. Plato and Aristotle viewed the war as «part of the art of political». Heraclitus was convinced that war is the father and king of all[164]. Society, the thinker stated, in the process of its development and existence is constantly in the struggle for its existence. «You should know, – pointed out Heraclitus, – that war is universal, and everything happens through struggle and, if necessary»[165].

From the philosophy of antiquity, the problems of war and peace were transferred to the Renaissance and Modern times. The thinkers of the time rejected the idea of war in every way, focusing on peaceful coexistence, love and justice, and promoted the idea of eternal peace. So prominent humanist E. Rotterdam argued for the destructive impact of war, the destruction of all things beautiful and useful, and called on rulers and everyone to fight and protect peace[166]. According to the Czech prominent scientist, teacher I. Comensky, war and all sorts of aggression are anti-human and anti-human phenomena, and therefore humanity must eradicate this cruelty in favor of humanism[167].

Already in the New Age T. Hobbes, J. Locke, Voltaire, J. J. Rousseau, I. Fichte is beginning not only to strongly condemn the aggressive wars, but also to analyze the terrible consequences and outline ways to achieve peace for the progressive development

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[164] Богданович В.Ю., Єжеєв М.Ф., Свида І.Ю. Основи державного управління забезпеченням обороноздатності України: теорія й практика. Львів: ЛІСВ. 2008. С. 29.

[165] Артюшин Л.М. Теоретичні аспекти стратегії воєнної безпеки суспільства і держави: Монографія / Л. М. Артюшин, Г.Ф. Костенко; Національний університет внутрішніх справ. Х.: Вид-во Нац. ун-ту внутр. справ, 2003. С. 48.

[166] Роттердамский Э. Жалобы мира // Трактаты о вечном мире. URL: https://azbyka.ru/otechnik/6/jaloba_mira/.

[167] Коменский Я.А. Всеобщий совет об исправлении человеческих дел // Трактаты о вечном мире. URL: http://jorigami.ru/PP_corner/Classics/Komensky/Komensky_Yan_Amos_Pampedia_izbr.htm.

of human civilization. In particular, the English thinker T. Hobbes in a famous treatise «Leviathan» (1651), recognizing war as a natural part of human existence, at the same time claimed that it is destructive to man, and those rulers, who send their generals and army against other peoples and their possessions, are seriously ill «the most horrible monsters»[168]. Prominent philosophers I. Kant and J.J. Rousseau. were opponents of aggressive wars. In particular, I. Kant believed that the war was barbarism and devastation, its consequences were terrible – ruin and collapse of states, and therefore no state should, through force and violence, encroach on the rights of independent peoples and interfere in their internal affairs, all wars should be banned[169]. The thinker was also convinced that the cultural development of peoples would gradually lead humanity to the desire to live in peace[170]. Another well-known German thinker, I. Fichte, who actually promoted the same ideas as I. Kant, was firmly convinced that interference in the internal political affairs of other states was completely unacceptable, and that a state that ignored them, is unfair in its internal construction because it seeks to rob neighbors. The scientist believed that the development of science and culture – is the magical path that will ensure the security of humanity and allow everyone to live in peace[171].

Despite the fairness of such statements by thinkers, in practice they refuted almost everyone with the course of historical development of human civilization, which constantly turned to war

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[168] Гоббс Т. Сочинения: в 2 т. / сост., ред., авт. примеч. В. В. Соколов; пер. с лат. и англ. М.: Мысль, 1991. Т. 2. С. 271; Гоббс Т. Сочинения: в 2 т. / пер. с лат. и англ.; сост.; ред. изд., авт. вступ. ст. и примеч. В. В. Соколов; Мысль, 1989. Т. 1. С. 259.

[169] Иммануил Кант. К вечному миру. URL:. http://loveread.ec/read_book.php?id=89617&p=1

[170] Фихте И.Г. К вечному миру. Философский проект Иммануила Канта 1796 // Трактаты о вечном мире; предисл. Ф.В. Константинова; вводная статья и прим. И. С. Андреевой. М.: Соцэкгиз, 1963. С. 202.

[171] Ойзерман Т.И. Философия Фихте. М.: Знание, 1962. С. 46-47.

as a normal means of resolving conflicts. Moreover, until the twentieth century, the right jus ad bellum (the right to war) was a natural right of every state. Wars between empires, states, nations, peoples, and wars of various kinds – interstate and civil, total and local, sacred and secular, public and private, ideological and commercial – were commonplace. And although it is difficult to find a person who would really like war as such, it is still turned to war to be able to witness a significant event – peace. If the moral philosophy categorically beats the war, this so-called «school of the violence», then the politic philosophy only states its fatal influence on the historic realism.

Such maxims suggest that war, the use of force, and aggressive behavior in general are a natural phenomenon inherent in humanity, and that it develops and dies with it. In general, our historical heritage convincingly confirms this statement. Indeed, historians have shown that at least 1,600 military conflicts have occurred since the written history of mankind, about 2,500 years ago. From such statistics, it may seem that war is not only normal, but also an effective and sometimes necessary way of resolving disputes between states. The aftermath of World War I and World War II forced humanity to reconsider these beliefs. The large number of victims, mutilated destinies, the devastation of European states, the destruction of their infrastructure, economy and other negative moments actually lead to the unification in the international arena of efforts between peoples for peace and tranquility in the world. The United Nations is being created, the first universal international organization whose main goal has been to ensure international peace and security for humanity. The use of force in international relations falls under the absolute prohibition of international law, and the crime of aggression begins to be defined as an international crime, for which the perpetrators may be liable on the basis of international law and bear international legal responsibility. But, unfortunately, this did not put an end to the wars. This suggests that the idea of a common peace is possible – a utopia never realized, except after the extinction of the human

race? This rhetorical question of his time was asked by Kant, who also could not think about the emergence of nuclear weapons and its potential.

The current political picture of the world, the superpower of the United States and the Russian Federation, which impose their rules of the game on weaker participants in international relations, and the development due to the intense scientific and technological progress of new previously unknown forms and methods of hostilities, the emergence of the so-called hybrid war (aggression), which is based on the promotion of terrorism and acts of aggression, undoubtedly give this fundamental key issue a philosophy of morality, as well as a policy of extreme relevance.

There is such a pattern: the more wars spread around the world, the greater the need for a global peace system. In fact, both war and peace are essential living conditions, that is, it can be argued that peace presupposes war, war presupposes peace. At the same time, the legal literature also suggests that wars have become anachronism, and that now serious, large-scale and protracted wars have to be forged in history and disappear. People must continue human civilization, make an impact and make history, not die during war. Such death is the most shameful and unjust. However, Russia's military aggression against Ukraine refutes this thesis. In the XXI century, unfortunately, it is our state that is involved in a full-scale war, bold and cruel, the main element of which is the genocide of our people, the destruction of our culture and traditions.

The peculiarity of modern universe is also that, that the rejection of confrontation as a result of the cessation of the «Cold War» and the launch of a new phase in international politics – cooperation and partnership – in general did not lead to a radical change in the arsenal of means of destruction of interstate, national, religious or other contradictions, and did not rule out war. In fact, Western nations continue to improve military power, bet on them in achieving their political goals. The United States and Russia continue to oppose and fight for spheres of influence in

international politics. In addition, they are accumulating military capabilities with an emphasis on nuclear weapons and a strong army. The Russian Federation is actively using hybrid military technologies. The resolved military conflicts in Chechnya, Transnistria, and the Caucasus, where the Russian military has polished its skills in using hybrid means and methods of warfare, have remained unnoticed. The international community's response to all these acts of aggression was quite moderate. The aggressor went unpunished. This created a springboard for the actual further advancement of the Russians in the territories of their neighbors. The events of 2014 in Ukraine clearly demonstrate this. The unhindered annexation of Crimea[172], the creation of illegal terrorist groups of the DNR and LNR in the territory of Donbass[173], was the first stage in the implementation of the criminal policy of the Russian Federation, aimed at eliminating the independence and independence of Ukraine, its territorial integrity. The lack of radical action by the international community, in addition to expressing regret, sympathy and concern, led to a full-scale invasion of Ukraine by Russian troops on 24 February and the outbreak of an aggressive war. Constant threats to the use of chemical, bacteriological and nuclear weapons keep Europe and the world in suspense. Russian aggression is in fact a serious threat to international peace and law and order.

In general, it should be noted that the emergence of nuclear and thermonuclear weapons and their means of delivery has brought the role and significance of war in the life of civilization to its logical end. There is an objective need for the laws of morality, that ordinary people should be guided by in relations with each other, to become the laws of international law. Hence we can state the

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[172] Задорожній О. Анексія Криму - міжнародний злочин: Монографія. К.: К.І.С., 2015. 576 с. URL: https://books.google.com.ua/books?id=ZE_7CgAAQBAJ&printsec=frontcover&redir_esc=y#v=onepage&q&f=false

[173] Війна на Донбасі: реалії і перспективи врегулювання. Київ, 2019. 144 с. URL: https://razumkov.org.ua/uploads/article/2019_Donbas.pdf

following conclusions:

– peace – no war. Although it is clear that eternal peace is an unattainable ideal, but to which humanity must strive in its development;

– peace – the absence of armed violence, which in the international arena most often acts in the form of war;

– peace is such a relationship between states, devoid of contradictions, which are a possible cause of the next armed conflict.

Periods of lack of armed confrontation in the history of civilization cannot be called periods of peace with full right, because often at this time there was increased preparation for a new war, there were contradictions, which are the inevitable source of a new war. If we talk about the XXI century, then war becomes increasingly metaphysical, as if everywhere, but nowhere at the same time, it is very unpredictable and fickle, while humanity is accustomed to functioning according to certain patterns. It should be stopped to assume that war – is when they are at war, and peace – when they are not at war, because you can be in a state of war without hostilities. The fact is that the modern form of war – is a conspiracy, a rebellion, a synthesis of different methods: habitual and unusual, outspoken and hidden, regular and irregular, which must effectively affect the masses[174].

However, peace as a state of the world community can be achieved by achieving an acceptable balance of interests of subjects of international relations. Politics is what we have in common, connecting war and peace into a holistic system that reveals forms of relations between states. Peace is a continuation and result of state policy in the international arena. The social orientation of this policy, its subjects ultimately depends on both the conclusion of peace and the nature of this peace. That is, peace is a continuation of exactly the

[174] Левантович О. Гібридні війни XXI століття: нові виклики для медіапростору. *Вісник Львівського університету.* Серія Журналістика. 2019. Випуск 45. С. 54. DOI: http://dx.doi.org/10.30970/vjo.2019.45.9984

policy pursued by opponents before and during the war.

The most important characteristic and feature of peace in the relations of states is its legal consolidation in treaties, agreements, etc. Since the UN Charter[175] unconditionally prohibits the recourse of states to war as a means of resolving international disputes, because an armed attack, committed by it in compliance with the requirements of the III Hague Convention of 1907[176] on the Declaration of War, does not become legitimate. The very declaration of war, not even accompanied by the opening of hostilities, should be seen as an illegal act, as a threat of armed attack.

II. THE CONCEPT AND ESSENCE OF WAR

War is often defined as action between states: but then what is civil war? Should the definition of war include economic or trade wars? Are sanctions a form of war? The list of these questions can be continued.

For a more thorough understanding of the problems of resolving an aggressive war, it is first necessary to be clearly aware what «war» is. In addition, other terms – «armed conflict» and «aggression» are often used in the literature. The situation is even more confusing because, in fact, all these terms are mentioned in international humanitarian law, conventions, agreements and treaties, and this naturally raises questions about whether they should be accepted, as equivalent. In particular, the first international conventions adopted at the Hague Peace Conference used the term «war». Later, the Geneva Conference of 1949 adopted numerous norms of international humanitarian law, which already operate the term «armed conflict». The term «aggression» appears in UN regulations within work on international peace and security.

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[175] United Nations Charter, 1945. URL: https://www.un.org/en/about-us/un-charter

[176] Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907. URL: https://ihl-databases.icrc.org/ihl/a/b59c84b75bfb1520c125641e0037aa5a

In general, it should be clear that the boundary between these terms is quite conditional. In particular, the concepts of «war» and «aggression» are generally perceived as equivalent in content in international law. Regarding the ratio of terms «war» and «armed conflict» the situation is a little different. Such a division matters when the question arises as to the applicable law to which the conflict situation will be resolved. In addition, with a more thorough analysis of the content of these concepts, it becomes clear that the concept of «armed conflict» is broader and includes the concept of «war» and not all armed conflicts are war.

Taking into account the large number of works devoted to the issue of waging war, it can be claimed that today there is a sufficiently large number of definitions of «war» («aggression») in the scientific literature. At the same time, it is worth understanding that this concept is considered differently in different fields of knowledge. So, if philosophers focus more on the types, causes, morality of war, its importance in the world system, then political scientists and lawyers always try to outline this concept, to highlight certain features, signs that would help to more clearly understand the nature of this phenomenon. In particular, Hugo Grotius, an outstanding lawyer and the founder of the science of international law, defined war as an armed clash between states competing by force[177]. As a rule, political scientists defining war note that it is, first of all, a certain organized armed struggle between social classes, nations, peoples or states. At the same time, the transition of the social conflict to the armed stage consists in the fact that each of the parties seeks to impose its own will on the opponent by force of arms in combination with various economic, ideological, diplomatic and other means of pressure, using destructive blows on its human and material potential. The German theoretician of war, the Prussian general K. von Clausewitz, defining war, says that it arises from the political situation and is dictated by political motives, and therefore represents a serious means to achieve

[177] Гроций Г. О праве войны и мира. 1994. URL: http://grachev62.narod.ru/huig_de_groot/content.html

a political goal, that is, war is nothing more than an act of violence , directed to the fulfillment of a certain will. From the point of view of political science, the essence of war is that it is a real tool of politics, its continuation by resorting to violent means[178]. Therefore, politics determines, firstly, the direction and character of the preparation of a state or a coalition of states for war; secondly, it formulates the goals and objectives of the war, determines its means, directs the material preparation for the war, etc.

Among the international lawyers, L.Oppenheim thoroughly investigated the nature and signs of war. In his opinion, war is an armed conflict between two or more states with the aim of forcing the defeated to accept peace terms favorable to the winner[179]. For his part, E.David believes that war is such a state of affairs between two states, or between two groups of states, or between a state and a group of states, which is characterized by the breakdown of diplomatic relations, the suspension of the general norms of international law during peacetime, which necessarily accompanied by a cts of violence or the threat of committing them[180]. V.M.Repetsky and V.M.Lysyk draws attention to the main legal features when a war is defined, in particular: the formal status of the declaration according to the norms of international law, which leads to the rupture of diplomatic relations and bilateral treaties, primarily political ones[181].

From these definitions, it can be concluded that the war – is a certain relationship between the states, which is necessarily

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[178] Carl von Clausewitz. On War. Book 1, Chapter 1, paragraph 2. URL: https://antilogicalism.com/wp-content/uploads/2019/04/on-war.pdf

[179] Oppenheim L. International law. War and Neutrality. Volume 2. Second edition. URL: https://www.gutenberg.org/files/41047/41047-h/41047-h.htm

[180] Дэвид Э. Принципы права вооруженных конфликтов. Международный комитет Красного Креста, 2011. С. 89. URL: https://www.icrc.org/ru/doc/resources/documents/publication/eric-david-principles.htm

[181] Репецький В.М., Лисик В.М. Міжнародне гуманітарне право: Підручник. К.: Знання, 2007. С. 121.

accompanied by the complete cessation of all legal relations of peacetime. However, a more thorough analysis of other positions of scientists indicates other important signs of war, including the operation of treaties governing hostilities, as well as the establishment of a special regime of partial restriction of human rights. In addition, the correct opinion of A.P. Ladynenko, who believes that the concept of war is now used not only in relation to armed conflict, in particular, ideological, information warfare[182].

Often from the legal plane, the term «war» is transferred to political and legal. Sometimes individual politicians use terms such as economic, diplomatic, political war in their speeches. This indicates that now the concept of war has changed, the content of the filling covers much more elements. The concept of «war» has become perceived as the use of hybrid technologies, which include both traditional methods and means of warfare, and the latest, which primarily the battlefield see the information space. Moreover, if the aggressor state had previously aimed to conquer the territory of other states, the accents have now shifted. The territory is no longer a key target of military aggression. Shaking sentiment in certain regions of the world, undermining the economic system, undermining information security and influencing in general different spheres of public life in order to weaken states and, accordingly, the establishment by the aggressor of its hegemony in the international arena – are the main guidelines of modern aggressors. It can often be a long-term conflict that focuses on the depletion of both victim states and other countries that are economically or energy-dependent on the conflicting parties, which allows the aggressor to establish his so-called rules at the international level by blackmail and manipulation. Therefore, it is rightly stated in literary sources that the new type of war is a war of the era of information imperialism – colonialism, where destabilization and «haos in the management» of a particular state

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[182] Ладиненко А.П. Види збройних конфліктів і чинне право. *Альманах міжнародного права.* 2009. № 1. С. 141.

is carried out consciously and purposefully.

Technology, the stages of a new war with a focus on information colonialism have been in place since the Bolsheviks won in 1917, and have found clear directives from the National Security Council (USA) 1942-1945., beginning with the famous instruction 2001 of December 17, 1945 A. Dulles to destroy by new means the most rebellious people on earth. Later there were the directives of the US National Security Council 1948-1951, 1957, 1968, 1980s, where the combination of all means of a new war was proved to be open intervention at all levels in the internal affairs of Eastern Europe, USSR, Cuba, DPRK and others. At present, the Russian Federation actually shares leadership with the United States on this issue. Russia's military strategy is almost always filled with different plans to strengthen ties and «friendships» with neighboring states.

Also now it should be noted that quite intensively individual actors in international relations use the so-called cyber war. This is due, as O.O. Merezhko rightly points out, with the importance of cyberspace and modern information technology in the current world[183]. Perhaps the most striking example of cyber-espionage a large-scale cyber-espionage operation called «GhostNet». The operation, which is suspected by the Chinese government, covered 1,295 computers worldwide, a third of which were in foreign ministries, embassies, international organizations and large private firms. According to Canadian experts, these computers also included a computer headquartered in Brussels.

In the light of the above considerations, it is clear that war in any of its formats as a social phenomenon is one of the most brutal forms of resolving social conflicts between states and peoples, which is a completely unacceptable phenomenon that carries death, destruction, devastation and levels all human values. Therefore, from the standpoint of international law, war is under a total ban. The

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[183] Мережко О.О. Проблеми кібервійни та кібербезпеки в міжнародному праві. *Юридичний журнал*. 2009. № 6 (84). С. 94-96.

whole system of basic principles of international law is now aimed at peace and quiet, the protection of international law and order and the protection of human rights and humanity as a whole. Violation of such principles leads to chaos and the question of the effectiveness of international law or its existence in general. Undoubtedly, war can be considered the greatest danger, threat and at the same time a challenge to the modern system of international security, especially when the aggressor state has nuclear weapons in its arsenal. The ideas of anthropocentrism, humanism, goodness and justice must be the basis of the modern universe in order to promote peace, peace and prosperity of nations and peoples, and therefore the world is all, without exception, must unite and work together to create an effective universal counter-mechanical mechanism and the main prevention of aggressive wars in international relations.

III. HYBRID WAR AS THE NEWEST FORM OF AGGRESSION AND THE FORM OF GLOBAL OPPOSITION IN CONTEMPORARY INTERNATIONAL RELATIONS

Since February 24, Ukraine has unfortunately been embroiled in a full-scale war, which almost all military experts and specialists qualify as a hybrid aggression. What gives grounds for such assertions why is this form of aggression in modern international wear and tear considered the most dangerous and a danger to the entire international community? In order to answer this question, first of all, you need to know what the term «hybrid warfare » means and what the very nature of this phenomenon is.

In the most general form under «hybrid aggression» (from Latin. *hibrida*) is considered a new type of war that combines the classical methods of military operations with guerrilla warfare, terrorism, information warfare (cyber warfare), biological, etc.

Aggressor states are increasingly preferring this latest type of war, which can be deployed in all possible directions – political, legal, economic, information, reputation, and so on. Everyone who

has influence over the population must work for such a war: actors, singers, writers, directors. At the same time, hostilities create only a background for a larger war in the human sense[184]. As you know, in 2014, the Russian Federation tried in every way to veil its participation in the territory of Donbass as the main organizer and initiator of hostilities, spreading through all practical possible information sources, as their own, and foreign, he met on the alleged provision of exclusively humanitarian assistance to the Russian-speaking population of the territory of Donbass, which was oppressed through the Russian language. In principle, on February 24, eight years later, the controversy did not change, Putin announced the so-called «special operation» in Ukraine, not the resolution of a full-scale war. Although it is clear to the whole world that it is a matter of substituting the concepts, but the Putin regime continues to stubbornly avoid the word war and deny the obvious facts. The same acts of hybrid aggression were successfully tested a few years earlier in the Caucasus and Transnistria.

The very concept of «hybrid warfare» has already been introduced into the official terminology of Western military policy. Thus, the final document adopted at the NATO summit in September 2014 in South Wales, paragraph 13, addresses the need to prepare the North Atlantic Military Alliance for, that «NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of and cover military, paramilitary, and civil measures are placed in high integrated design»[185]. Alliance members see hybrid wars as a broad set of fighting, secret operations by guerrilla formations, involving civilian components, and as combating propaganda campaigns, cyberattacks, and local separatism. A special training center in Latvia – Strategic Communications Center off

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[184] Харарі Ювал Ной. 21 урок для 21 століття. К.: BookChef, 2018. С. 264.
[185] Wales Summit Declaration. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales. 05 Sep. (2014). Press Release 120. Issued on 05 Sep. P. 13. URL: https://www.nato.int/cps/en/natohq/official_texts_112964.htm

Excellence – was even set up to carry out communications and exercises to work out actions in the hybrid war. However, as is rightly noted in the legal literature, despite such widespread use of the term «hybrid warfare», there is no clear understanding of what exactly this phenomenon is, what its nature and essential characteristics are. This state is objectively conditioned – there is no universal definition of this phenomenon, respectively, scientists who study the problem of hybrid wars, invest in the content of this concept various important, in their opinion, features and elements. The most commonly used synthetic, integrative definition, including as active military action using special weapons (whose target is the physical destruction of the enemy and its human strength), and a set of certain actions of the aggressor towards the injured party, aimed at discrediting the latter in the eyes of the world community, its own people, the split of the political elite and society as a whole[186].

Undoubtedly, it can be predicted that such actions can strike much more strongly than military invasion, as their main goal is to form certain distorted stereotypes and attitudes in the mass human consciousness through manipulative influence. A striking example illustrating the above is the current situation in Ukraine. The information war, which unfolded by the Russians in a wide European digital space, is bearing fruit. Some Europeans are beginning to justify and, moreover, support the actions of the Russian Federation in Ukraine through misinformation. The consequences of such media misinformation can be serious. It is worth mentioning World War II, the beginning of its solution, when disguised German officers in Polish uniform, killing their compatriots, provoked the bloodiest war in history. Germany, under the slogans of saving the integrity of its territory and protecting its citizens, started a war. Some literary sources indicate that it was then that the ideology of hybrid warfare was first used. Leaders of the Third Reich – A. Hitler and P. Goebbels

[186] Феськов І.В. Основні методи ведення гібридної війни в сучасному інформаційному суспільстві. Актуальні проблеми політики. 2016. Вип. 58. С. 66.

(Reich Minister of Public Education and Propaganda of Germany) – systematically through the print media, special releases on the radio or film chronicle worked to promote the sacred war for the preservation of the so-called «German values», investing in the minds of their citizens pseudo-values and installations that would justify a bloody aggressive warfare.

Similar techniques and techniques are now used by Russians through central television channels, print media and cyberspace. Moreover, the channel «Life News» was specially created for advocacy, where 24/7 TV presenters, journalists report to viewers «real values of the Russian measure ». As a result, 90% of the population of the aggressor state support the aggressive war and the policies of its dictator aimed at the genocide of other peoples and nations. The distorted values, which were engraved in the minds of the Russians through propaganda, first, allow them to justify the atrocities committed by the Russian military in Bucha, Irpen, Mariupoli and a number of other cities in Ukraine, second, replace the term (instead of the word « war» use the word «speech operation», instead of the word «genocide» – «denacification»), and third, to promote the use of violence, threats and forces as the only right methods to achieve their criminal goals. Gradually, there is a setting in the minds of Russians about their supremacy over other peoples, impunity and supremacy, which in turn leads to the formation of a model of behavior when there are no prohibitions and obstacles. permissiveness gives impetus to the resolution of the invaders' wars, the commission of acts of genocide, interference in the internal affairs of other states, non-fulfillment of international obligations and, accordingly, the imposition of their policies on actors in the international arena. On the other hand, the Russians launched a broad disinformation campaign in foreign media, distorting events, facts, and covering hostilities in Ukraine as their own operations to save Ukrainians from the Nazis, who are in power in Kyiv and are undermining the rights of the Ukrainian people. Undoubtedly, these fakes sometimes achieve their goal and Europeans begin to support them without thinking about the fact that Ukraine is now a shield for Europe and if Ukrainians do not stop this aggression, this

disease will spread to other countries, as it happened during World War II, when, after the attack on Poland, the international community did not take radical steps to repel the fascist occupiers and as a result was captured and devastated by the German army.

Given such examples, it is clear that in such cases a devastating blow is made to international law and order and the security of humanity. The aggressor state opposes itself to the whole world, ignores all democratic values, forcing humanity to adapt to itself.

IV. CONCEPTS AND SIGNS OF «HYBRID WAR»

The author of the concept of hybrid warfare was the American military and scientist F. Hoffman, who drew attention to the fact that modern conflicts can be described as multimodal, ie those conducted in different ways, and multivariate, ie such, falling from the usual limits of a simple warfare design[187]. Hybrid threats to Hoffman involve a variety of war regimes (standard weapons, irregular tactics, terrorist attacks, criminal chaos) to achieve political goals that can be embodied not only by states, and non-state actors using both simple and complex technologies[188].

The concept of «hybrid warfare» in scientific circulation was introduced by American scientists M. McLuin, who considered the means of communication a new resource of the state and in his scientific works often emphasized that modern wars take place in the information plane[189], and therefore ensuring the security of the information space is now a very urgent task and quite difficult for any

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[187] Major Shane R. Reeves and Major Robert E. Barnsby. The New Griffin of War. Hybrid International Armed Conflicts. *Academic joutnal article «Harvard International Review»*, Cambridge, 2013. Volume 34, Issue 3. P. 16-18. URL: https://www.proquest.com/openview/363b5a1667c50757519c1917eed87345/1?pq-origsite=gscholar&cbl=32013

[188] Hoffman F. Conflict in the 21st Century: The Rise of Hybrid War. Arlington: Potomac Institute for Policy Studies, 2007. P. 20-22.

[189] Маклюэн Г.М. Понимание Медиа: Внешние расширения человека / Пер. с англ. В. Николаева; Закл. ст. М. Вавилова. 2003. URL: https://studfile.net/preview/7070354/

state.

Despite the intensive implementation of this concept in the practice of international wear and tear and the use of the term, the very definition of «hybrid warfare» in international legal instruments is absent. The same is observed within the domestic law of many states. For example, in Ukraine, which is involved in this type of war, in the Military Security Strategy of Ukraine[190] has no provisions that would reveal the essence of this concept. Therefore, to clarify this concept, it is necessary to refer to the analysis of legal doctrine.

The following definition can be found in the political encyclopedic dictionary: «Hybrid War – War, the main instrument of which is the creation of an aggressor state in a state chosen for aggression, internal contradictions and conflicts with their subsequent use to achieve the political goals of aggression, which are usually achieved by ordinary war»[191]. From such generalized definition, it is quite difficult to understand the nature, essence and key features of this phenomenon of modern reality. Moreover, when referring to many well-known encyclopedic publications, it can be found that the concept of «hybrid warfare» or «hybrid aggression» is not included in their content at all and this is not included, that this phenomenon is increasingly worrying humanity. According to experts, this type of military conflict will most often be used in the XXI century[192].

Held by the Armenian scholar R.V. Arzumananyan research has allowed him to combine similar definitions of hybrid warfare in 6

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[190] Указ Президента України «Про рішення Ради національної безпеки і оборони України від 25 березня 2021 року «Про Стратегію воєнної безпеки України». URL:
https://zakon.rada.gov.ua/laws/show/121/2021#Text

[191] Війна «гібридна» // Політологічний енциклопедичний словник / Уклад.: Л.М. Герасіна, В.Л. Погрібна, І.О. Поліщук та ін. За ред. М.П. Требіна. Харків: Право, 2015. 816 с.

[192] Попович К.В. Гібридна війна як сучасний спосіб ведення війни: історичний та сучасний виміри. *Науковий вісник Ужгородського університету.* Серія «Історія». Вип. 2 (35). 2016. С. 75.

approaches to understanding its essence[193]. Hybrid war:

1) is a type of armed conflict where the lice crategia accumulates elements of the common, small and cybervin in the cobe;

2) is a cycladic and flexible dynamics of the combat proctor, which provides rapid reaction and adaptation of the anti-cotting partitions;

3) is a war in the process of which an attack takes off with the use of various weapons (nuclear, biological, chemical), as well as homemade weapons for terrorist attacks and information pressure;

4) is the main method in the asymmetric war, which is waged on three conditional fronts – among the population of the conflict zone, the rear population and the international community;

5) is a modern type of guerrilla warfare that combines modern technologies and methods of mobilization;

6) is any action by an enemy who quickly and flexibly uses a variety of combinations of permitted weapons, guerrilla warfare, terrorism, crimes on the battlefield and other possible means to achieve political goals.

The author of the concept of hybrid warfare (aggression) F.Hoffman defines the cyanosis of aggression as a complete arsenal of all types of hostilities, taking into account conventional capabilities, irrational tactics and formations, terrorist acts containing violence and criminal disorder[194]. According to F. Hoffman, you can single out five elements of hybrid warfare: modality versus structure, simultaneity, mergers, complexity and crime[195].

At the same time, there are many other definitions of hybrid

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[193] Арзуманян Р.В. Определение войны в 21 веке. Обзор XXI Ежегодной стратегической конференции Института стратегических исследований Военной академии сухопутных войск, 6-8 апреля 2010 г. Ереван, 2011. С. 22.

[194] Hoffman F.G. Hybrid vs. compound war. *Armed Forces Journal.* Oct. 2009. URL: http://armedforcesjournal.com/hybrid-vs-compound-war/

[195] Hoffman F.G. Future Threats and Strategic Thinking. *Infinity Journal.* No 4. 2011. URL: https://www.infinityjournal.com/article/34/Future_Threats_and_Strategic_Thinking/

warfare in the literature. In particular, according to V.V. Vlasyuk and Ya.V. Karman, a hybrid war – is a specific modern type of war for which it is inherent to use a variety of means of attack and defense of states that go beyond conventional and defined variants and types of warfare[196].

D. Kilcullen, author of «The Accidental Guerrilla», argues that the term hybrid warfare is the best definition of modern conflict, but the author emphasizes that it includes a combination of guerrilla and civil wars, as well as rebellion and terrorism[197].

According to A. Nikitin, a retired major general, a military expert, should understand war under hybrid war using all available means except the direct use of force. According to him, propaganda and diplomacy, economics and finance – everything is set in motion to inflict maximum damage on the enemy, up to the provocation of social unrest on his territory and armed conflicts on the borders[198].

«Hybrid warfare is often not interpreted as something new, as most of its components have happened before. The new has been the unification of these components into a single whole, as well as the additional special role of the information component, which at different levels ensures the functioning and creates conditions for the justice of the war to recognize its own population, without which there are no modern wars»[199].

Exploring the basic methods of waging a hybrid war, we can conclude that the hybrid war is, first, the latest form of aggression that combines the use of classical warfare methods (conducting

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[196] Власюк В.В., Карман Я.В. Деякі основи поняття «гібридна війна» в міжнародному праві. *Право і громадянське суспільство*. № 1. С. 226-234. URL: file:///C:/Users/User/Downloads/Vlasiuk_Karman_2015-1.pdf

[197] Kilcullen D. The Accidental Guerrilla. Hardcover, First Edition (U.S.), Published March 16th 2009 by Oxford University Press, Inc. 384 p.

[198] Nikitin A. Hybrid warfare. October 16. URL: https://zavtra.ru/blogs/gibridnaya-ataka-na-ameriku

[199] Почепцов Г.Г. З історії поняття гібридної війни в США і Росії. *Media Sapiens*. URL: http://osvita.mediasapiens.ua/trends/1411978127/z_istorii_ponyattya_gibridnoi_viyni_v_ssha_i_rosii/

military operations), information or information-psychological, guerrilla warfare, «cyber wars», elements of terrorism and subversive actions, economic and diplomatic influence; second, this war is dangerous because the borders of war are actually being erased, scenarios of its beginning and end, it is often difficult to identify the opponent, the change of state from military to peaceful often does not solve the conflict, in the future the situation may worsen[200]. Thus, hybrid aggression should be understood as the latest type of war, which is characterized by a set of pre-prepared and promptly implemented actions of a military, diplomatic, economic, information nature, aimed at achieving strategic goals[201]. From this definition we can clearly identify the main components of hybrid warfare: threats of various nature (traditional, unconventional); terrorism and subversive actions.

In general, among the most characteristic features of the so-called hybrid war are the following:

- an armed attack takes place without the official announcement (so it actually happened in 2014, and now – in 2022 in our Ukraine);

- concealment of the participation of the aggressor State in the resolution of the war and its disregard for the norms of both international law in general and the norms of international humanitarian law in particular[202] (for example, in 2014, the Russian Federation did not recognize its involvement in resolving the military conflict in Donbass, and regarding the annexation of Crimea, the Russians disseminated information about the voluntary

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[200] Феськов І.В. Основні методи ведення гібридної війни в сучасному інформаційному суспільстві. *Актуальні проблеми політики*. 2016. Вип. 58. С. 68.

[201] Магда Э.М. Гибридная война: сущность и структура явления. *Международные отношения*. Серия «Политология». № 4. URL: http://journals.iir.kiev.ua/index.php/pol_n/article/view/2489/2220

[202] Курило В.С., Савченко С.В. Інформаційна агресія в контексті гібридної війни на Сході України. *Освіта та педагогічна наука*. № 2 (167). 2017. С. 5.

accession of Crimeans to the Russian Federation of their own free will, expressed after the referendum – although in fact everyone remembers how it happened in the presence of armed «green men»);

- use of irregular armed groups – so-called militias, insurgents, terrorists, militants, guerrillas, «green men» (all this took place in the Crimea and Donbass in 2014);

- non-compliance with international agreements (a clear demonstration of this is the disregard for the Budapest Memorandum by the Russian Federation);

- the use of «dirty» information technology on propaganda and counter-propaganda and confrontation in cyberspace[203] (such propaganda work of the Russian media lasted long before 2014 and continues today in the context of a full-scale war in Ukraine);

- mutual measures of political and economic pressure.

Also often in literary sources it is emphasized on special signs of hybrid wars: blurring the boundaries between war and peace, when it is impossible to allocate any threshold of war; uncertainty when it is difficult to identify this war at all[204].

It follows from the above that the typical methods by which an aggressor state, which is away from hostilities, fulfills its goals are: information war; economic war; promoting and inflating separatist tendencies and terrorism; promoting the formation and support of insurgent units. Information warfare is especially dangerous.

The term «information warfare» was used by one of the first Thomas P. Rona in the analytical report for Boeing «Weapon Systems and Information War» in 1976[205]. In fact, from that

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[203] Лисенко В.В. Проблеми інформаційної незалежності держави. URL: http://www.politik.org.ua/vid/magcontent.php 3?m=1&n=59&c=1318.

[204] Оверчук О. Гібридна війна проти України: як розуміти та що робити? 23 лютого 2022 року. URL: https://mind.ua/openmind/20236395-gibridna-vijna-proti-ukrayini-yak-rozumiti-ta-shcho-robiti

[205] Thomas P. Rona. Weapon Systems and Information War, Boeing Aerospace Company Seattle, Washington, 1976. July. URL:

moment on, an understanding begins that information can be a weapon. And given that the development of the economies of Europe and the United States is based on a breakthrough in information and telecommunications technologies, this sector is becoming particularly vulnerable in both wartime and peacetime. Here it is necessary to detail the directions of influence of information weapons. Its application takes place in two directions in relation to the objects of influence: the influence on the information means and systems of the enemy and the impact on human consciousness.

The first direction was also called cyber warfare, when attacks are exposed to technical equipment and systems of its software. There are entire scientific institutes in the world that are developing new and new computer viruses, viral programs and other means of disabling computers or stealing information.

The second direction is the old ways of propaganda and agitation, counter-propaganda and counter-guidance, but still unprecedented in their power of height in terms of sophistication and mass influence on people's minds. Outright lies and falsification of information are used (the term «fake» war has become widespread).

If the purpose of the first direction is to harm the life support systems of the enemy state (in the fields of energy, defense, management, etc.), then the second is aimed at achieving mass psychological treatment of people in order to destabilize the political situation in the country.

A clear example of the use of the information product as a weapon in the commission of acts of military aggression is the activity of the Russian Federation. The war in Chechnya, Transnistria, Nagorno-Karabakh, South Ossetia, Syria and Ukraine was fought, and continues in our country, with the use of

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https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Science_and_Technology/09-F-0070-Weapon-Systems-and-Information-War.pdf

information resources. The distortion of reality, the substitution of values and the total fakes carried by the masses by propagandists are not the main methods of such hybrid aggression. Russia's propaganda operations are characterized by the destabilization of the information and communication space, the use of a large number of sources of information in order to discredit and fake refutation of true messages. For example, at one time in Donbass, information was actively promoted that Donbass – is a historical part of the Russian-speaking population, traditions and values «Russian measure». Thanks to such sabotage actions, there is a distortion of the minds of citizens, who are already used as an involuntary resource. The Russian media themselves create fake pictures, film staged interviews, and spread false news. Sometimes the information comes first hand – B. Putin, S. Lavrov or D. Peskov.

Such advocacy appears to pose a particular threat given its strategic, targeted nature and full support at the public policy level. Deepening the «twinning ties between the Russian, Belarusian and Ukrainian peoples» by strengthening the position of the Russian language as «the language of international communication», supporting Russian citizens living in other countries, and their preservation «of the general Russian cultural identity». From this situation, the main question arises – how to effectively protect our information space, consciousness and identity of Ukrainians, to achieve a sufficient level of security of state development. In this situation, it is not enough to act «in response to», destroying and refuting false messages, it is necessary to resort to preventive actions, create your own quality content and achieve its widest distribution. For example, through such content in the language of culture and history to talk about the formation of identities, the role of Ukrainians in the development of Crimea, cultural ties, human rights violations, artificial militarization of the Crimean Peninsula and the Black Sea by the Russian Federation, the fate of political prisoners, etc.

Recently, an increasing number of analysts are beginning to predict that the war of the future will completely move into the

information plane, and therefore the information war will come to the fore and replace other forms of warfare. Without falling into such extremes, we still have to partially support this view. Weapons still fire, bringing destruction and human loss, but such wars have been localized in some parts of the planet. The huge advantage of the information war is that without a single shot you can master the resources of the state, if you reprogram the behavior of the enemy, convincing, for example, society in the only true Western values (annexation of Crimea just like that happened). The technology of such reprogramming has been developed, the first objects of which are the ruling elite and youth.

An analysis of doctrinal sources on the understanding of hybrid warfare suggests that under hybrid warfare («hybrid warfare») a specific modern type of war should be understood without official announcement, in the course of which the political goals of the aggressor state are achieved through timely, prepared and promptly implemented actions of a military, economic, information, diplomatic nature. At the same time, it is important to understand that in the conditions of hybrid wars a wide range of different means and methods can be used, in particular: political destabilization, undermining the economic security of the victim country, conducting information and ideological operations using regional and international media, creating centers of social tension on a national-ethnic basis, inciting interethnic hostility, creating and financing separatist groups and terrorist groups, sending to the territory of interest of sabotage and intelligence groups, bribery and blackmail of high-ranking officials, creation of an agency network in key government positions, establishment of controlled political movements and parties. An equally important qualifying feature of hybrid warfare is that, that the current aggressor state does not recognize itself as such and by all means tries to hide or veil its participation in the preparation and commission of acts of aggression and conducts active propaganda work in information a space that completely misinforms both its own citizens and foreigners. This seems to pose an extremely serious threat to the

peace and security of the world, as it may make it impossible to even rule on the question of bringing such a state to justice for aggression under international law, and then – to avoid responsibility. Therefore, the strong states themselves now prefer this type of aggression.

V. PROBLEM OF WARNING, PROTECTION AND APPLICATION OF GIBRID AGRESSION ACTIONS

The nature of modern hybrid warfare (aggression) in the XXI century is quite complex and much more refined than hybrid manifestations in the last century, as there is now a transition from three-dimensional space (land, sea and air) in four-dimensional, which includes the psyche, the consciousness of the warring parties and those who are not included in the military conflict, but in one way or another will feel the consequences of such aggression. Basic knowledge of classical wars is needed, but today it is impossible to give a decent rebuff with them alone, especially on the information front. One way or another, the world map of today is full of hybrid confrontations, both small conflicts and large-scale wars, there is a need to develop an asymmetric, hybrid response.

The security system developed by international law after 1945 cannot meet the threat of a new challenge today, and leading world organizations, such as the United Nations, are building their work based on doctrines, adopted after the Second World War. Accordingly, modern types of conflicts need a completely different legal interpretation. Of course, this is not so easy to do, as it is difficult to determine the location of «hybrid warfare» in international law, as there is still no clear framework that would outline the concept of «hybrid warfare»[206]. Therefore, it seems, first of all at the level of international law it is necessary to develop a universal definition of «hybrid warfare», to outline clearly the signs and list of acts that

[206] Левантович О. Гібридні війни XXI століття: нові виклики для медіапростору. *Вісник Львівського університету*. Серія Журналістика. 2019. Випуск 45. С. 53. DOI: http://dx.doi.org/10.30970/vjo.2019.45.9984

could be classified as committing hybrid aggression. The production of universal definition «hybrid aggression» at the international level would allow international organizations to cooperate more fruitfully in conducting preventive measures. A clear idea of what to fight would, say, promote the UN and NATO in terms of closer cooperation in countering new manifestations of aggression, including hybrid warfare, and developing a common strategy to combat this negative phenomenon.

In general, work to prevent acts of hybrid aggression is crucial to ensuring international peace and security, but it is equally important to work to end the current hybrid wars, which destabilize the environment around the world on all fronts and pose a great danger and threat to humanity. Since international law includes only civilized ways and means to resolve any conflicts, there is no doubt that a solution to this issue should be sought in the area of compliance with the basic principles and norms of international law.

What instruments of international law can be used today?

1. Appeal to the diplomatic procedures for resolving international conflicts set out in Section VI of the UN Charter[207].

2. Application of force on the basis of Section VII of the UN Charter[208].

3. Introduction of sanctions to the aggressor state within the framework of international intergovernmental organizations.

4. Exclusion from member states of international intergovernmental organizations.

5. Complete isolation and rupture of all relations with the aggressor state. Initiation of trials in international judicial bodies.

As practice shows, most of these tools do not work today. This can be demonstrated by the example of Ukraine. Although our

[207] United Nations Charter, 1945. URL: https://www.un.org/en/about-us/un-charter

[208] United Nations Charter, 1945. URL: https://www.un.org/en/about-us/un-charter

lawyers are quite active on the legal front, the results and prospects still do not look so comforting.

Of the above list of international legal instruments through the prism of hybrid aggression of the Russian Federation against Ukraine, only a few are currently working. This applies to the sanctions regime against Russia within the UN, the EE, the Council of Europe, as well as the deprivation of Russia's membership in the Council of Europe and the partial isolation of Russians in the international arena.

With regard to diplomatic means of peaceful settlement, and even more so as a force option as a last resort, it is quite difficult to lead a language, and they, as international experience shows, could be effective. The main reason is the permanent membership of the Russian Federation in the Security Council, which is completely illogical and absurd in this situation, because it is this international body that is fully responsible for international peace and human security. The aggressor State cannot take part in considering whether the aggression it has committed threatens peace and security. This does not fit into any laws of logic. Moreover, if a state has such a powerful voting instrument as a veto, its behavior (SC as a permanent member of the SC will be predetermined. As a result of no resolution on the involvement of diplomatic settlement of the conflict or the use of UN peacekeeping forces has been adopted and the situation among the permanent members of the Republic of Belarus will not change. As you know, the importance of adopting such resolutions is that it opens the door to other means of resolving the conflict, including the force option. And it works. Mention should be made of Operation «Desert Storm»[209] for Iraq, which occupied the neighboring state of Kuwait in 1990-1991. In four days, a multinational coalition force led by the United States, with the consent of the UN Security Council, liberated Kuwait from

[209] Катарина. Х. «Буря в пустелі»: як завдати нищівного удару ворогу, який переважає за кількістю. 24.01.2022. URL: https://www.5.ua/svit/buria-v-pusteli-266226.html

the occupying forces. Iraq was completely isolated and held accountable. This example clearly demonstrates that by uniting the efforts of the international community, results can be achieved even in such complex issues – war and peace.

As for initiating cases in international judicial institutions, the situation also does not seem very comforting. On February 26, 2022, Ukraine filed a lawsuit against the Russian Federation with the UN International Court of Justice on charges of genocide[210]. In addition, on March 3, the prosecutor of the so-called Hague tribunal (of the International Criminal Court) Karim Khan launched an investigation into crimes of military aggression against Ukraine. As Ukraine has not yet ratified the Rome Statute of the International Criminal Court, this was done at the request of the 39 participating States of the Statute, and the number of states has increased to 41[211]. There was also an appeal to the European Court of Human Rights. On February 28, 2022, the ECtHR received a request from Ukraine to inform the Government of the Russian Federation about the adoption of urgent temporary (safe measures under Art. 39 of the Court's Rules of Procedure in connection with «mass human rights violations committed by the Russian military in the course of military aggression against the sovereign territory of the State of Ukraine». And on March 1, the decision was made to apply the following measures: the ECHR ordered the Russian government to «refrain from military attacks on civilians and civilian objects, including housing, ambulances and other civilian objects under special protection, including schools and hospitals, as well as to ensure the safety of medical facilities immediately, their personnel and ambulances in the area under attack or siege by Russian

[210] Україна подала позов проти РФ до Міжнародного суду ООН у Гаазі. URL: https://www.bbc.com/ukrainian/news-60545890

[211] Кількість країн, які звернулися до МКС у зв'язку зі злочинами РФ в Україні, зросла до 42. URL: https://ua.interfax.com.ua/news/general/818614.html

troops»[212].

It is worth noting that in each of these cases the situation is disappointing, because not only will the process of considering the cases of the Russian Federation be, given the levers of influence on the part of the Russian Federation (the right of veto), extremely complex and protracted, but also significant problems are predicted in terms of the implementation of decisions of international judicial institutions.

Why will there be such problems? First of all, it should be borne in mind that international judicial institutions differ significantly in the procedure for the formation and especially the procedure for appealing and initiating a case from intra-national courts. The basis for the establishment of such institutions is the norms of international law, which are drawn up in the form of such an constituent act as a statute based on the agreement of the positions of the member states. As a rule, jurisdiction is clearly limited and defined in the statute by a fairly small range of issues. If a State is not a party to the statute, there are very few maneuvers in international law to institute proceedings without the consent of the respondent State. Another specificity – should also be considered in international courts for a long, painstaking, super-difficult process.

Case in the UN International Court of Justice. Usually, the UN International Court of Justice (hereinafter – the ICJ) is not so easy to apply. According to its Charter[213], the jurisdiction of the ICJ is defined as follows: (1) on the basis of applications submitted by the parties for recognition of the Court's jurisdiction (§ 2 Art. 36 of the Statute). Such a statement in the form of a unilateral act of the State concerned may be made at any time; (2) on the basis of the provisions of the current agreements and conventions (§ 1 Art. 36

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[212] Юридичний фронт: кого і як Україна може притягти до відповідальності у міжнародних судах. URL: https://dejure.foundation/tpost/1u106gg0r1-yuridichnii-front-kogo-yak-ukrana-mozhe

[213] United Nations Charter, 1945. URL: https://www.un.org/en/about-us/un-charter

of the Statute). Since both Ukraine and the Russian Federation are parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[214], which contains a provision on, that «Disputes between the Contracting Parties concerning the interpretation, application or implementation of this Convention, including disputes concerning the responsibility of a State for the commission of genocide or one of the acts listed in Article III shall be referred to the International Court of Justice at the request of either Party in the dispute» (Art. 9), Ukraine managed to initiate a case. That is, the opportunity arising from the parties' previously made international obligations under an international treaty has been used, to which both States are parties and which contains the so-called «jurisdictional article» on the procedure for resolving disputes between the parties regarding the interpretation, application and implementation of this agreement in a particular international judicial body.

In substantiating the claims, Ukraine noted that there was a dispute between Ukraine and Russia over the interpretation and application of the Convention, as Ukraine and Russia hold opposing views on whether genocide took place in Ukraine, and whether the Convention is grounds for Russia's use of military force against Ukraine to «warn and punish» for this alleged genocide. Ukrainian representatives in the ICJ stressed the illegality and unfoundedness of the invasion of Russian troops into Ukraine, as well as the distortion by the Russian side of the concept of «crime genocide», which allegedly takes place in our state under the control and assistance of the authorities. In addition, the statement said that Russia, denying the existence of the Ukrainian people as such and deliberately killing and seriously injuring Ukrainians, – itself is committing acts, which may be

[214] Convention on the Prevention and Punishment of the Crime of Genocide, 1948. URL: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

classified as genocide under the Convention.

It is worth noting that the trial of the case in the UN International Court of Justice will be long-lasting, as is the case for all judicial institutions at the international level. Despite good predictions for Ukraine, the «stumbling block» will, if not reformed by then by the UN Security Council, enforce the decision of the UN International Court of Justice. Russia has already stated that it will not fulfill it. In such cases according to Art. 94 of the UN Charter apply for enforcement of the decision by appeal to the Republic of Belarus. It is clear that a permanent member of the Russian Federation will block this process by announcing a veto. Therefore, a stalemate arises. There will be a decision, and there will be no implementation, provided there is a permanent representative in the UN Security Council with a veto. The way out of this situation is the immediate reform of the Republic of Belarus with the withdrawal of the Russian Federation as a permanent member.

Case in the International Criminal Court. As for the consideration of the case at the ISS in The Hague and the execution of the decision of this court, there are also many questions. First, is it possible to consider a case in the ICC, if neither Ukraine nor the Russian Federation has ratified the Rome Statute of the ICC, even more the Russian Federation has withdrawn its signature after the events of Euromaidan, the Revolution of Dignity? Second, how can Putin and his entourage be prosecuted individually at the international level if the Russian Federation does not betray them in a basic manner? However, even with such a pessimistic perspective, we can still talk about the positive aspects. First of all, this concerns the freedom of movement of the head of the Russian Federation and his entourage outside his country. Visits to the States Parties to the Rome Statute will be banned for them, as this will threaten their arrest, and other non-participating states condemning the Russian Federation may also issue them to the ICC. In addition, the ICC's decision is extremely authoritative and will raise questions for Ukraine about post-war reparations and demand from states in whose territories there are property,

Russian bank accounts or other property, them to restore our state. Of course, if there is such a decision, there will be fewer questions in foreign countries and they will be more willing to go to dialogue and cooperation on this issue.

Case in the European Court of Human Rights. Unfortunately, in this case, the most difficult, because from September 16, 2022, the Russian Federation will no longer be officially a party to the European Convention of 1950, and this gives it even more confidence, that it will evade all decisions that may be taken in the ECHR.

Given all these difficulties, the legal front of Ukraine, represented by reputable and qualified international lawyers, began to operate actively from the first days of the war and began work on the establishment of a Special Tribunal for the Russian Court for aggression and other crimes against Ukraine. Foreign experts and well-known statesmen from different countries are involved in this work. Even one of the proposals is to hold a trial of the Russian Federation and representatives of the Putin regime in Nuremberg. On the one hand – it is symbolic, and on the other – is not without clear applied problems – to remind humanity of the horrors of world wars and their consequences, as well as about, that the principle of non-reversal of criminal punishment also applies in the international arena and will not allow criminals to evade responsibility. It seems that the very establishment of such a military tribunal is currently the only way out for Ukraine to bring the Russian Federation to justice. Therefore, work on its creation and accordingly adoption of the statute, which would determine the procedure for its organization and operation, should be carried out as soon as possible. At the same time, Ukraine should involve not only European countries, but also others. This is due, firstly, to those disappointing predictions about the spread of invasion by Russian troops and other states and the possibility of using nuclear weapons, which in turn gives grounds to claim, that Russian military aggression is a real threat to international security in general. Secondly, even if Putin does not dare to take such steps, we

must not forget that the ancestral object of international crime is international peace and human security, which gives grounds not only to the victim State to make claims against the aggressor State, but also to all others and even to the international community as a whole. And, thirdly, the consolidation of the efforts of most states will play a preventive role in this case, which will help restore confidence in the mechanism of collective security.

Finally, it should be noted that, in addition to the use of international mechanisms to prevent and combat acts of hybrid aggression at the national level, states also need to focus on this area. First, state military doctrines should clearly outline both the very concept of «hybrid aggression» and the specific list of acts to be qualified as the commission of a crime of hybrid aggression. Second, states must work to strengthen the defense capabilities of (proper state support for the army, funding for military training, joining international military alliances, etc.). Third, within the framework of national government programs to carry out educational patriotic work through secondary schools, state institutions, to create for this purpose various public educational organizations, to establish national-patriotic holidays, to actively spread national symbols, bringing the grease love to his homeland, language, culture and traditions. Fourth, at the legislative level, to maintain and protect the state language, which is traditionally used in the territory of a particular state. Individual experts also add to this list another important component of national security – is the creation of an atmosphere of trust between the government and the population, when citizens believe in their army, military command, president, government, parliamentarians, mayors, and even village elders[215]. It seems that in the complex all these efforts should give positive results.

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[215] Оверчук О. Гібридна війна проти України: як розуміти та що робити? 23 лютого 2022 року. URL: https://mind.ua/openmind/20236395-gibridna-vijna-proti-ukrayini-yak-rozumiti-ta-shcho-robiti

CONCLUSIONS

So, a study of the outlined issue showed that the issue of war and peace still worries humanity. The war, although already under the complete prohibition of imperative norms of international law, is unfortunately present in interstate practice. Moreover, the methods and means of wartime are being modified, modernized and improved. The emergence of a hybrid war clearly broadcasts the full range of threats to the latest forms of war. It is extremely difficult to create an effective mechanism for preventing and combating acts of hybrid aggression. After all, new weapons are emerging due to scientific and technological progress, including the most dangerous – nuclear. In addition, one of the key signs of hybrid aggression is the information war, which is being waged to influence people's minds, which undoubtedly further complicates the struggle and opposition to modern hybrid wars. Eternal peace, unfortunately, remains an unattainable dream to this day. But still we must not forget the positive developments: the transition of international law from jus ad bellum to the law of peace, the proclamation of respect for human rights as a basis for the goal of the international community, recognition of aggression as the most dangerous international crime against international peace and human security, creation of international mechanisms (normative and institutional) to bring aggressor states to justice. And although quite slowly humanity has come to the quintessence – peace – the highest good, man – the greatest social value, yet this process has a positive trend and dynamics. It is hoped that in the future the emphasis in the international arena will be transferred to the plane of close mutually beneficial cooperation of states on the basis of the highest moral values – respect, tolerance, tolerance, humanity and justice. Only peace, intensive interstate cooperation in various spheres of public life can contribute to the progress of humanity. War – is regression, degradation, the path to nowhere, and peace, on the contrary – progress and the path of humanity to a bright future.

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45. Wales Summit Declaration. Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales. 05 Sep. (2014). Press Release 120. Issued on 05 Sep. P. 13. URL: https://www.nato.int/cps/en/natohq/official_texts_112964.htm

46. Zadorozhnii O. Aneksiia Krymu – mizhnarodnyi zlochyn: Monohrafiia. Kiev: K.I.S., 2015. 576 s. URL: https://books.google.com.ua/books?id=ZE_7CgAAQBAJ&printsec=frontcover&redir_esc=y#v=onepage&q&f=false

47. Oppenheim L. International law. War and Neutrality. Volume 2. Second edition. URL: https://www.gutenberg.org/files/41047/41047-h/41047-h.htm

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THE DOCTRINE'S ROLE OF IGOR LUKASHUK IN THE SCIENCE AND PRACTICE OF INTERNATIONAL LAW AMID THE RUSSIAN FULL-SCALE INVASION OF UKRAINE

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INTRODUCTION

Modern international law is facing the most crisis period after 1945, the ineffectiveness of institutional and legal mechanisms, such as the UN, non-observance of the principles of international law by states whose status assumed a leading role in the maintenance of international peace and security, the inability of international legal mechanisms to effectively counter international legal violations are making it increasingly difficult to discuss international law reform.

One of the ideological sources of such reform is undoubtedly the international legal doctrine and heritage of prominent international lawyers. For example, Raphael Lemkin's work on the concept of genocide and the Genocide Convention is used to re-think the legal nature of the crime of genocide in the context of Russian atrocities committed against Ukrainians. Igor Lukashuk's heritage certainly belongs to those who can become such sources.

Ukraine and its legal schools, which were formed historically in university centers, gave the world a lot of prominent international lawyers. In the last decades, many research areas analyze life, activity, impact on the development of international law and doctrinal views of many scientists associated with Ukraine. Our international law science returns the names of Vasily Nezabytovsky, Volodymyr Grabar, and Otto Eichelmann. It also reveals the names of Eugen Ehrlich, Hersch Lauterpacht, and

Raphael Lemkin, who for decades have been erased by Soviet approaches to the science of law.

Unfortunately, their belonging to the Ukrainian science of international law is confirmed only by territorial affiliation to their place of life, education, and activity. The turmoil of the 20th century, which sowed Ukraine, does not allow us to talk about their belonging to the Ukrainian school of international law and its direct influence on it. At the same time, Igor Lukashuk's doctrine did not just influence the latter but established a modern Ukrainian school of international law.

The professor's ideas and views on nature and the development of international law lie far beyond national borders or chronological stages. He was a versatile scholar in the field of international law and the relevance of his ideas is growing rapidly. At the same time, it is necessary to recognize and assess the impact he has made on the development of the school and doctrine of international law in Ukraine, which was his native country and in which he lived and worked for more than half of his life.

The influence of views and ideas of Dr. Lukashuk is difficult to overestimate for the Ukrainian school of international law, even from a purely quantitative point of view. For example, Volodymyr Butkevych says that "more than half a century Igor Lukashuk is the most cited researcher in Ukrainian science and practice of international law". At the same time, he notes that "the palm of the championship keep his works and their use by amateurs of science, which exploit his thoughts and doctrines in a good way, but do not refer to the first source". The substantiation of this statement is still illustrated below.

I. ROLE OF IGOR LUKASHUK'S DOCTRINE AND ITS PLACE IN THE UKRAINIAN SCHOOL OF INTERNATIONAL LAW

The important role of the doctrine of Igor Lukashuk is noted by a considerable number of lawyers. For example, a well-known Ukrainian politician and international lawyer Oleksandr Merezhko

called him "a famous Russian and Ukrainian scientist"[216]. He also gave a very high assessment of the scientist's works, in particular, as "fundamental work" he called "Modern Law of Treaties"[217].

Olga Butkevych also counts Igor Lukashuk in the "Ukrainian science of international law"[218]. The Ukrainian Association of International Law is the main Ukrainian professional association of international lawyers, also called Dr. Lukashuk as the "founder of modern Ukrainian doctrine of international law"[219].

Igor Lukashuk is particularly highly appreciated and his work is given by one of the most famous contemporary Ukrainian international lawyers, long-term President of the Ukrainian Association of International Law, and former judge of the European Court of Human Rights Volodymyr Butkevych. Professor Butkevych called him his "good teacher" and also noted that Dr. Lukashuk "created the Ukrainian system of international law education" and that "all international lawyers in our country are his students or his students"[220].

Moreover, even the Russian science of international law, at least until 2014, recognized the Ukrainian identity of Igor Lukashuk. In the necrosis of "In Memoriam", which was placed after Lukashuk's death in the Moscow Journal of International Law in 2007, it was argued that he "belonged simultaneously to Ukrainian

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[216] Мережко О.О. Проблеми теорії міжнародного публічного та приватного права. К.: Юстиниан, 2010. С. 37.
[217] Ibid. С. 59.
[218] Буткевич О. В. Історія міжнародного права. К.: Ліра-К, 2013. С. 34.
[219] Спеціальний випуск Українського часопису міжнародного права до 95-річчя Ігоря Івановича Лукашука. URL : https://www.uail.com.ua/spetsialnyj-vypusk-ukrainskoho-chasopysu-mizhnarodnoho-prava-do-95-richchia-ihoria-ivanovycha-lukashuka/?fbclid=IwAR1WHUrS70Uhr7SHGqPe9YvVBQ_CjgsOQavtmYWPuXqNbJuB9KuK_mt_oDw
[220] Володимир Буткевич: «У системі Європа — Україна велика дистанція, і вона пов'язана з непрофесіоналізмом вітчизняних фахівців». URL : https://veche.kiev.ua/journal/1146/

and Russian culture"[221]. Although the Ukrainian origin of the scientist is already being ordered, and in the announcement of the online conference of his memory, which took place in December 2021 it was called "the prominent soviet and Russian lawyer-international"[222], without mentioning Ukraine.

Igor Lukashuk was the founder of the modern Ukrainian school of international law. The list of his students is really impressive. Among them were people who created modern Ukrainian jurisprudence and politics. Thus, one can recall only the name, unfortunately, the deceased scientist, Oleksandr Zadorozhnii (1960-2017) – the long-term head of the Department of International Law of the Institute of International Relations of the Taras Shevchenko Kyiv National University (2003-2017) and the President of the Ukrainian Association of International Law (1999-2017), the parliament member for several times and founder of the first Ukrainian private law firm "Proxen".

It is especially worth noting the name of Volodymyr Butkevych, the judge of the European Court of Human Rights (1998-2008), who became the heir of Igor Lukashuk as the head of the Department of International Law of the Institute of International Relations of the Kyiv National University (1985-1998), was also the first president of the Ukrainian Association of International Law (1991-1999) and a parliament member. Professor Butkevych, together with her daughter Olga Butkevych, as well as Oleksandr Zadorozhnii, left the most valuable personal memories of his teacher, many times a good word was mentioned about him in an interview.

Another important name is Petro Martynenko (1936-2013), who from 1996 to 2001 was a judge of the first composition of the Constitutional Court of Ukraine. Igor Lukashuk got acquainted with him at the Saratov University and after moving to Kyiv offered to move

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[221] Игорь Иванович Лукашук (1926 - 2007). *Московский журнал международного права*. 2007. №1. С. 278.

[222] Онлайн-конференция памяти профессора И. И. Лукашука «Политика санкций в международных отношениях: между верховенством права и принуждением». URL : https://pravo.hse.ru/intlaw/news/533592903.html

from the position of teacher at the Department of State and International Law of Saratov Law Institute to the Department of International Law of the Kyiv State University. Also, among the prominent Ukrainian students of the scientist distinguish names O. Chalyy, S. Kozyakov, S. Voitovych, D. Grishchenko, A. Kravets, I. Paliashvli, V. Ryzhyi, E. Rulko, V. Honin, etc.

Concerning Igor Lukaschuk's contribution and its influence on the Ukrainian science of international law, first of all, it is necessary to note his textbook "International Law", which was published in 1971 under the editorial office of the scientist and Volodymyr Vasylenko[223]. This textbook had become the first Ukrainian-language manual on international law since 1931. Volodymyr Butkevych wrote that "it was highly appreciated by the scientific and pedagogical community. I do not know any negative feedback on the quality of the textbook"[224].

This trend has continued. The impressive statistics of the work of the "Kyiv" period of the scientist's life and activity is not just his indicator. It is the contribution of the Ukrainian school of international law to doctrine and practice. Supported by Dr. Lukashuk's authority, these works were actively used in pedagogical and scientific work. There are quoted abroad too. Throughout his life, Igor Lukashuk's work was in the most active scientific circulation, and both parts of the 2005 edition of the textbook ''International Law'' became a "new classic" for many generations of international lawyers.

The move of Igor Lukashuk to Moscow did not break this connection. The scientist himself had practically kept constant contact with the Ukrainian school of international law and his students after the USSR collapse. For example, in 1992 he agreed to

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[223] Міжнародне право : підручник / за заг. ред. І.І. Лукашука, В.А. Василенка. Київ : Вища школа, 1971. 377 с.

[224] Буткевич В. Г. «Любіть міжнародне право, шануйте міжнародне право, служіть міжнародному праву – це окупиться сторицею» (до 95-річчя професора Ігоря Івановича Лукашука). *Український часопис міжнародного права*. 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 84.

join the editorial board of the newly created "Ukrainian Journal of International Law". It is an official periodical of the Ukrainian Association of International Law. And in the first issue of the "Chasopys" there was published an article by Igor Lukashuk on the topic "Interrepublican agreements and human rights", which was written in Ukrainian[225].

This connection had been maintained in the future. Even in the last years of his life Igor Lukashuk followed the Ukrainian school of international law and used Ukrainian-language works of Ukrainian researchers. In particular, during the study of the historical stages of international law development in general, and the law of international responsibility in particular, Dr. Lukashuk applied the work of the Ukrainian historian of international law A. Dmitriev "Westphalian Peace and International Law"[226].

Concerning the direct impact of the scientific heritage on the formation of modern Ukrainian legal doctrine of international law almost all Ph.D. and doctoral dissertations contain references to books, monographs, and articles of his works.

However, the aggression of the Russian Federation against Ukraine with the further occupation of Ukrainian territories of the Autonomous Republic of Crimea and some parts of Donetsk and Luhansk regions and the resolution of a full-scale war led to objectively justified rejection by Ukrainian lawyers of the modern Russian doctrine of international law. Moreover, termination of references and use of Russian authors in scientific work. It is necessary to emphasize the substantiation of such an approach, taking into account the Russian lawyers' justification of the blatant violations of international law and the denial of its basic principles. It has called in questions regarding the quality of their scientific publications.

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[225] Лукашук І.І. Міжреспубліканські угоди і права людини. *Український часопис міжнародного права.* 1992. Вип. 1. С. 51-57.

[226] Дмитрієв А.І. Вестфальський мир 1648 року і сучасне міжнародне право: Монографія. К. : Ін-т держави і права ім.В.М.Корецького НАН України; Київський університет права, 2001. - 426 с.

However, this cannot serve as a rule for ignoring the scientific heritage of Igor Lukashuk. First, he died in 2007 – long before Russia's aggression against Georgia and Ukraine, its occupation of part of the Ukrainian territory, launching a full-scale war, and manipulation of its status as a permanent member of the UN Security Council in resolving the Syrian issue, direct or indirect interference in the conflicts in Libya, Mali, etc.

Secondly, our research shows that the above-mentioned facts contradict the scientist's legal views and would certainly be a study if he had the opportunity to research them and comment on them. And, thirdly, Dr. Lukashuk's doctrine is a part of the Ukrainian science of international law and to cut it means giving an invaluable treasure of ideas and concepts to Russians.

Moreover, references to the ideas, concepts, and views of Igor Lukashuk on international law can strengthen Ukraine's position in opposition to the Russian Federation at the official level and in international judicial institutions. As we will show in the next sub-section, in Lukashuk's works you can find many arguments for criticism of both actions and the position of Russia on its actions in the last decade and a half.

Thus, it is possible to state that Igor Lukashuk should be a representative, first of all, of Ukrainian science of international law and a founder of its modern direction. The scientist made both a methodical and doctrinal contribution to its formation and development and prepared a whole range of famous Ukrainian international lawyers and diplomats. Nonetheless, it should be noted that the use of its scientific heritage in modern domestic international legal studies often refers to it only symbolically, not using all the potential and depth of its international legal views.

It is noteworthy, that independent academic publishing companies, for example, "Martinus Nijhoff Publishers" while mentioning relevant at that time the scientist's post as a professor

at the State and Law Institute of Moscow, noted him as Ukrainian[227].

However, the main task for the representatives of Ukrainian science is to preserve Igor Lukashuk's well-known name and heritage in scientific circulation and not to submit it to the "cancel culture" because of his life and work period in Moscow. It is necessary to remember that the scientist was a Ukrainian and recognized himself as such, for many decades he lived and worked in Ukraine and his connection with our land and belonging to Ukrainian science is indisputable.

The priority in this context is to return the scientist's work to the scientific agenda in Ukraine and to ensure their translation into Ukrainian. First of all, we are talking about the key works of Igor Lukashuk's recent years of life and activity: "Hlobalizatsiia, derzhava, pravo, XXI stolittia" ("Globalization, the State, the Law, the XXI century"), "Pravo mizhnarodnykh dohovoriv" ("The Law of Treaties"), "Pravo mizhnarodnoi vidpovidalnosti" ("The Law of International Responsibility"), both parts of books "Mizhnarodne publichne pravo" ("International Law"), etc. Taking into account that the international publishing house "Wolters Kluwer" owns its copyright, a positive solution to this issue is more than likely.

Besides, as was mentioned many times, the scientist did not uphold and would rather oppose the atrocities of the Russian authorities against Ukraine since 2014. Therefore, the protection of his reputation and the use of his achievements for the development of domestic international law science is the most priority goal for all international lawyers in Ukraine.

II. PERSPECTIVES ON USING IGOR LUKASHUK'S DOCTRINE IN THE MODERN INTERNATIONAL LAW

Especially important and actual achievements and ideas of the scientist become in our time and gain values. Gross and flagrant violations of the fundamental principles of international law by the

[227] Bedjaoui, M. (Ed.). (1991). International law: Achievements and prospects . Martinus Nijhoff Publishers. p. 301

Russian Federation and its ruling regime would have received not only support but also a judgment from Igor Lukashuk. His ideas include the supremacy and respect of international law and the promotion of global interests. That is why now Dr. Lukashuk's doctrine can become not only a way to solve the problem of Russian aggression, but also to prevent similar precedents in the future.

It is also assumed that Igor Lukashuk's views may be relevant to political figures as well. For example, one of his students, Serhii Voitovych, expressed the opinion that "the ideas of Professor Lukashuk, as one of the most recognized scientists of Ukraine and Russia of the 20th century, about international-legal consciousness and international law, can teach many of those modern leaders of states that do not respect the elementary norms of international law in real politics"[228]. This statement concerns the long-term president of the Russian Federation V. Putin. However, can be applied equally to all heads of state and governments.

Despite the scientist's significant contribution to the development of the law of treaties[229], unfortunately, not all of his theoretical views and concepts were implemented in a practical form. For example, there was for the first time, Igor Lukashuk raised the issue of the differences between the potential and valid participants of the treaty and attempted to classify them. But those ideas did not receive further development.

In our opinion, one of the key reasons for this was the belonging of Igor Lukashuk, first, to the Soviet School of international law, and later official belonging to the Russian one. During the cold war and East-West confrontation in the post-war world, such processes were also spread to neutral areas, such as international law. The idea of the USSR representative, or even more so, their practical implementation,

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[228] Войтович С. Слово про вчителя: професор І. І. Лукашук (1926–2007). *Український часопис міжнародного права.* 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 204.

[229] Yaremchuk, V. (2019). Periodization Of Igor Lukashuk's Research On The Law of Treaties. Eur. JL & Pub. Admin., 6, 89.

faced many difficulties because even in the most reasonable form could be perceived as an act of defeat.

Another factor that influenced the limited application of Dr. Lukashuk's legal opinions in science and practice became the closeness and limitation of the Soviet science of international law. The free scientific discourse was impossible and limited to political and ideological barriers. Some topics were prohibited from a discussion, others should be examined only in the ideological key dictated by the Communist party's program.

And the bullet point was a lack of relevant sources widely used in the Western science of international law. We should keep this in mind while analyzing Lukashuk's doctrine of "Kyiv"[230] and the beginning of the "Moscow" periods of his life, that it contains research and references to a wide range, including American and European studies on international law. However, in the possibility of their use, the scientist was the exception rather than the rule.

This led to the fact that by the beginning of the 1990s the science of international law in the USSR was considerably lower and more limited than in other parts of Europe and North America. This affected the level of reasonableness of proposals expressed by representatives of the post-Soviet doctrine and the willingness to accept them by foreign colleagues. Unfortunately, this became an obstacle to the application of scientist's international legal views too.

It also became an obstacle at later stages. Despite the recognition of Igor Lukashuk's contribution based on the results of his work at the International Law Commission and his input to the codification of the law of treaties[231] and the law of international

[230] Яремчук, В. (2021). Наукова та практична діяльність І. І. Лукашука в сфері міжнародного права у «Київський» період його біографії. Право і суспільство. С. 321-326.

[231] Яремчук, В. В. (2018). Відображення правових ідей І.І. Лукашука у Віденській конвенції про право міжнародних договорів. Альманах міжнародного права, (19), С. 13-23.

responsibility[232], he was not known to the general public. This was not a subjective assessment of the scientist's heritage, but a sign of the quality of post-Soviet and Russian science of international law, when the original concepts were not offered first, but later only served the foreign policy of putin's regime.

Nevertheless, this does not mean that Igor Lukashuk's scientific heritage cannot be taken into account in the international legal doctrine and practice at this stage and later. Especially, while a permanent member of the UN Security Council grossly violates the fundamental principles of international law, that contradicts the ideas of the representative of the doctrine of this state, which go against such a policy, is especially valuable.

In the science of international law, there are various proposals for further implementation of the doctrinal ideas of Igor Lukashuk in international law. For example, according to I. Khmeleva, his views on the institution of recognition in international law are perspective. She considers that the doctrine "can be used to protect the national interests of Ukraine in the conditions of the ongoing Russian-Ukrainian international armed conflict"[233].

In her opinion, particular value views of Igor Lukashuk on:

• the key role of the basic principles of international law, as well as the practice of states and international organizations in regulating relations concerning recognition;

• inability to recognize a state formed as a result of aggression following the principle of non-use of force [234].

We fully agree that the formal consolidation of these ideas in the form of international law will help to eliminate the problems of

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[232] Яремчук, В. (2020). Розробка І.І. Лукашуком теоретичних основ права міжнародної відповідальності. Юридичний бюлетень. Випуск 13. С. 51-61.

[233] Хмельова І. Є. Погляди І. І. Лукашука на інститут визнання у міжнародному праві. *Український часопис міжнародного права*. 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 247.

[234] Ibid. С. 247.

institutional recognition. They are particularly important in the context of the actions of the Russian Federation regarding the disrespect for the territorial integrity of Ukraine and Georgia and in the future of Moldova and other states.

We consider that the scientist's views, which in the future can be taken into account and implemented in modern international law, are the following:

- the condemnation of Russia's aggressive policy in violation of norms and principles of international law in the fight against aggression of the Russian Federation against Ukraine;
- views on the modernization of international law under the influence of globalization processes;
- views on the improvement of the law of treaties.

In our opinion, the substantiation of facts of ***international law norms violation by the Russian Federation and the possibility of bringing it to international responsibility***, based on Dr. Lukashuk's legal ideas and concepts could be extremely authoritative. Research of modern international legal views, which are based on the Russian Federation through the prism of views of Igor Lukashuk leads to interesting conclusions.

History in general and the history of law, in particular, does not tolerate the conditional case, it is objectively expedient to assume what Igor Lukashuk's assessment of Russian aggression towards Ukraine might be. The scientist strongly condemned aggression as an instrument of international policy. For example, in a 1991 letter to the editor-in-chief of the American Journal of International Law, commenting on the international community's reaction to Iraq's aggression against Kuwait, he expressed his belief that "Regardless of the outcome of the [war] in the Gulf, potential aggressors will now have to consider that their crimes will be met with a decisive response by the international community"[235]. This thesis is unambiguously applied to the reaction of the international community to the Russian

[235] Notes and Comments. *American Journal of International Law*. 1991. Vol. 85. Pp. 537.

aggression against Ukraine.

Even preliminary analysis of this problem allows asserting that the scientist would categorically not support the actions and statements of modern Russian authorities. For example, as is known, on the 8th of December, 2020 the president of the Russian Federation v. putin signed a law that introduced amendments to procedural codes, according to which the rules of international agreements of the Russian Federation in their interpretation are not allowed to be applied, contrary to the Constitution of the Russian Federation. In other words, de facto, the primacy of international law in the internal system of law of the Russian Federation has been abolished, including to prevent the implementation of decisions of the European Court of Human Rights.

Instead, Lukashuk emphasized that "the inalienability of basic human rights and the state's duty to ensure their means that the relevant principles and norms occupy a special position in the legal system of the state" and that the proper provision of human rights is ensured "through the harmonization of international and domestic law". Based on these theses and the analysis of the norms of the Constitution of the Russian Federation, the scientist concluded that "generally recognized norms of human rights should be applied even if the rights which are derived from them are not enumerated in the Constitution of [Russia]"[236].

The fact approach applied by the current Russian authorities contradicts the professor's ideas and his former students confirm that. For instance, V. Butkevych is convinced that "Igor Lukashuk's position, which is based on the fundamental norms of contemporary international law and disavows the groundless territorial claims of V. Putin and his subordinates, simultaneously disavow the evil foundations of the so-called Putin's new political paradigm"[237].

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[236] Лукашук И.И. Право международной ответственности : монография. Москва: Волтерс Клувер, 2004. С. 75.

[237] Буткевич В. Г. «Любіть міжнародне право, шануйте міжнародне право, служіть міжнародному праву – це окупиться сторицею» (до 95-

Such a vision is supported by some representatives of Russian law science too. In particular, R. Bathiev believes that the approaches of the Russian authorities, in particular, due to the non-recognition of the ECHR decisions, contradict the Constitution of the Russian federation, according to which: "Everyone shall have the right to appeal, according to international treaties of the Russian federation, to international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted", and would not have found... understanding by Igor Ivanovich Lukashuk, a great scientist and a wonderful person"[238].

In light of this, it is also vital to see Lukashuk's vision of the consequences of establishing the non-constitutionality of a treaty. From his point of view, this fact cannot serve as a basis for the uniqueness of international law but only makes it impossible to implement it at the national level. At the same time, the state will continue to be bound by such a treaty, and the consequences of their non-fulfillment will also be the responsibility of international law[239].

It can be said that Dr. Lukashuk would strongly reject new proposals on the division of the world into spheres of influence, which are expressed in our time by the Russian federation. As is known, the Ministry of Foreign Affairs of the Russian Federation on the 15th of December handed over to the US State Department proposals, which established spheres of influence in Central and Eastern Europe, as an example of the Yalta system of international relations[240].

річчя професора Ігоря Івановича Лукашука). *Український часопис міжнародного права.* 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 112.

[238] Воспоминания о профессоре И.И. Лукашуке. URL : https://eurasialaw.ru/nashi-rubriki/persona-grata/vospominaniya-o-professore-i-i-lukashuke

[239] Лукашук И.И Международное право в судах государств. С.-Пб.: Россия-Нева, 1993. С. 242

[240] Росія пропонує США відмовитись від включення до НАТО колишніх радянських країн. США й НАТО відповіли. URL :

This absurd proposal would have been unequivocally criticized by scientists. This is also indicated by the fact that the Russian Federation offered the US to draw up it in the form of an international treaty. And the scientist consistently followed and supported the position according to which modern international law does not recognize such international agreements, in the form of which "spheres of influence and interests have been formed"[241]. In his opinion, such agreements contradict international law, which neutralizes Russian proposals a priori.

Another outrageous position of the Russian federation, which cannot withstand criticism from the point of Lukashuk's view, is the justification of the temporary occupation of Crimea and aggression against Ukraine by the Russian authorities. Thus, in March 2014, V. Putin justified the actions of his state in relation to Ukraine by saying that an anti-constitutional coup had taken place and the Russian Federation was not responsible for its obligations to the new government[242].

At the same time, the scientist emphasized that "invalidity, termination or suspension of the agreement does not affect the obligation of the state or organization to fulfill any obligation written in the agreement, which is valid for them according to international law, regardless of this agreement"[243]. He defined, in particular, the rules of customary law. The principles of non-interference in internal affairs, inviolability of borders, and

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https://suspilne.media/190367-rosia-proponue-ssa-vidmovitis-vid-vklucenna-do-skladu-nato-kolisnih-radanskih-krain/

[241] Лукашук И.И. Современное право международных договоров: Заключение международных договоров. В 2-х томах. Т. 2. М.: Волтерс Клувер, 2004. С. 46-50.

[242] Путин: Россия не рассматривает присоединение Крыма. URL : https://www.bbc.com/ukrainian/ukraine_in_russian/2014/03/140304_ru_s_putin_ukraine_statement

[243] Лукашук И.И. Современное право международных договоров: Заключение международных договоров. В 2-х томах. Т. 2. М.: Волтерс Клувер, 2004. С. 89.

territorial integrity exist in international law regardless of whether bilateral treaties between states are in force or not. Accordingly, the above justification, in addition to contradicting real facts, is a priori illegitimate from the point of view of Lukashuk's concept.

As we have already highlighted, the promotion of these ideas, in particular in the context of international opposition to Russian aggression against Ukraine, can significantly strengthen the position of our state in public discourse. Representatives of the criminal Putin's regime will be forced to oppose one of the most authoritative lawyers in the modern history of Russia, and one who was Ukrainian by origin and recognition.

Also, the case around aggression against Ukraine has actualized the views of the scientist on the ***modernization of international law under the influence of globalization processes***. The inability of the international community to prevent the war, as well as the lack of effective and clear instruments to counter it after the beginning, demonstrate the need to improve the entire international legal institutional mechanism.

According to the scientist, "mankind has entered the XXI century, which is characterized by the growing process of globalization... A single world community is formed". In this connection, he believes that there is a need for the modernization of international law. Because "the complex regulatory system that occurred during the Cold War to some extent ceased to correspond to new realities. First of all, it concerns political norms and the so-called rules of the game. The change of political conditions has deprived many political norms of their foundation." Therefore, he stated "the need to create a new world order based on a high level of cooperation to ensure national and international interests of countries"[244].

Despite his work in Russia and cooperation with its government, the scientist was aware of and clearly articulated the state's challenges. He saw three possible options for its development:

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[244] Лукашук И. И. "За международным правом будущее". Международное публичное и частное право. 2006. №4. С. 2-4.

1) optimistic: successful advancement on the main way of creating a post-industrial and information society with a developed economy and democracy;

2) undesirable: delay in reforms, stagnation, weakening of the state and the rule of law, the transformation of Russia into a secondary state;

3) catastrophic: developments in Russia and its relations with the world lead to a nuclear catastrophe[245].

Talking about the specific statements of the scientist, then even considering the case of the Iraqi aggression against Kuwait in 1990-1991 Dr. Lukashuk made, at that time, prophetic thoughts for 2014-2022, that "Under the existing international system, it is impossible to make sufficiently radical decisions", indicating that a cumbersome international system can slow down the adoption of the necessary measures. To remedy this situation, the scientist proposed "to create a parliamentary assembly within the framework of the United Nations", but at the same time admitted that "revision of the UN Charter may take a long time"[246].

To work out the relevant proposals and directions of changes, the scientist proposed in the second half of 1990 called the "world parliamentary congress" under the name "International law order of the XXI century". This congress, in his opinion, would have "to define the global legal order of the twenty-first century"[247].

It demonstrates Lukashuk's visionary gift, which allowed him more than convincingly to predict the risks that will be faced by the world legal order in the future and, unfortunately, will affect our country. It is worth bearing in mind the validity and depth of the proposals that were made by scientists.

First of all, it should be recognized that international

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[245] Лукашук И.И. Глобализация, государство, право, XXI век. М. : Спарк, 2000. С. 253.

[246] Notes and Comments. *American Journal of International Law*. 1991. Vol. 85. Pp. 537.

[247] Ibid. pp. 538.

cooperation is conducted almost exclusively through representatives of the executive branch: heads of state, government, and foreign ministers. At the same time, cooperation at the level of the legislature is practically amorphous. We believe that few will argue that different kinds of "parliamentary assemblies" in different international organizations are mostly symbolic (The European Parliament is an exception in this case, but the EU is a supranational union).

Therefore, the deepening of interparliamentary cooperation proposed by Lukashuk, in particular through holding a global congress or in another form at the universal level, can become, if not the key, then one of the effective tools for solving the challenges facing the international community. At the same time, as he noted, it should not be about the legislative function, but about the visionary, strategic definition of the principles of the world legal order.

The international legal views of the professor are especially vital in ***improving the rules of law of treaties***. Notwithstanding the active participation of the scientist in practical work on the codification of this branch in 1960-1980 and constant work in the development of doctrine in this area, many of his ideas remained unfulfilled.

A way to take into account the legal views of the scientist in the field of international law is by developing the concept of desuetude, as one of the forms of treaty termination. As we said above, the scientist considered this form as a way not of formal, but of actual termination of the contract as a result of the fact that its provisions cease to be fulfilled by the participants[248].

The scientist noted that it is very often possible to speak about desuetude in the case of agreements concluded a long time ago, and the parties simply forgot about them, because the obligations which they foresee lost value or are blocked by the subject of other

[248] Курс международного права: Отрасли международного права. В 7-ми томах. Т. 4 / Бардина М.П., Лукашук И.И., Сандровский К.К., Усенко Е.Т.; Отв. ред.: Лукашук И.И. М.: Наука, 1990. С. 74-75.

agreements. However, modern international practice shows a wider range of such agreements, in particular, they include not implemented ones because of the refusal of one of the parties, but whose recognition of validity leads to fundamental importance not only for the interests of the other party but for the international legal order as a whole.

In particular, in the conditions of Russian aggression against Ukraine, when Russia is in every way aversion to the observance and implementation of the interstate agreements concluded by February 2014 at the same time, our state needs to prove state to prove and insist that the respective obligations, in particular, regarding respect for the territorial integrity of Ukraine. The acts and violations are not only factual, but also continuing, since they are desuetude, but they do not change the character of Russian actions' non-validity.

Accordingly, we consider the doctrinal development of the concept of desuetude treaties and their practical implementation to meet the interests of modern international law. It will address the problem of gross disregard for international obligations and create opportunities for future violations.

Consequently, it is possible to state that despite the significant contribution of Igor Lukashuk to the development of international law practice of the XX – early XXI centuries, many of his ideas have not been realized. Now, in the conditions of the crisis of international relations, there is a chance to re-think and implement them to solve the current problems facing the international legal community. Moreover, Ukraine should be particularly interested in promoting the concepts of the scientist in the international air force to counter challenges and threats, in particular from the Russian federation.

III. WORLDWIDE RECOGNITION OF IGOR LUKASHUK'S DOCTRINE

The progressive development of any science is impossible without the contribution of specific personalities, which, by their daily work and enthusiasm, are engines of new ideas and concepts that change the present-day paradigms. The active development of international law after the Second World War has opened several names of prominent theorists R. Jennings, T. Elias, J. Crawford,

W. Schabas, M. Shaw, and many others formed the image of international law we know now.

However, often their contribution does not find proper recognition or finds it very late. For example, M. Bem, commenting on the international recognition of R. Lemkin in the development and consolidation of the concept of "genocide" in international law, wrote that "long time... Name of R. Lemkin was half-forgotten, and his contribution to the theory and practice of international law was not properly assessed"[249]. As we can see below, the worldwide recognition of Igor Lukashuk is on the verge of realizing his contribution to the science and practice of international law and underestimation.

Especially impressive is the number of quotations and reviews of Lukashuk's works. To illustrate this, V. Butkevych notes that according to statistics the scientist is ahead of any of the post-Soviet and Eastern European international lawyers by the number of reviews and quotations. Of course, these indicators are only relative, but it is clear that through the prism of numbers we can also estimate the extent of influence of scientific opinions of the scientist[250].

Igor Lukashuk's influence on the doctrine of international law of the former Soviet Union states was also noted in European and American science. For example, he was noted by professor of Oxford University F. Berman in his review of the book of Estonian international lawyer R. Mullerson "Ordering Anarchy: International Law in International Society"[251].

According to F. Berman Lukashuk's idea of fundamental

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[249] Бем М. В. Міжнародно-правові погляди Р. Лемкіна : автореф. дис. ... канд. юрид. наук : 12.00.11 Одеса, 2014 С. 9-10ю

[250] Буткевич В. Г. «Любіть міжнародне право, шануйте міжнародне право, служіть міжнародному праву – це окупиться сторицею» (до 95-річчя професора Ігоря Івановича Лукашука). *Український часопис міжнародного права.* 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 86.

[251] Mullerson R. Ordering Anarchy: International Law in International Society. Leiden, Boston: Martinus Nijhoff, 2000. Pp. x, 400.

principles as an element that combines different norms and institutions, and avoids the tendency to decorate them automatically with the bright of *ius cogens* and *erga omnes,* in part because fundamental principles are often in fact or would seem to be in confrontation with each other (a good example is non-interference in the internal affairs of states and respect for human rights)[252].

W. Butler, in his article for the American Journal of International Law, gave a high assessment of the monograph "Law of International responsibility", calling it comprehensive and one that stands out among others[253]. He also noted the two-volumes' work "Suchasne pravo mizhnarodnykh dohovoriv" ("Modern Law of Treaties") is among the key academic paper on the post-Soviet doctrine of international law[254].

Other works of the scientist were also recognized. For example, L. Malksoo highlighted Lukashuk's two-volume textbooks as "a noteworthy exception", while taking the background of other Russian textbooks, which, for the most part, had collective authorship[255]. D. Bederman noted the scientist's work of the scientist (in particular, in the singing-author with R. Mullerson) on the international legal challenges facing third-world countries[256].

Foreign specialists paid attention to the methodological completion of the scientist's work. For example, American lawyer B. Ferencz in the review of the collective monograph '"The

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[252] Recent Books on International Law. *American Journal of International Law*. Vol. 98, pp. 855-883.

[253] Butler W. E. Post-Soviet Russian doctrinal writings: an overview. *American Journal of International Law*. 2012. P. 181.

[254] Butler W. E. Post-Soviet Russian doctrinal writings: an overview. *American Journal of International Law*. 2012. P. 181.

[255] Malksoo L. International Law in Russian Textbooks: What's in the Doctrinal Pluralism? *Gottingen Journal of International Law*. 2009. Vol. 1, No. 2. P. 282.

[256] Bederman D.J. Appraising a Century of Scholarship in the American Journal of International Law. *American Journal of International Law*. 2006. Vol. 100, No. 1. P. 43.

Nuremberg Trial and International Law'' noted that Igor Lukashuk "methodically" considered the evolution of the concept of aggression as a criminal offense[257].

Also noted is the scientific maturity of the scientist. W. Butler mentioned that Igor Lukashuk was the first in the Soviet and post-Soviet science of international law since 1940 to prepare and publish an author's textbook on international law in 1998, having come out of the framework of a collective author approach to such publications, which has dominated for many decades[258].

In addition, the scientist's publications were marked by different international journals. For example, in 1997 Lukashuk's article "Zvychaievi normy suchasnoho mizhnarodnoho prava" ("Customary Norms of Modern International Law") was noted in the section "Selected Articles" of the magazine "American Journal of International Law"[259].

Besides direct scientific influence, Lukashuk influenced indirectly the theory and practice of international law through his students, who work at high positions in the international legal sphere. Some of them (Volodymyr Butkevych, Roman Kolodkin), we have already mentioned earlier. Also, can be called the name of the representative of Sierra Leone Abdul Gadire Koroma, who was a judge of the International Court of Justice from 1994 to 2012, a representative of Azerbaijan Latif Huseynov, a fully-fledged judge of the European Court of Human Rights since 2017, and others.

Unfortunately, the topic of the direct influence of Lukashuk's views on the doctrine of European, North American, and African experts in international law remains unexplored, although there is some evidence about the scientists who were inspired by his ideas

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[257] Ferencz B.B. The Nuremberg Trial and International Law. by George Ginsburgs, V. N. Kudriavtsev. *American Journal of International Law*. Vol. 86, No, 1. Pp. 211

[258] Recent Books on International Law. *American Journal of International Law*. 2007. Vol. 101, P. 918.

[259] Collected Essays. American Journal of International Law. Vol. 91, No. 4. 1997. P. 771.

and concepts. For example, V. Butkevych says that in personal communication Swiss judge and former judge of the European Court of Human Rights L. Wildhaber one of his books " Treaty-Making Power and Constitution – An International and Comparative Study" wrote "being under the impression of the mentioned work of Lukashuk [it is about "the authorities representing the state during the conclusion of a treaty"[260] – author's note], but to get it, he needed to spend a titanic effort"[261].

Among foreign experts in the field of international law, who referred to Lukashuk's works, it is worth mentioning the Polish scientist K. Skubiszewski. In article "Application of law by international organizations", referred to the monograph of Igor Lukashuk "Dzherela mizhnarodnoho prava" ("Sources of International Law"). Another example, the Hungarian scientist E. Csatlos cited Lukashuk's paper in the article "The Legal Regime of Unilateral Act of States"[262].

At the same time, not all international legal opinions of Lukashuk received positive feedback from his colleagues from Europe and the USA. For instance, D. Shelton took into account the scientist's views that the state cannot bear obligations to which it did not express consent and on the non-recognition of collective interest as such that is higher than the individual interest of a member of the international community in the "voluntarist" course of international law[263].

However, it cannot be argued that the name of Igor Lukashuk became a "brand" for the world science of international law, which

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[260] Лукашук И.И. Органы, представляющие государство при заключении международных договоров. К., 1965. 93 с.

[261] Буткевич В. Г. «Любіть міжнародне право, шануйте міжнародне право, служіть міжнародному праву – це окупиться сторицею» (до 95-річчя професора Ігоря Івановича Лукашука). *Український часопис міжнародного права.* 2021. Спецвипуск присвячений 95-річчю з дня народження проф. І. І. Лукашука. С. 88.

[262] Csatlos E. The Legal Regime of Unilateral Act of States. *Miskolc Journal of International Law*. 2010. Vol. 7, No. 1. P. 44.

[263] Shelton D. Normative Hierarchy in International Law. *American Journal of International Law*. Vol. 100, No. 2. P. 299.

became, for example, the name of F. Martens. It is worth noting there is no English-language article about him on the online encyclopedia "Wikipedia", while there is an article about another representative of the Soviet international legal doctrine G. Tunkin[264]. There are objective reasons for this status quo.

Thus, one of the main obstacles to the worldwide recognition of Lukashuk's contribution to international law was the language, or, more precisely, the translation barrier. This statement is also true of the scientific heritage of his other prominent colleagues, in particular V. Koretsky, D. Levin, G. Tunkin, and others. They could not always use decent translations, which is especially relevant in the case of official international documents.

Foreign colleagues recognized this problem. Thus, the American lawyer A. Rubin, commenting on the works of Dr. Lukashuk, associated the "vagueness" of his legal formulations concerning the translation. Moreover, A. Rubin considered that it resulted in the "intelligence or honesty" of scientists with whom the scientist disagreed.

Instead, in the post-Soviet space and some other states, the name of Igor Lukashuk and his scientific heritage are recognized and are in active scientific circulation. His textbooks, monographs, and books will continue to serve as an essential source for new generations of lawyers from different countries

This is facilitated by his rich educational, methodological, and teaching methods heritage. A. Saidov spoke about the "significant contribution" made by Igor Lukashuk to the development of teaching international law in Russia, Ukraine, and the post-Soviet space: "Developing the traditions of his scientific predecessors, he created a new generation of international law textbooks"[265]. He also emphasizes that "Lukashuk reflects both an expression of the legal consciousness of modern humanity and an artist who, creatively

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[264] Tunkin, G. Biography. Wikipedia. URL: https://en.wikipedia.org/wiki/Grigory_Tunkin

[265] Саидов А.Х. Памяти патриарха российской науки международного права И. И. Лукашука. URL : https://center-bereg.ru/l3024.html

predicting the future, cleared his way"[266].

Therefore, it has to be admitted that the figure of Igor Lukashuk still expects to recognize his contribution to the development of science and practice of modern international law. Unfortunately, in the fifteen years since the scientist's death, there have been no appropriate measures to honor his memory, both at the international level and in Ukrainian or Russian international law sciences. This is an obstacle to the further implementation of its work for the benefit of law and society.

CONCLUSIONS

1. For the Ukrainian science of international law Igor Lukashuk is not just one of the most prominent representatives in its history, but also one of the founders. Unfortunately, after a period of life and work in Moscow, he is associated with the Russian science, with which one cannot be reconciled, especially amid the Russian full-scale invasion of Ukraine. Ukrainian lawyers must defend the Ukrainian identity of the scientist and integrate his doctrine into scientific circulation.

2. Even though, since the death of Igor Lukashuk has passed more than fifteen years, his works do not lose relevance and ability to be used in new scientific developments and the practice of international law. His ideas and views are especially applicable in the context of the Russian war against Ukraine since they allow to justify the illegality of Russian actions and the necessity of their punishment. Lukashuk's views are vital in possible directions of development of the law of treaties and reforming of international law under the influence of globalization processes.

3. Although for the post-Soviet space Igor Lukashuk remains the authority, for a wide range of experts from other countries and regions, his heritage remains unknown. Nevertheless, the scientist's research contains a fresh and unique view of the past and the future of international law. It may form the basis of some

[266] Ibid.

decisions to improve the effectiveness of international legal mechanisms. It can be noted that his heritage should still be accessible to the general public, for instance, through a translation of his works. There is a chance to lead this process and to fully enter its name into the history of international law, just as a Ukrainian international lawyer.

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PART II

INTERNATIONAL LEGAL REGULATION: COMPLIANCE WITH THE DEMANDS OF THE MODERN WORLD ORDER

THE SPECIFICITY OF CONFLICT REGULATION OF OBLIGATIONS ARISING FROM DAMAGE IN PRIVATE INTERNATIONAL LAW

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INTRODUCTION

The integration processes of the economy of states, the activation of the processes of migration of the population, as well as the social activity of citizens of different countries determined the significance of the study of conflict issues of non-contractual (tort) obligations. Thus, systematically harmful events that occurred in one country appear in another or even in several countries. In particular, there is a growing number of cases of compensation for damage caused by recent global environmental disasters, or damage associated with traffic accidents outside the country of the victim, or damage caused to consumers by defects in goods manufactured in other countries. All this leads to the emergence of so-called non-contractual cross-border obligations.

Non-contractual obligations are quite diverse; they are divided into certain types, each of which has its own specific features and differences. The main types of non-contractual obligations are the following: obligations arising from the infliction of harm (tort obligations); obligations arising from unfair competition; obligations for unfair negotiation at the conclusion of the contract; obligations to cause damage due to defects in goods, works or services; liabilities arising from unjust enrichment.

The relevance of this topic is increasing due to the fact that recently the application of the principle of autonomy of the will of the parties to obligations arising from damage and unjust enrichment has been expanded. The protection of the parties in disputes over obligations arising from bad faith negotiation at the conclusion of contracts has also been expanded.

Insignificant attention was paid to the study of non-contractual obligations in the literature, thus separate studies were carried out mainly on certain types of obligations, mostly torts/delicts. In particular, certain aspects of the legal regulation of non-contractual obligations in international private law were highlighted in their scientific works by such domestic and foreign scientists as: A.S. Dovgert, V.I. Kysil, O.O. Otradnova, I.V. Troshchenko, B.Y. Rebrish, O.D. Kutateladze, A.V. Bankivskyi, G.K. Dmitrieva, N.Y. Yerpylaeva, V.P. Zvekov, M.A. Manukyan, E.A. Patrikeev, O. Perepelinska, H.D. Pirtskhalava, V.L. Tolstyh, A. Stone, A. Scott, J. Schonning, A. Tatley, N. Jansen, D. Wallis, M. Zhang, S. G. A. Pitel, V. Volders, and others.

This article discusses the current problems of tort liabilities, taking into account current trends. Issues of tort/delict obligations are being studied in a comprehensive manner, taking into account the new legislation. In addition to the analysis of the current Ukrainian legislation, the legislation and doctrine of individual foreign states, as well as international treaties regulating non-contractual obligations in international law, are considered. The main goal of this study is to promote the strengthening of the legal grounds for the participation of Ukrainian individuals and legal entities in international relations and the harmonization and approximation of the ways of regulating non-contractual relations with the approaches adopted in international acts and in the legislation of most countries.

The article reveals the specifics of non-contractual obligations and the peculiarities of their legal regulation with a special emphasis on tort/delict obligations. At the same time, attention is focused on the fact that in private international law the regulation

of non-contractual (tort/delict) obligations provides for the simultaneous application of both — international treaties and domestic law. Due to the transboundary nature of these non-contractual obligations, we are talking about conflict-of-laws regulation, which often leads to the need to apply the norms of foreign legislation, which causes a number of difficulties, in particular, the correct interpretation and application of foreign law, as well as its correct qualification. This leads to the need to study the legislation of foreign states, as well as the correlation between the operation of the norms of international treaties and national legislation in the non-contractual sphere.

I. THE CONCEPT OF DELICT/TORT IN PRIVATE INTERNATIONAL LAW

The concept of delict (from the Latin "delictum") is considered in the legal doctrine in a broad and narrow sense. In a broad sense, a delict is defined as any impermissible act, an offense, which entails the application of punishment to the person who committed it. That is, torts/delicts according to the sphere of their occurrence and implementation can be divided into public law and private law, among the latter there are civil law offenses or torts in the narrow sense[267].

The emergence of delictual/tort obligations is a legal heritage of Roman private law. In Roman private law, delictual/tort obligations arose as a result of a civilized rejection of the custom of revenge, which was expressed in the verbal form "an eye for an eye, a tooth for a tooth". According to the Collins Cobuild, "You say 'an eye for an eye' or 'an eye for an eye and a tooth for a tooth' to refer to the idea that people should be punished according to the way in which they offended, for example if they hurt someone, they should be hurt equally badly in return. Indeed, as a result of

[267] Маковій В.П. Взаємне поглинання сутнісних теорій делікту у міжнародному приватному праві / В.П. Маковій. *Юридичний вісник Причорномор'я: збірник наукових праць.* 2011. № 1 (1) /2011. С. 127.

the implementation of the latter custom, the independent realization of the victim's right to bring the person who committed the offense to justice by causing him appropriate damage was ensured"[268]. However, the victim's exercise of the right to revenge did not presuppose the occurrence of a reciprocated obligation on the part of the perpetrator of the damage to compensate it, despite the fact that such a right was exercised without the mediation of state structures, which fully met the requirements of that time.

Later, in ancient Rome, revenge was gradually replaced by restitution in one form or another. This happened in connection with the establishment of state institutions, which sought to establish a uniform order and prevent the unlawful arbitrariness of participants in social relations. As a result, private torts as illegal encroachments on the interests of private individuals were quite clearly distinguished among the offenses in Roman law.

In Roman private law, the constituent elements of a private tort giving rise to the corresponding obligation were defined as: illegal action or activity in relation to the rights and interests of the victim, the corresponding occurrence of a negative legal consequence for the victim (damage), the connection of the specified illegal behavior with such damage, presence of fault of the person who caused the damage (delinquent). At the same time, Roman private law did not know the essence of general delict in the modern sense.

Independent states were created on the territory of the Western Roman Empire after its collapse. These states, although they turned to the norms of customary law, at the same time constantly and excessively carried out the reception of the provisions of Roman law. In this period, intensive codification of law takes place in Western Europe and civil codes are adopted. These include the Napoleonic Civil Code (1804), the German Civil

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[268] Collins COBUILD Phrasal Verbs Dictionary by Collins. URL: https://www.collinsdictionary.com/dictionary/english/an-eye-for-an-eye

Code (1896), and the Swiss Civil Code (1907).

The Civil Code of the French[269] upholds the position of general tort, which assumes that any act of a person that causes damage to another obligates the person whose fault the damage was caused to compensate for such damage. German law[270], unlike French law, distinguishes tort responsibility not only for the commission of offenses defined by law, but also in case of commission of any other offense.

As for the countries of the common system of law, it differs significantly from the Romano-Germanic legal system, in particular, in the selection of torts. So, in England and the USA, independent civil offenses or a system of singular torts are distinguished. In the Anglo-American legal system, in the legal regulation of tort obligations, along with judicial precedent, laws play a certain role, for instance the Restatement (Second) of Conflict of Laws.

II. CONDITIONS FOR THE EMERGENCE OF TORT OBLIGATIONS IN PRIVATE INTERNATIONAL LAW

It is important to detail the grounds for the emergence of tort obligations in the national legal systems of the present time.

It is generally accepted to define the following conditions for the emergence of tort/delict obligations:

- illegal behavior;
- the existence of damage/harm;
- a causal connection between wrongful conduct and damage/harm;
- the wrongdoer's fault.

The first condition for the occurrence of tort/delictual liability is *illegal behavior*. According to the Legal Definitions

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269 Code civil. URL: https://jurkniga.ua/contents/grazhdanskiy-kodeks-francii-(kodeks-napoleona).pdf

270 Bürgerliches Gesetzbuch Deutschlands mit Einführungsgesetz (1900). URL: https://continent-online.com/Document/?doc_id=30005486

Dictionary, illegal behaviour means any behaviour which is prohibited by law and includes any anti-competitive or collusive behaviour, without limitation, prohibited by regulation or legislation including, without limitation, the Commerce Act 1986, the Fair Trading Act 1986 and any acts subsequently passed in substitution therefore or in addition thereto[271].

The definition of illegal behavior is grounded on the basis of two theories. The essence of the first — evolutionary — theory lies in the fact that illegal behavior is not sanctioned by law or it does not fit with another proper reason. In this case, the presumption of illegal behavior of the delinquent is established and, accordingly, there is no need to prove this to the victim. Therefore, an illegal action means an action that violates someone else's subjective right, an action that violates or contradicts the law, an action that falls under the signs of abuse of law. Tort obligations within the framework of the Romano-Germanic legal system are based on evolutionary theory. The second — traditional — theory is that illegal behavior is recognized as behavior within certain types of non-contractual offenses, outside of which tort liability is excluded. Within the framework of the traditional theory, the legitimacy of the behavior of the subject is presumed and, accordingly, the burden of proving the illegality of the behavior of the delinquent lies with the victim. Anglo-American tort obligations are based on the traditional theory[272].

The second condition for the occurrence of tort/delictual liability is *damage/harm*. Legal dictionary defines damage as the loss caused by one person to another, or to his property, either with the design of injuring him, with negligence and carelessness, or by inevitable accident. Wherein, harm is a loss of or damage to

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[271] Law Insider: Legal Definitions Dictionary. URL: https://www.lawinsider.com/dictionary/illegal-behaviour

[272] Отраднова О.О. Критерії правомірності поведінки у деліктних зобов'язаннях. *Право і громадянське суспільство.* № 2, 2015. С. 33-39. URL: file:///C:/Users/admin/Downloads/Otradnova_O.O.%20(1).pdf

a person's right, property, or physical or mental well-being.[273]

Harm/damage in legal systems has two varieties: property and non-property (moral). Damage is considered depending on the good to which it is caused: property damage is associated with damage to a thing, while moral damage is associated with bodily injury. The presence of damage shall be proved by the victims, except for cases of presumption of harm in case of damage to a thing, bodily injury, etc. Property damage is damage (damage) caused to the property status of a legal or natural person as a result of causing him harm (damage) or non-fulfillment of the terms of the contract. At the same time, in most cases, moral harm/damage can be recovered only in cases expressly specified in the current legislation. Non-property (moral) harm is understood as causing bodily harm, harm to health, and compulsion by deceit, imprisonment of any person, committing a misdemeanor or crime against morality etc. Therefore, moral harm is understood as any physical or moral suffering of an individual or humiliation of honor, dignity, business reputation of an individual or business reputation of a legal entity.

A *causal connection* as the third condition for the occurrence of tort/delictual liability is understood as objectively existing connections in nature and society, in which some phenomena are the cause, and others are the consequences of such causes. The most common among the theories of causality is the theory of a necessary condition (the theory of equivalence), which consists in the mandatory presence of an unlawful act as a prerequisite for the emergence of a tort obligation, and the theory of adequate causation, i.e. when the illegal act significantly increases the possibility of harmful consequences[274].

The fourth condition for the occurrence of tort/delictual

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[273] Legal Dictionary by Farlex. URL: https://legal-dictionary.thefreedictionary.com/harm

[274] Идрисов Х.В. Хусейн Идрисов. О соотношении вины, риска, случая в гражданском праве. *Власть.* 2007. № 11. С. 107.

liability is *fault*. Fault is defined in several meanings: as the delinquent's mental attitude towards the act he/she committed; 2) as necessary care and prudence of the delinquent in the performance of his/her duties and exercise of his rights. The fault of the delinquent manifests itself in two forms: intent or negligence. According to the Legal Dictionary by Farlex, a civil injury is any damage done to person or property that is precipitated by a breach of contract, negligence, or breach of duty. The law of torts provides remedies for injury caused by negligent or intentional acts. Negligence is a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions when there is some duty to act[275]. The person who caused the damage is released from responsibility if he proves that the damage was not caused by his fault, therefore the presumption of guilt of the delinquent is established[276].

A civil offense (tort/delict) is a violation of personal civil rights, causing harm to a person and property of an individual or legal entity. If a legal connection with the legal order of two or more states is found in the torts/delicts, then the torts are in the field of private international law. In the doctrine of some states, the concept of "international tort law" is used, which is understood as a set of rules governing relations from obligations of a non-contractual nature related to a foreign legal order. International tort law is an independent sub-branch of private international law.

In general, non-contractual obligations (obligations under the law) include:

— tort/delict liability (from torts/delicts and as a result of

[275] Legal Dictionary by Farlex. URL: https://legal-dictionary.thefreedictionary.com/Injury

[276] Гринько С.Д. Значення вини потерпілого в деліктних зобов'язаннях. Університетські наукові записки. 2009, № 3 (31). С. 56.

defects in goods, works or services);

— obligations from unjust enrichment;

— obligations from unfair competition;

— obligations from conducting other people's affairs without a mandate *(negotiorum gestio)*;

— obligations from the fault in conclusion of a contract *(culpa in contrahendo).*

The conditions for the emergence of tort/delict obligations in private international law include the following: the victim or the delinquent are recognized as foreigners; actions of the delinquent to compensate the damage depend on the foreign legal sphere; the subject of the legal relationship is damaged on the territory of a foreign state; the subjective right of the victim and the legal obligation of the delinquent arise in one state and are realized in another; the violated rights of third parties are protected under the laws of a foreign state; a dispute about compensation for damages is considered in a foreign court; the decision on compensation for damage must be executed in a foreign state; the right to compensation for damage derived from prejudicial facts subject to foreign law (for example, an insurance contract)[277].

III. THE SPECIFICS OF THE TORT/DELICT STATUTE OF THE LEGAL RELATIONSHIP

In tort/delict obligations, the tort/delict statute of the legal relationship is always highlighted. It is understood differently in different legal systems. Such a different understanding of the tort/delict statute leads to conflicts between national legal systems and the problem of choosing the applicable law. It is possible to single out the main elements of the tort/delict statute, which are typical for most countries, although their list is not exhaustive.

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[277] Ануфриева Л.П. Соотношение международного публичного и международного частного права (сравнительное исследование правовых категорий): Дис. ... д-ра. юрид. наук. М., 2004. С. 395.

The main elements of the tort/delict statute of legal relationship in tort/delict obligations are: the ability of a person to bear responsibility for the harm caused; imposition of liability on a person who is not a delinquent; grounds for liability; grounds for limitation of liability and exemption from it; methods of compensation for harm; amount of damages[278].

As a rule, the law applicable to the obligation of causing harm extends to all issues of the tort statute, that is, it determines the capacity for civil liability, the conditions and scope of civil liability, as well as the responsible person, the liability of a person with limited legal capacity. At the same time, some issues are resolved on the basis of other conflict of laws links, namely: the law established on the principle of the closest connection applies to the tort obligation as a whole, but the delinquency of an individual is determined according to the law of the place of harm.

IV. THE PECULIARITIES OF CONFLICT-OF-LAWS REGULATION OF DELICTUAL/TORT OBLIGATIONS

The emergence of delictual/tort obligations, complicated by a foreign element, is due to the migration of the population, the intensification of international transportation, the activation of integration processes, and the development of innovative technologies. So, today the most acute and urgent problem is the settlement of conflicts of laws in non-contractual obligations and, in particular, in delictual/tort obligations.

In the field of delictual/tort obligations, complicated by a foreign element, starting from the 13th century the collision binding "law of the place of injury" *(lex loci delicti commissi)* is traditionally used, which means the application of the law of the state, where the harm was caused. Both the doctrine and the

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[278] Гетьман-Павлова И. В., Пронюшкина Д. А. Унификация внедоговорных обязательств в праве Европейского Союза. *Международное право и международные организации / International Law and International Organizations.* 2011. № 5. С. 95.

judicial practice pointed to the application of this collision binding. Opponents of this point of view were prominent German legal scholars Carl Friedrich Wächter (1797-1880) and Friedrich Karl von Savigny (1779-1861). Even at the early stages of the development of private international law, they defended the application of the collision binding of the law of the court *(lex fori)* to delictual/tort obligations. That is, the law of the state where the dispute is being considered. In this case, the court or other law enforcement body was guided by the law of its country. According to Wächter, despite the commission of the offense abroad, the court in making a decision should use only its own laws and should not be subject to foreign laws. At the same time, the law of the place where the offense was committed, in his opinion, can only be applied as an exception: if the application of a foreign law is more favorable for the victim, since according to the laws of his own state, the defendant does not bear any responsibility for the harm caused.[279]. From Savigny's point of view, the very nature of tort/delictual obligations indicates the application of the law of the court. According to the teachings of Savigny, for each individual case, the law to which the legal relationship belongs by its nature should apply: 1) personal rights must be governed by the law of the place of residence *(lex domicilii)*; 2) rights in rem are governed by the law of their location *(lex rei sitae)*.

The law of the place where the offense was committed in resolving disputes arising from torts became most widespread in the second half of the 19th century. Thus, in the first international legal codification of private international law, the Bustamante Code of 1928, separate articles are devoted to this issue (Art. 167, 168). The Code establishes that "obligations arising from offenses are regulated by the same law as the offenses from which they arose; liabilities arising from acts or omissions, whether

[279] Wächter. Ueber Theilung und Theilbarkeit der Sachen und Rechte. Archiv für die civilistische Praxis 27. Bd., H. 2 (1844), pp. 155-197. Mohr Siebeck GmbH & Co. KG. URL: https://www.jstor.org/stable/41038003

committed intentionally or in connection with negligence, shall be governed by the law of the place of origin of the intent or negligence that gave rise to such obligations"[280].

The need for the combined application of the law on the place of the offense with national law was established by the doctrines and legislation of a number of countries.

According to the Introductory Act to the German Civil Code of 1896, claims cannot be made against a German citizen who has committed an offense abroad that exceed those that can be made under German law. It follows that a German citizen will only be liable for an offense if the liability arises under the law of the place of injury and under German law, which means the collision binding *(lex fori)* will be used. As L. Raape noted, if a German citizen committed a tort/delict abroad, the judge must apply two legal orders: first of all, foreign, and then German[281].

French doctrine of the late 19th — early 20th century was formed under the influence of Antoine Pille (1857–1926). In France, the priority collision principle in the field of tort/delict obligations was considered the principle of the law of the place where the offense was committed *(lex loci delicti commissi)*. Specifically, in accordance with this collision principle, liability for illegal acts was also assessed.

English doctrine is of particular interest in this respect. In England, the relationship between the collision principles *lex loci delicti commissi* and *lex fori* is reversed. Due to the fact that the English courts have jurisdiction to hear claims from foreign torts, in the event that a claim is brought in English courts, the court applies English law *(lex fori)*, and not the law of the state where the offense was committed *(lex loci delicti commissi)*. Therefore,

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[280] Кодекс міжнародного приватного права (Кодекс Бустаманте): Кодекс від 20.02.1928 № 995_419. URL: https://zakon.rada.gov.ua/laws/show/995_419?lang=uk#Text

[281] Raape L. Internationales Privatrecht. 5th ed. (Berlin and Frankfurt a. M.: Verlag Franz Vahlen GmbH, 1961. 720 p.

English law applies if two conditions were met: firstly, the offense must be of such a nature that it could be sued if it had been committed in England, and, secondly, the offense must be recognized as unlawful also by the law of the place where the offense was committed.[282].

The American doctrine of the late 19th – early 20th century was formed under the influence of the famous American doctrinalist Joseph Beale (1861-1943), who adhered to the conflict principle "the law of the place where the offense was committed". In accordance with this principle, the existence of a cause of action for an offense was also determined[283].

It can be concluded that in the doctrine of private international law of the late 19th – early 20th centuries there were strict conflict of laws rules: the law of the place where the offense was committed *(lex loci delicti commissi)* and the law of the court *(lex fori)*. They were applied to tort/delict obligations complicated by a foreign element. At the same time, in some countries their parallel application was observed, while in others, the collision binding "the law of the place where the offense was committed" was fundamental.

In the middle of the 20th century, the situation began to change dramatically. At that period of time the specialists in the field of private international law began to criticize the previously introduced strict conflict rules and supported the use of more flexible collision bindings. This trend has affected the United States most acutely.

Such flexible conflict principles included the following principles:

- the law of the closest connection by J. Morris;
- the theory of "government interest" by B. Curry;

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[282] Вольф М. Международное частное право [пер. с англ. С. М. Рапопорт]. М. : Иностранная литература, 1948. 702 с.

[283] Beale J.H. A treatise on the conflict of laws: Or, Private international law. University of Michigan Library. 1916. 280 p.

• the method of taking into account the circumstances affecting the choice of law by R. Leflare;

• the theory of "better law" by A. Erenzweig;

• the theory of "comparative harm" by V. Baxter;

• the theory of "advantage principles" by D. Kavers and others.

Let's take a closer look at these flexible regulation theories.

The law of the closest connection (proper law) provides for the application of the law of the state with which the legal relationship is most closely connected. J. Morris[284] pointed out that the motives that lead to the rejection of the courts from the strict application of *lex loci contractus* in favor of the more flexible "the proper law of the contract" (the proper law of the contract) could be equally successfully applied to tort/delictual obligations.

American lawyer Brainerd Currie[285] (1912 – 1965), who developed the ***theory of "government interest" (governmental interest analysis)***, rejected traditional conflict norms and instead of these norms shifted the center of gravity to the analysis of the "politics of law" behind the material law of a certain state. In situations with a foreign element, Curry suggested that through the interpretation of material norms, state interests underlying these norms should be identified.

Robert A. Leflar's[286] (1901 – 1997) ***method of taking into account the circumstances affecting the choice of law is based on the principles (considerations)*** that the court should take into account when choosing the applicable law: simplification of the judicial task; predictability of results; predominance of state interests of the court; application of the best legal norms.

The essence of the ***theory of "better law" by Albert***

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[284] Morris, J.H.C. The Proper Law of a Tort. *Harvard Law Review*, Vol. 64, Issue 6 (April 1951), pp. 881-895.

[285] Currie, B. Selected essays on the conflict of laws. Durham, N.C., Duke University Press, 1963. 761 p.

[286] Leflar, R. A. Choice of Law: State's Rights. *Hofstra Law Review*: Vol. 10: Iss. 1, Article 10. 1981. URL: https://scholarlycommons.law.hofstra.edu/hlr/vol10/iss1/10

Ehrenzweig[287] (1906 – 1973) was that in solving cases with a foreign element, it is necessary to interpret the norms of the substantive law of the court, and not to solve the case with the help of conflict of laws norms. Ehrenzweig called his approach to conflict issues "proper law in a proper forum". Interpreting the norms of the private law of the state of the court, Ehrenzweig sought the application of "better law".

According to the ***theory of "comparative impairment" by William F. Baxter***[288] (1929 – 1998), when solving a conflict problem, one should first of all weigh the comparative damage that can be caused to the interests of a certain state in case of non-application of its law.

The ***theory of "advantage principles"*** was proposed ***by David Cavers***[289] (1902 – 1986). The declared goal of the Cavers method is to achieve a fair result in a case through a comparative analysis of competing legal systems in favor of the application of the law of one or another country.

The use of more flexible conflict-of-law bindings, in particular the conflict-of-law norm of the closest connection, which had to be applied as a general and as a subsidiary norm, was provided for in the legislative bodies of European countries on private international law in the second half of the 20th century.

The Law "On Private International Law and Process" of the Czechoslovak Socialist Republic of 1963 (currently in force in the Czech Republic) became the first codification act in the field of private international law. In 1965, the Law on Private International Law was adopted in Poland. The Federal Law of

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[287] Ehrenzweig, A.A. A Treatise on the Conflict of Laws. St. Paul, Minn.: West Publishing Co., 1962. 824 p.

[288] Baxter W.F. Choice of law and the federal system. 16 Stan. L. Rev. 1. 1963. URL: https://heinonline.org/HOL/LandingPage?handle=hein.journals/stflr16&div=12&id=&page=

[289] Cavers D.F. A Critique of the Choice-of-law Problem. Harvard Law Review. Vol. 47, No. 2 (Dec., 1933), pp. 173-208.

Austria "On Private International Law" of 1978 was also adopted. Hungary's Law "On Private International Law" was adopted in 1979. In Turkey, the Law on Private International Law and Process was adopted in 1982. In the same year, the Law on Private International Law was also adopted in Yugoslavia (currently in force in Croatia, Slovenia, Serbia, Montenegro). In 1987, Switzerland also adopted the Law on private international law. The Law on the reform of the Italian system of private international law was adopted in 1995 in Italy.

In the majority of these acts in the field of tortious obligations, the conflicting norm "the law of the closest connection" is established as a general conflict of law norm. If the circumstances of the case collide with a foreign country, then the legal order with which there is the closest connection will be applied to these private law relations. As for non-contractual claims for damages, they are determined in accordance with the law of the state in which the actions that caused the damage were carried out. However, in the event that there is a closer connection with the law of one and the same other state in relation to the interested persons, then this law is decisive.

The classification of complex torts/delicts was proposed in the doctrine:

1) "Torts/Delicts at a distance": a person acts in one state and the consequences of a harmful action appear in another;

2) “Delict and many states”: a harmful action takes place on the territory of one state, and its result appears on the territory of several states; or: harmful actions are carried out from the territories of several countries, and harm occurs only in one;

3) “Transit tort/delict”: a person commits harmful actions that follow each other in time in a number of countries, causing unlawful harm[290].

[290] Внедоговорные обязательства в международном частном праве **:** монография / отв. ред. И. О. Хлестова. М. : Институт законодательства и сравнительного правоведения при

As for the use of one or another collision binding to tort/delict relations, in this area the most important issue is the place where the tort/delict was committed. The doctrine of the European countries proceeded from the fact that the law of the country of injury should be applied, while at the same time, the Anglo-American doctrine spoke in favor of applying the law of the country where the injury was caused.

At the same time, torts/delicts can be formally divided into two main types: simple and complex. The tort/delict is considered complex, the elements of the actual composition of which are localized in two different countries, that is, the place of the tort/delict and the place of occurrence of negative consequences occurred in different countries. At the same time, a tort/delict is considered simple, the elements of the actual composition of which are localized in one country[291].

The collision binding locus delicti in some countries is understood as the place of the harmful action, in others – the place of occurrence of the result of this action. Some legal systems offer a solution to the problem of the duality of locus delicti by choosing the law that is more pleasing to the victim.

As noted earlier, since the middle of the 20th century strict conflict rules became a thing of the past and flexible conflict rules came in their place. At this time, the principle of the closest connection becomes the fundamental principle of private international law in many states. In most European countries, there was a principle, according to which, if there is a substantially closer connection with the law of a state than with the law that would be decisive under the law of torts/delicts, then the law of the state with which there is the closest connection shall apply.

Правительстве РФ : Норма : ИНФРА-М, 2017. С. 20.

[291] Егорова М.А., Крылов В.Г., Романов А.К. Деликтные обязательства и деликтная ответственность в английском, немецком и французском праве: Учебное пособие / отв. ред. доктор юридических наук М.А. Егорова. М.: Юстицинформ, 2017. С. 32.

Considering the conflict of laws regulation of tort/delict obligations, it is impossible to ignore the principle of autonomy of the will of the parties, which until the middle of the 20th century did not apply in principle to liability for harm, complicated by a foreign element. In the doctrine of most states, it was believed that in tort/delict law there is no autonomy of the will, moreover, in this area, the possibility of applying this principle was generally rejected. Changes regarding the application of the principle of autonomy of will to tort/delict obligations occurred by the beginning of the 21st century. At this time, the principle of autonomy of the will of the parties in the field of torts/delicts is spreading[292].

Dispositivity, which is typical for private international law in general, is manifested in tort/delict law in particular. It manifests itself primarily in the freedom to choose the applicable law in the field of conflict regulation. The autonomy of will in the sphere of tort/delict obligations is manifested, first of all, in the right of the victim to freely dispose of his right to claim damages. Within the framework of tort/delict obligations, the principle of autonomy of the will was initially applied within limited limits. Such restrictions manifest themselves in two main variants:

1) The parties could agree on the application of the law of the court that considered the dispute;

2) The parties could choose the law from the proposed options: the law of the country of common citizenship, the law of the country of common place of residence.

At the same time, if different legal orders apply in the place of commission of the tort/delict and in the place of its consequences, then according to the prevailing point of view, the most favorable law for the victim in this particular case serves as competent.

The collision binding *lex loci delicti commissi* as a fundamental collision principle in the field of tort/delict obligations has a dual

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[292] Magnus U. (ed.), Unification of Tort Law: Damages Kluwer Law International, 2001. 320 p.

meaning. It is understood as the place where illegal actions were committed, and the place of consequences of these illegal actions. In such cases, the victim has the right to choose the law at his own discretion during the trial[293].

According to the current doctrine, the conflict regulation of tort/delict obligations is considered from two positions:

1) The law determines liability for causing harm to a foreigner, namely: foreigners who caused harm are liable according to the rules of the state where the harm was caused;

2) The law determines liability for damage caused abroad, namely: to establish civil liability, a harmful action must be illegal both under the law of the country of the court where this action was committed, and under the law of the state where the claim is brought.

A conflict rule was introduced into the doctrine of the late 20th century, which established that the rights and obligations of the parties for obligations arising from the infliction of harm are determined by the law of the country where there was an action or other circumstance that served as the basis for the claim for damages. The principle of the place of commission of the tort/delict, which is the main one in the field of tort/delict obligations, is applied, however, with certain limitations, especially when it comes to offenses committed outside the state whose court is considering the case.

The conflict principle *lex loci delicti commissi* is the main stable collision principle in the field of tort/delict obligations. At the same time, according to the opinion of Zvekov V.P., tort/delict relations have the following points of localization:

– the place of infliction of harm, which can be considered as the place of commission of actions that caused harm, and the place of occurrence of harm;

– the state where the court is located;

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[293] Банковский А.В. Об автономии воли сторон при выборе статута деликтного обязательства. *Государство и право.* 2002. № 3. С. 64.

– the state of nationality or residence of the victim;

– the state of citizenship or place of residence of the tortfeasor[294].

Summing up the foregoing, the views of the doctrine on the conflict of law rules on the law applicable to obligations from causing harm have changed. The use of strict conflict rules changed to the use of flexible conflict bindings. Although the *lex loci delicti commissi* is usually recognized as the basic principle, the principle of the place of harm is gaining more and more supporters.

One of the oldest principles of private international law, the law of the place where the offense was committed *(lex loci delicti commissi)* is used in the legislation of most foreign states in the field of conflict of law regulation of tort/delict obligations.

A similar regulation is contained in the Law of Ukraine on Private International Law of 2005, Art. 49 of which establishes that the rights and obligations under obligations arising from the infliction of harm are determined by the law of the state in which the action or other circumstance took place that served as the basis for the claim for compensation for harm; rights and obligations under obligations arising as a result of causing harm abroad, if the parties have a place of residence or location in one state, are determined by the law of this state; the parties to an obligation arising from the infliction of damage may, at any time after its occurrence, choose the law of the forum State[295].

In modern foreign acts regulating conflict of law issues of torts/delicts, the traditional principle of *lex loci delicti commissi* is also used as a general rule, understood as the place where the action that caused harm was committed. Usually, along with this general rule, other conflict rules are included in the law, which are

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[294] Звеков В.П. Коллизии законов в международном частном праве, М.: Волтерс Клувер, 2007. С. 67.

[295] Про міжнародне приватне право: Закон України від 23.06.2005 р. № 2709-IV. URL: https://zakon.rada.gov.ua/laws/show/2709-15#Text

exceptions to the main rule. Most often, this is associated with the characteristics of the subject of the legal relationship — the common place of residence or location of the parties. In addition, an indication of the application of the principle of autonomy of the will of the parties may serve as an exception to the general rule.

Accordingly, the general rule is that the law of the place where the tort/delict was committed applies to liability for tort/delict, but if the parties have a common habitual residence, then the law of the common habitual residence applies; if the parties by agreement choose the applicable law after the commission of the tort/delict, then that agreement shall prevail[296].

For the countries of the Anglo-American legal system, it is not typical to resolve conflict issues in the field of tort/delict obligations in the legislation. In countries with a common system of law, the main source of law is judicial precedent and there are no unified codified rules governing conflict of law issues of torts/delicts. The unofficial codification of United States the Restatement (Second) of Conflict of Laws §145(1) (1971)[297] establishes that torts/delicts shall be governed by the law of the state most significantly connected with them.

A close relationship is determined based on the following circumstances and criteria: the location of the action that caused harm; the place where the harm was done; place of residence (domicile), citizenship; principal place of business of the parties.

A different approach to establishing a general rule for choosing the law applicable to torts/delicts is based on applying the law of the place of occurrence of damage *(lex loci damni)* to these legal relations.

This principle is also followed by European countries, which

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[296] Отдельные виды обязательств в международном частном праве. Монография / Отв. ред.: Звеков В.П. М.: Статут, 2008. С. 267.

[297] Restatement (Second) of Conflict of Laws §145(1) (1971). URL: https://lawexplores.com/the-restatement-second-and-the-most-significant-relationship/

adhere to the *lex loci damni* conflict binding. It is the conflict binding of *lex loci damni* that is enshrined in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[298]. Article 4 of the Rome II establishes that non-contractual obligations arising from the infliction of harm are subject to the law of the country where the harm occurs, regardless of the country in which the legal fact causing the harm occurred, and in which country the legal fact causing the harm occurred, and in which country or countries the indirect consequences of this legal fact occur. This Regulation is binding in its entirety and is directly applicable in the Member States in accordance with the Treaty establishing the European Community.

The Rome II Regulation is of paramount importance in resolving conflict issues arising from obligations from causing harm for European countries. The Regulation entered into force on January 11, 2009. From the point of view of the legal nature, the norms of this document refer to the norms of EU law, being a "supranational" law.

The Rome II Regulation is an act of conflict of laws, since the unification of substantive norms in this area is difficult to achieve due to significant differences in the legislation of the EU countries. So the Regulation is a set of conflict rules relating to non-contractual obligations and it formulates common conflict rules for all EU countries. These rules ensure that the same law applies in the Member States of the EU, regardless of the court in which of these States the claim is brought.

The regulation covers the regulation of conflicts in the field of non-contractual obligations: arising out of tort/delict, unjust

[298] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R0864

enrichment, *negotiorum gestio* or *culpa in contrahendo.*

According to the Article 3, any law to which the conflict rule of the Regulation refers is subject to application regardless of whether it is the law of an EU member state.

According to the Article 4 of the Regulation, the reference to the law of the state on the territory of which the damage occurred (damage occurs) acts as the main conflict of laws binding. This rule applies regardless of the country in which the event that caused the harm took place, and also regardless of the country or countries in which the indirect consequences of the harmful event occurred. The principle of connection with the law of the state where the damage occurred *(lex loci damni)*, established by the Regulation, establishes a fair balance between the interests of the tortfeasor and the victim[299].

Due to the fact that the concept of non-contractual damage differs in individual EU Member States, the Regulation establishes that the term "damage" covers any consequence of tort/delict, unjust enrichment, *negotiorum gestio* (actions in another's interest without a mandate) or *culpa in contrahendo* (actions before the conclusion of a contract).

In accordance with this Regulation, *negotiorum gestio* means a situation in which a gestor acts on behalf of a principal for the benefit of that principal, but without the consent of that principal, and the action is later ratified by the principal.

There are two main subjects in the *negotiorum gestio*, namely:

– *gestor (negotiorum gestor)* — a person who has committed actions in the interests of another person;

– *dominus (dominus negotii)* — a person who has benefited from these actions, the owner of interest (the literal meaning of the Latin word *"dominus"* – "lord", "master").

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[299] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R0864

In its turn, *culpa in contrahendo* is a type of civil liability for losses caused at the stage of negotiating and concluding a contract as a result of improper performance by the counterparty of the injured party of his pre-contractual obligations (first of all, the obligation to positively inform the counterparty about the properties and qualities of the object of the contract, lack of intention to conclude a contract).

The Regulation also uses a combination of collision bindings: if the tortfeasor and the victim had their usual place of residence on the territory of the same state at the time of the damage, the law of that state applies. At the same time, in relation to legal entities, habitual residence in the Regulation refers to the location of their central administration. The habitual residence of a natural person acting in the course of business activities is understood as the main place of his/her business activities.

Another escape clause to the general rule is used when the closest relationship exists: if from the complex of all the circumstances of the case it clearly follows that the tort is most closely connected with a certain state, then the law of that state applies (for example, pre-existing contractual relations between the parties, closely related to tort in essence, which determine the closest connection with another state).

So, in the provisions of this document, the direction of the conflict law of European countries towards flexible conflict regulation can be clearly seen.

In addition to general conflict of laws rules, the Regulation also contains special conflict of laws rules related to torts/delicts. Special conflict of laws rules contribute to the achievement of a fair decision and legal certainty in each specific case.

Special conflict of laws norms include the following:

– provisions on responsibility for dishonestly manufactured products. In this case, reference is made to the law of the country in which the victim had his usual place of residence at the time of the damage, if the product was released on the market in this country;

– provisions on unfair competition and actions restricting free competition. The law of the state whose market is affected or may be affected by such restrictions is considered to be decisive, however, if the competition restrictions affect or may affect the market of more than one state, the plaintiff is given the opportunity to choose the law of the country whose court considers the dispute;

– provisions on damage caused to the environment. The law of the state on the territory of which the harmful event occurred is recognized as defining;

– rules on the law applicable to non-contractual obligations arising as a result of infringement of intellectual property rights. According to the Regulation, intellectual property includes, in particular, copyright, related rights, the right to protect databases, and industrial property rights. In this sphere, the law of the state is applied, on the territory of which protection is requested;

– rules regarding production conflicts, where it is about non-contractual liability of a person acting as an employee or employer, or an organization representing their professional interests, for damage caused as a result of such a conflict; the law of the state on the territory of which the conflict occurred or is occurring is considered to be decisive.

The Regulation expands the application of autonomy of will in the area of tort obligations. The choice of law is allowed by the conclusion of an agreement by the parties after the harmful event that caused the damage has occurred. Prior to the occurrence of such an event, the choice is allowed only if all parties are engaged in commercial activities.

The choice of law must be explicit or must explicitly follow from the complex of the circumstances of the case; it must not affect the rights of third parties.

The provisions of the Regulation are binding and subject to direct application by EU countries. Thus, the uniform conflict of laws rules on the law applicable to compensation for non-contractual damages replace, although in many respects similar,

but by no means coinciding with each other, the conflict of laws rules of the legislation of individual EU countries in this area. Some of these countries, when adopting new laws on private international law, excluded from them the conflict of law rules regarding non-contractual damage, replacing the specific regulation with a reference to the relevant rules of the Regulation[300].

Considering tort relations in private international law, it is impossible to ignore the legal regulation of tort obligations with a foreign element in the legislation of Ukraine. The Law of Ukraine "On Private International Law" is the main normative act regulating tort/delict relations with a foreign element in Ukraine. In particular, Chapter VII of the Law is devoted to the settlement of non-contractual obligations by establishing appropriate collision bindings. According to Art. 49, «Rights and obligations under tort obligations are determined by the law of the state in which the action or other circumstance that gave rise to the claim for damages took place. Rights and obligations under obligations arising as a result of causing damage abroad, if the parties have a place of residence or location in the same state, are determined by the law of that state. The law of a foreign state is not applicable in Ukraine, if the action or other circumstance that became the basis for the claim for compensation of damage is not illegal under the legislation of Ukraine. The parties to an obligation that arose as a result of the infliction of damage may choose the law of the state of the court at any time after its occurrence»[301].

Summarizing the abovestated, the domestic legislation of Ukraine establishes a general prescription for the application of the *lex loci delicti commissi* — the conflict principle (collision

[300] Внедоговорные обязательства в международном частном праве **:** монография / отв. ред. И. О. Хлестова. М. : Институт законодательства и сравнительного правоведения при Правительстве РФ : Норма : ИНФРА-М, 2017. С. 66.

[301] Про міжнародне приватне право: Закон України від 23.06.2005 р. № 2709-IV. URL: https://zakon.rada.gov.ua/laws/show/2709-15#Text

binding), which means the application of the law of the country where the tort was committed to the liability from the harm caused (tort/delict liability). The law details this binding within the law of the country, where an illegal act was committed, which became the basis for the emergence of a tort/delictual obligation. In addition to it, the parties to an obligation that arose as a result of the infliction of damage may choose the law of the state of the court at any time after its occurrence, i.e. the limited bilateral autonomy of the will of the parties to the tort/delictual obligation is established.

CONCLUSIONS

The emergence of delictual/tort obligations, involving a foreign element, is due to the migration of the population, the intensification of international transportation, the activation of integration processes, and the development of innovative technologies. So, today the most acute and urgent problem is the settlement of conflicts of laws in non-contractual obligations and, in particular, in delictual/tort obligations.

The following conditions for the emergence of tort obligations are distinguished: illegal behavior; the existence of damage/harm; a causal connection between wrongful conduct and damage/harm; the wrongdoer's fault.

The law of the place of the tort/delict is the main, but not the only conflict of laws rule applicable to tort/delict obligations. As domestic and foreign practice testifies, the application of this conflict of laws principle is often limited or completely superseded by other conflict of laws rules, and above all, rules that refer to the law of the country with which this relationship is most closely connected, to the general personal law of the parties to the obligation (the law of the place of residence or the law of nationality). Modern approaches to the conflict law of tort/delict obligations are also expressed in strengthening the regulatory role of the law of the country where the damage directly occurred *(lex loci damni)*, as well as in expanding the application of the

autonomy of the will of the parties to tort/delict obligations. In addition, differences in the approaches of legal systems to the definition of the concept of "place of tort/delict" complicate the solution of the collision problem of tort/delict obligations.

In the middle of the 20th century, strict collision anchors were replaced by more flexible collision bindings. This trend has most acutely affected the United States. Such flexible conflict principles included the following principles: the law of the closest connection by J. Morris; the theory of "government interest" by B. Curry; the method of taking into account the circumstances affecting the choice of law by R. Leflare; the theory of "better law" by A. Erenzweig; the theory of "comparative harm" by V. Baxter; the theory of "advantage principles" by D. Kavers and others.

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IS THE ENTERPRISE AS THE INREGRAL PROPERTY COMPLEX AN OBJECT OF CIVIL TURNOVER: NATIONAL AND INTERNATIONAL ASPECT

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INTRODUCTION

In the conditions of the formation of the market mechanism improvement of contractual forms is important for the functioning of the economy civil turnover. Special attention is paid to legal regulations legal relations that arise in the process of transferring property to management. Among of other objects, it is worth distinguishing relations with the management of the enterprise as a single property complex. The latter is a difficult thing to combine tangible and intangible assets that have different legal regimes, but in civil turnover act as an integral object of legal relations.

According to the typical ownership, the enterprise management contract is a type of property management contract under which the manager manages the property in accordance with the terms of the contract, i.e. performs legally significant actions in relation to it. But, before moving on to the characteristics of the enterprise management contract, it should be noted that not all enterprises can be transferred to management. Thus, integral property complexes of state unitary enterprises (state commercial and public enterprises) and communal unitary enterprises (communal commercial and communal non-commercial enterprises) cannot be the object of a management contract. This is explained by the fact that although there are different legal constructions in the law, with the help of which it is possible to achieve the same result, but the application of any construction

paralyzes the possibility of simultaneous application of another.

To be effective use real estate (buildings, buildings, etc.), owners sometimes transfer it is managed by another business entity. At the same time, you can save on payment of taxes, if a single tax payer is involved in management.

In the literature, there is no unanimity of opinions regarding the concept of an enterprise as a single property complex. Therefore, the issue of composition remains problematic property complex as an object of civil turnover.

The single property complex of the enterprise can be viewed as set of things and related property rights. Such individualizing features are necessary for quantitative and qualitative characterization a single property complex. The determining criterion of belonging material substrate to a single complex is used for the purpose determined by the technological process and statutory documents.

Enterprise as a Civil Rights Object is a rigorous and methodical evaluation of the legal nature and civil rights of the enterprise as an object of civil rights, defining the most pertinent concepts and theories in the definition and implementation of the legal rules concerning the enterprise, and offering advice for the settlement of the defined issues and advancement of the current regulatory oversight in light of the findings from foreign nations and comparative law.

The research's topic is important from a scientific and practical standpoint since the legal theory hasn't given the enterprise's unique characteristics as a subject of civil rights a complete investigation. Because taxing and sponsoring parts of business activities involving the subject of civil rights may not be considered an an object of the civil law, these components are not included in the research[302].

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[302] Jakutyte-Sungailiene Asta. Enterprise As an Object of Civil Rights: the Legal Status and Legal Regulation of the Civil Turnover of the Enterprise As an Object of Civil Rights. LAP LAMBERT Academic Publishing. URL: https://imusic.br.com/artist/Asta+Jakutyte-sungailiene

I. LEGAL CATEGORY "ENTERPRISE": A MODERN VIEW OF THE PROBLEM

The category "enterprise" and the question of its essence have a long history development history.

Some lawyers believed that an enterprise is an independent, economically independent, property-separated enterprise the subject of business relations is a legal entity. The value of which is the provisions on market of goods (works and services), business reputation, duties, which exist before counterparties. By the way, this approach to recognizing the essence of the enterprise has been preserved today and advocated by individual scientists.

Some lawyers believed that an enterprise is a separate property complex, a means obtaining entrepreneurial profit, the object of economic interests and civil rights. Proponents of this point of view also considered the enterprise as an economic unit, as a set of non-property and property assets, united to achieve a certain trade and economic goal according to a certain plan, that is, as an independent mining economy that is economically independent from that person, which runs it, and from other enterprises of the same person. They considered the following signs to be characteristic of the enterprise: the presence of assets, that is, the material composition that contained trade establishment, goods, money and rights related to this enterprise; personal resources that were made up from the entrepreneur himself and the support staff of the enterprise; disposal of assets, activities of relevant trade representatives according to a certain plan; the focus of the enterprise's activity plan on achieving a defined goal. On the one hand, reflected the economic nature of the enterprise as an operating object, and on the other, approached the understanding of the enterprise in foreign legal systems. It is noted in the literature that it is this one the point of view was dominant at that time.

The point of view was also expressed that the enterprise is an aggregate that is created in connection with a social goal acquisition and exercise of the rights and obligations constituting it.

The integral property complex of the enterprise is classified as items by law. The material components of a single property complex

of an enterprise are the basis of its use in economic activity.

The enterprise's integral property complex can be considered a collection of things and the property rights associated with them. Such individual characteristics are necessary for a single property complex's quantitative and qualitative characteristics. The determining criterion for the belonging of a material subject to a single complex is the use according to the purpose determined by the technological process and statutory documents.

The property base of the enterprise is formed not only by things and related property rights but also by cash, available on account of the enterprise, as a subject of legal relations. The primary purpose of the creation and functioning of the enterprise is to obtain profit through participation in a civil turnover. Therefore, the integral property complex of the enterprise can be considered in the statics and dynamics of contractual relations.

Therefore, the category of material goods, which are the object of civil law, also includes the activity of providing material services, which, despite not creating and not changing things, nevertheless cause a specific socially beneficial significant effect. According to supporters of this position, these phenomena have in common their economic nature as values necessary for society, so their circulation requires a unique approach to legal regulation.

Entrepreneurial activity is carried out to make a profit. The property complex of the enterprise is used in civil circulation to implement statutory tasks. The latter implementation is impossible without the conclusion of economic contracts, the result of which is the emergence of economic obligations, the content of which are rights and obligations.

Commercial obligations (in particular, property and economic ones) may arise, in addition to other grounds, from economic contracts and other agreements provided for by law, as well as from agreements, although not provided for by law, but such that do not contradict it.

As a result of economic activity using a single property complex of an enterprise, its constituent elements become claims and debts, which constitute the content of economic obligations.

The integral property complex of the enterprise is a complex conglomerate of property and non-property elements. This fact gives grounds for asserting in the literature that a single property complex of an enterprise is a complex thing. In our opinion, the single property complex of the enterprise cannot be considered through the prism of the criteria for defining the concept of a complex thing. This conclusion is based on the following considerations. Firstly, the property complex of an enterprise cannot be interpreted as a thing since the elements of the latter are non-property components. Secondly, the property complex of the enterprise in relation to the statics and dynamics of civil turnover acts as an independent object of civil rights and obligations. Thirdly, individual components of a single property complex of an enterprise can be objects of civil turnover themselves. However, they are united by a common goal, which is to use them for business purposes based on the material base of the property complex.

The enterprise as an integral property complex is immovable property, but as an object of civil law relations it consists of tangible and intangible assets having an independent valuation. Therefore, the concept of an enterprise as a single property complex and an object of the immovable property also covers multiple movable properties, each of which is separately covered by the legal regime of movable property. However, collectively, they act as a single integral object of civil-law relations.

All tangible property components of the enterprise's property complex can be divided into two groups – movable and immovable property. The basis of immovable property is land plots and houses. Civil law science considers a land plot as an object of ownership, with a specific purpose (in our case, one related to carrying out business and economic activities).

An agricultural plot of land can be used as a component of a single property complex of an agricultural enterprise that grows and simultaneously processes agricultural products.

At the same time, the elements of an integral property complex can include binding and real property rights. So, the integral

property complex of the enterprise is formed not only due to the contributions of the founders but also because of the acquisition of property rights during the production process. One of the defining features of entrepreneurship is the presence of property separated from the property of the founders (participants), property of other legal entities, state or communal property, which is manifested in the presence of an independent balance sheet.

An enterprise as a legal entity is not the owner of an object of property rights, but such objects are on its balance sheet and are elements of a single property complex. This does not contradict the provisions of the current legislation, according to which the same property used in economic activity may belong to other owners.

Thus, material components of an enterprise as a single property complex may be subject to different legal regimes. Still, the essence and purpose of the enterprise's material components of the integral property complex do not change. They constitute the property basis of performance provided for by the charter of economic tasks.

Undoubtedly, the problem of the essence of the enterprise in those times and today, it was studied by lawyers from multiple foreign countries. The ability of an enterprise to be the subject of certain transactions forced scientists from countries such as Germany, France, Italy, Belgium and Switzerland to develop within the categories of private law the concept of an enterprise as a subject of contractual, so and tort obligations.

In France and Italy, in the countries where the turnover of the enterprise was regulated at the level of the law, the development of theoretical problems was conducted within the limits of these laws. According to the law, the property of the enterprise belongs either to a natural person – the owner of the capital of this enterprise, or to a legal entity – the company that created the enterprise. The owner can advance his enterprise, withdraw its profits or values, using them for their other businesses. But all these operations do not have of legal significance, since the owner cannot be a debtor or creditor in relation to himself. However, the accounting records of each of these enterprises indicate transactions will find their reflection.

In Germany, where the concept of an enterprise was not defined in law, the search for the essence of this category led to the emergence of various theories, in particular, "activity theory", whose representatives considered the enterprise as an activity, business (business in the modern sense); "atomistic theories" – the enterprise was considered as a sum of various kinds property; "theories of the personification of the enterprise" – the enterprise was considered a subject of law, and its owner – a representative of the enterprise; "unitary theory", representatives of which considered the enterprise simultaneously as an actor and as an amount various types of property. Of course, there were other theories.

Meanwhile, state-owned enterprises that were transferred to economic calculation, could not be considered legal entities in the modern sense, because the property of these enterprises belonged to the state, which at the same time was not responsible for their activities. This circumstance allowed K. A. Fleishyts characterize state enterprises as "underdeveloped" entities. This state of affairs encouraged scientists to find out the essence of the enterprise. It is at this time in the doctrine of civil law, the discussion regarding the enterprise as an object of civil rights is being revived.

That the trust as a single state enterprise has turned into almost a general organizational and legal form, in which was worn not only by any economic activity that was related to the production and distribution of goods, provision services, as well as any other activity (including cultural and educational) that is built on the basis of equivalent payment. But, as noted in the scientific literature, in practice for a long time there was a discrepancy between the current legislation on state legal entities and the actual legal the position of industrial enterprises.

Only with the adoption of the Central Committee of the Ukrainian SSR in 1963 and the Central Committee of the RSFSR in 1964, the status of state-owned enterprises was determined as legal entities and the legal status of the registered for their property. Already later, the approach to the enterprise as a legal entity – a subject of civil rights – found its own embodied in the

Regulations on State Production Enterprises in the USSR, in the Law of the USSR "On State Enterprises (Associations)" and, by the way, became dominant in the doctrine civil law.

At the same time, the problem of the essence of the enterprise was not of interest only lawyers, but also economists. Considering the enterprise as a primary production, independent, management unit socialist industry, they, however, did not connect it is with mandatory recognition of its legal personality. This caused objections from some lawyers. The enterprise is not possible interpret only as an economic category, namely as a certain one a complex of tools and means of production. Enterprise can be called only such an economical organization – subject of law, which has all the characteristics of a legal entity.

Under such conditions, research gained practical significance legal properties of the enterprise as a special entity of civil law, in order to determine its legal capacity, that is, the possibility of independent participation in civil turnover. The majority of lawyers of that time recognized that the

Meanwhile, whether at that time the category "enterprise" really became synonymous with the category "legal entity"? There were several points of view on this matter. Some authors believed that it is indeed, others denied it.

The enterprise should be an object of law, who believed that an enterprise is not only an object of ownership of a merchant, but also an object that has a certain separation from another property of the latter, which is manifested in the fact that the enterprise is obliged to keep its own reporting, including tax reporting; can be registered under its own company (commercial (brand) name; can act as object of various trade transactions. At the same time, a scientist emphasized that this separation is largely conditional, because the owner of the enterprise can "put his hand in his pocket the enterprise", having duly completed such a transaction, while the obligation to return the "debt" to the enterprise does not exist. But it will be much longer than this the approach will find its embodiment in the law.

Only in the late 80s and early 90s of the last century, the enterprise began to be recognized by law object of law. Yes, the Fundamentals of Civil Legislation of the Union of the SSR and the Union Republics of 1991 (hereinafter – Fundamentals) the enterprise was attributed not only to the subject of law – a legal entity, but also to the object of law, marking it as a property complex that is strongly connected with the land, and that next to with buildings, structures and other property complexes was treated as real estate (Article 4). The citizen has endowed the right to own both enterprises and other property complexes in the field of production of goods, household services, trade and other business activities. In view of this, it is hardly possible to agree with those lawyers who claim today that the appearance of an enterprise – object of civil rights in the updated civil legislation was spontaneous, because neither the doctrine nor the legislation before they were not ready for this.

Approach to the enterprise simultaneously as a subject and as an object of law was also observed in the legislation of the first years existence of independent Ukraine. If the Law "On enterprises in Ukraine"[303] considered the enterprise as the main organizational link of the national economy of Ukraine, independent managing statutory entity that had legal rights person and carried out production, research and commercial activities with the aim of obtaining the appropriate profit (income) (Article 1), then the Law of Ukraine "On Property"[304] together with recognition of the enterprise as a subject of property rights (Article 20) considered it as an object of ownership (Articles 34, 35).

Renewal of the approach to the enterprise as an object of law in domestic legislation mainly coincided in time with the processes of denationalization and privatization in Ukraine, when the

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[303] Про підприємства в України: Закон України від 27 берез. 1991 р. № 887–XII. *Відом. Верхов. Ради України.* 1991. № 24. Ст. 272.

[304] Про власність: Закон України від 7 лют. 1991 р. № 697-XII. Відом. Верхов. Ради України. 1991. № 20. Ст. 249

corresponding legislative framework aimed at reforming the economy. For the first time, the object of privatization was the enterprise, as well as its structural units (workshops, factories, divisions, other subdivisions that could be allocated in independent enterprises, provided that such allocation is not violated the technological unity of production from the main one specializations of this enterprise) were recognized in the Concept denationalization and privatization of enterprises, land and housing, which was approved by the Resolution of the Verkhovna Rada of Ukraine dated October 31, 1991[305].

Thus, it can be concluded that the reason for for the enterprise to transform as a single property complex to an independent object of civil rights, became the realities that developed during the privatization of state property. It was they who demanded it bringing the actual position of existing subjects and objects civil rights in accordance with their essential characteristics. In addition, the need for harmonization became the basis for the transformation of the enterprise from a subject to an object of civil rights national legislation with the European one, because that's exactly what it is approach to the enterprise characterizes the legislation of many foreign countries, in particular Italy and France. It should be added that the legislation of these countries contains not only special legislation construction of the enterprise as an object of civil rights, but also, on in contrast to the current legislation of Ukraine, the norms regulating the execution of transactions with him.

It should be noted that the domestic legislation still maintains a dual approach to understanding the enterprise. Yes, the Civil Code of Ukraine, which regulates the procedure for creation legal entities under public law, considers the enterprise as an independent business entity created by a competent state authority, a local self-

[305] Концепція роздержавлення і приватизації підприємств, землі і житлового фонду: затверджена Постановою Верхов. Ради України від 31 жовт. 1991 р. № 1767-XII . *Відом. Верхов. Ради України.* 1991. № 53. Ст. 795

government body or other entities to meet public and personal needs (Part 1 of Article 62). As noted from this according to S. M. Grudnytska[306], enterprises are those branches of the national economy in which productive forces are found direct and immediate combination with means of production from for the purpose of productive exploitation of the latter and release of the finished product products. Hence, according to the concept of "owners", the enterprise is a subject of law, and a complete property complex is the property base of its functioning.

The Central Committee of Ukraine, of course, cannot ignore the existing order of creation of public legal entities, because it establishes only the order of creation, organizational and legal forms and the legal status of legal entities under private law (Part 3 of Art.81). Therefore, taking into account the provisions of the current Civil Code of Ukraine, the Central Committee of Ukraine established the state's right to create state enterprises (Part 2 of Article 167), and the right of territorial communities – on the creation of communal enterprises (Part 2 of Article 169), which are legal entities under public law, as it implies functioning of the latter as subjects of law.

Given this, they are still relevant today the words of K. A. Fleishyts, that legal opinion, like legislation, followed two main paths. Fascinated by the economic phenomenon of the enterprise as a participant in the economy turnover, some lawyers personalized it and announced it the subject of rights, others, before the growing turnover capacity enterprises recognized it as an object of rights.

There is particular attention among legal scolars to the fact that the designation is one and the same the term of both the subject of law and the property belonging to him cannot be used to recognize as true, others, referring to German law in which the concept "enterprise" is used both in the meaning of the subject and in the

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306 Науково-практичний коментар Господарського кодексу України. 441 с.

meaning of the object of legal relations, considers it appropriate and even necessary But still, given the difference in values of the above concepts of the enterprise to understand the one in which in the sense in which this term is used, the lawyer considers it sufficient that the text of the law clearly indicates what it is about it is said in each specific case.

We believe that we cannot agree with this. The situation, at to which the same term has different meanings, first of all, entails a misunderstanding in law enforcement practice. It is hardly possible to adopt such a normative legal act, which would be able to cover all those cases where it would be used the concept of an enterprise, and also to determine in what sense it will be applied practically. In our opinion, the situation that has developed in the legislation of Ukraine, can be resolved at the level of coordination of provisions current Central Committee and Central Committee of Ukraine. We should agree with Y. M. Shevchenko that this will be facilitated by the change in the wording of Part 1 of Art. 83 of the Civil Code of Ukraine, which should contain an indication of only two forms, in which legal entities can be created – partnerships and institutions. This will make it possible to remove the enterprise from the Civil Code of Ukraine as one of the organizational forms of business[307], because it is the indication in Part 1 of Art. 83 of the Civil Code of Ukraine on others, in addition to companies and institutions, the forms in which legal entities can be created enabled businessmen to consider the enterprise as such an organizational form, recognizing the enterprise as a subject of law.

[307] Шевченко Я. М: Проблемыи перспективыразвития гражданского права Украины в соответствии с новым Гражданским кодексом. Україна – Німеччина: розвиток законодавства в рамках європейського права. С. 35–43.

II. INTERNATIONAL STANDARDS OF EVALUATION ACTIVITY AND ENTERPRISE VALUE MANAGEMENT

The process of estimating the value of an enterprise for the purpose of its further management is strictly regulated, as it is controlled by the state and international organizations through a system of valuation standards activity Assessment standards determine methodical recommendations and procedural aspects of assessing the value of various types of assets and contain recommendations on the organization of evaluation activities.

Appraisal rules and standards – summary basic concepts and rules for estimating the value of objects developed and adopted by state regulatory bodies, self-governments by professional organizations of appraisers or management to carry out professional activities.

National and international assessment standards are distinguished. They include:

- determination of the main types of value identified by appraisers;
- a list of assessment principles;
- a list and brief description of the main methods and procedures provided for assessors;
- a brief description of the requirements for the evaluator's activities, namely, reports or conclusions regarding the evaluation.

National standards of assessment activities in most countries with developed market economies were formed in 1940-1960. The most carefully developed evaluation standards in the USA, where there are standards of individual professional organizations of evaluators (there are about fifteen of them in the country), unified standards (Unified Standards of Professional Appraisal Practices), which recognized by all appraisers-practitioners.

International standards of cost estimation have been developed since 1985 and supplemented by the International Committee on Property Appraisal Standards (MCSO). They reveal the main types of value that are determined by the appraiser,

determine a certain order of his actions during the appraisal for specific purposes. From national organizations that are members of the ICSO, it is necessary to bring national standards into line with international ones.

The most widespread international standards that can to be used for separate evaluation purposes are as follows:

International assessment standards (IAS); developed in 1994. Today the edition "MCO-2011" is used;

American Appraisal Standards (USPAP) – "Uniform Standards for Professional Appraisal Activities"; first developed and approved in 1989;

European assessment standards; developed by The European Group of Valuers' Associations (TEGoVA) and published in 1980;

British assessment standards RICS (The Royal Institution of Chartered Surveyors) – "Standards of the British Royal Society of Surveyors". RICS is the largest international organization of professionals in the field real estate First published in 1976.

Special attention is needed for regional standards, which include, first of all, the European assessment standards (ESA), which are implemented the same functions as International, but they can be considered more detailed, clear, comprehensive. However, the effect of these standards extends specifically to European countries, since assessment activities in Europe have its specificity.

National evaluation standards are mandatory for the subjects of evaluation activities when determining the type of value of the evaluation object, approaches, methods, as well as conducting the evaluation process itself. According to the requirements of the standards during the preparation of the evaluation report the appraiser is obliged to use information that ensures the reliability of the report on the object as a document containing information of evidentiary value.

The standards define the main approaches to assessment: cost, comparative and income. During the assessment the appraiser is obliged to use (or justify the refusal of use) given approaches to

assessment. At the same time, the appraiser has the right independently determine within the framework of each of the approaches specific evaluation methods defined in the evaluation standards as a method of calculating the cost object of assessment within one of the approaches.

International standards of evaluation activities are developed and approved by international public associations and organizations, representing the interests of appraisers from different countries of the world. Thus, a self-regulatory process of management of assessment activities and assessors through public organizations is formed.

Let's take a closer look at the specifics of the functioning of some of the international organizations that develop and approve International Standards of Assessment Activities.

Organization TEGoVA (The European Group of Valuers' Associations)[308], which approves the European EVS assessment standards, effective since 1997, replacing EUROVAL with itself. Today, it unites sixty-three national associations of appraisers from thirty-four countries, mainly on the European continent. In its current format, TEGoVA, as an international organization, represents the common professional interests of more than seventy thousand of appraisers from European countries. Thus, TEGoVA is an international non-profit organization uniting national assessment associations. Development and distribution of harmonized international standards evaluation activity are declared by TEGoVA as one of the main directions of his activity. Direct development of assessment standards conducted by the Committee for European Assessment Standards EVSB (European Valuation Standards Board), whose members are part of TEGoVA, representing national organizations of valuers.

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[308] Офіційний сайт The European Group of Valuers' Associations – TEGoVA. URL: http://www.tegova.org/.

International Valuation Standards Council IVSC (International Valuation Standards Council)[309], which approves the International IVS assessment standards and by its status as an independent not-for-profit private organization with headquarters in London, United Kingdom. It was created in 1981. Until 1994, it was called the International Committee on Evaluation Standards assets of TIAVSC (The International Assets Valuation Standards Committee). This organization defines the main subject of its activity as follows development and dissemination of advanced standards of assessment activities and technical guides to them. Today, ninety-six organizations from fifty-eight countries of the world participate in its work, covering almost all regions of the globe. It is noteworthy that unlike TEGoVA membership in which is provided only for national associations of appraisers, structures of different status are involved in IVSC activities, including professional associations of national and regional assessment direction levels, institutional structures of a number of countries, academic and educational associations institutions, individual large companies in the evaluation and related fields and their groups. Ukraine is represented in IVSC activities by the Ukrainian Society of Appraisers (UTO) and the Federation of Business and Intellectual Property Appraisers (PHOBIS). After some break, the Ukrainian Society of Appraisers since 2017 renewed its membership in TEGoVA, which it became a member of in the fall of 2016 Association of Bank Appraisal Specialists of Ukraine (ASBOU).

In its target formulation, the European EVS valuation standards are traditionally oriented towards their application for the valuation of mainly real estate. This is the predominant focus of this group of standards, which is confirmed by their latest version of 2016, is largely determined by the general positioning of TEGoVA's activities, which in recently strengthened cooperation with the governing structures of the European Community.

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309 IVSC (International Valuation Standards Council). URL: https://www.ivsc.org /.

At the same time, the International Assessment Standards Council IVSC puts facing more global tasks, focusing its activities on the generalization of generally recognized best practices and practices of evaluation activities and its reflection in universal standards. Assessment tangible and intangible assets for the financial system as a whole is of great importance. Such standards should be universal in their application, giving validity to the procedures and practice of assessment activities and thus increasing confidence in those received on their basis results Thus, according to its purpose, the scope of application of IVS standards is wider compared to EVS standards, but does not diminish the importance and role of the latter.

EVS 2016 European Evaluation Standards published under the auspices of the European group of appraisers' associations TEGoVA (The European Group of Valuers' Associations); IVS International Valuation Standards 2017 issued by the International Valuation Standards Council IVSC (International Valuation Standards Council), together with the Royal Institution's Assessment Standards certified surveyors of Great Britain RICS (Royal Institute of Chartered Surveyors) make up the leading group of internationally recognized standards. All other valuation standards at the national, regional and industry levels are formed on their basis. Convincing confirmation of this provision is the fact that Article 26 of the European Directive Union No. 2014/17/EU precisely these three groups of standards – EVS, IVSC and RICS directly recommended for use as the most justified.

Review of the main content of the new version of the International Assessment Standards IVS 2017 and their comparison with the European standards EVS 2016 allows us to state that: the structure and content of the International Assessment Standards IVS 2017 and the European Standards EVS 2016 differ significantly. These differences are determined by the specific orientation of the standards themselves. If the IVS International Assessment Standards 2017 are universal in nature and can to be considered as the most general, then the European

assessment standards EVS 2016 are focused on property valuation applications. It is related to the aim of these standards to be included in the common European legislative field; despite the differences in the structure and content of these standards, there is a similarity and inconsistency in the interpretation of these basic standards elements of value assessment, such as: market value, market rent, assessment approaches and methods, reporting requirements, assessment procedure, etc.; the defined groups of standards can be considered as complementary to each other. In considering the most general elements of the procedure, criteria and requirements for cost evaluation, it is advisable to rely on IVS International Standards 2017. If necessary, detailed accounting of specifics property and property rights, especially in relation to the pan-European market, it is advisable to use the EVS 2016 family of standards; new versions of International Standards in terms of their structure and content evaluations of IVS 2017 and European standards EVS 2016 have undergone substantial changes compared to previous editions, reflecting the accumulated experience of their application and the perspective of further development.

Therefore, the International Assessment Standards (IAS) are developed by the IVSC organization. The main task of such standards is to achieve consistency between national assessment standards and standards, expedient for the needs of the international community. MSO has only one a basis, a solid foundation that reflects the unity of economic principles that do not depend on political borders.

The framework of the International Valuation Standards 2017, the draft of which was published by the International Valuation Standards Committee (IVSC), is given in Annex A. A similar structure of the MSO allows to cover all issues and problems aspects that may arise in the process of evaluation activities, regarding different types of assets and integral property complexes.

III. THE ESSENCE OF VALUE-ORIENTED INTERNATIONAL MANAGEMENT THE COMPANY

In the modern theory of enterprise management, there are many indicators and indicators for evaluating the company's activity. Their systematization and definition of analysis goals have changed over time. Development of approaches to understanding the essence of the basic goals of the enterprise in the field of economic theory and management at the end of the last century revealed a single vector of development, according to which the creation of company value is a priority direction her activities.

The basis of the value approach to management is laid not only a set of tools for evaluating strategic and operational decisions, but also the concept of integrated interaction at all levels of the enterprise, creation special corporate culture. Interest in enterprise value management arose in financial management with the works of I. Fisher (1930), who argued that maximizing the company's value is the best way to resolve conflicts of interest (between owners, managers and creditors).

In 1967, F. Modigliani and M. Miller proved that the cost of the company depends on the amount of cash flows that can be obtained from the ownership of the enterprise. At the beginning of 1990, the companies McKinsey Co and Stern Stewart developed techniques for applying the value of companies to goals management of corporations.

Numerous theoretical studies in the field of value-oriented management led to the practical application of this concept, the relevance of which has been increasing recently. The innovation of value-oriented management is the evolution of thinking in the field of analysis of the company's activities, namely the transition from an accounting model to a financial one. The concept is based on an understanding of the effectiveness of business development from the position that the income from the business should exceed the funds spent on the acquisition of resources. Profitability index, in this case is not enough for an adequate assessment of the business performance.

The value approach in management (Value Based Management – VBM) is implemented using various methods reflected by indicators,

which are used to estimate the value of the company. In particular special attention in the literature is given to such indicators as: added economic value (EVA – Economic Value Added), added market value (MVA – Market Value Added), return on investment (CFROI – Cash Flow Return on Investments), added shareholder value (SVA – Shareholders Value Added), added monetary value (CVA – Credit Valuation Adjustment). Orientation to one or another model may depend on the specifics of the business, capital intensity of production, situation in the industry and other factors. As part of the operational analysis, it should be noted that the interests of management are shifting from accounting to economic profit.

We will reveal the main characteristics of the methods and the expediency of their application for evaluating the management of the development of the enterprise.

The method of market value added (Market Value Added, MVA) – one of the most common methods used to estimate value enterprises. As a criterion for value creation, this method considers the market capitalization and the market value of the company's debts. But, you should note that the use of MVA is complicated for a number of reasons:

1) in accordance with modern accounting rules, the company's intangible assets (trademarks, licenses, the company's brand, its reputation, specialists, etc.) remain unaccounted for or are accounted for at a value that does not correspond to market conditions. However, development the enterprise depends on the quality of intangible assets;

2) assets are shown on the balance sheet at their purchase price. But, if the asset was purchased several years ago, it is likely that the original cost asset may differ significantly from its current market value;

3) broad capabilities of managers in manipulating accounting data in order to increase the calculated value of MVA.

Another well-known indicator of enterprise value assessment is economic value added (Economic Value Added, EVA). The EVA indicator from a financial point of view characterizes the quality of

management decisions made, which is especially important for managing the development of the enterprise. When the value of EVA is positive, the positive dynamics of this value are observed. So, we can conclude that the company is developing. However, the negative value and negative dynamics of EVA indicate its reduction and ineffectiveness of management activities in management development processes.

For the assessment of development processes, it is important that economic added value takes into account not only the final result (the size of the received profit), but also at what "price" it was obtained (what amount of capital was spent on it)[310].

One of the methods that are used in the framework of cost evaluation of development is the method of shareholder added value (Shareholder Value Added, SVA). Equity added value is defined as growth between the two indicators – the value of the share capital after the commission a certain operation and the cost of the same capital before this operation. Later, another definition of the SVA indicator appeared: shareholder value added as the increment between the calculated value of the shareholder capital (for example, by the method of discounted cash flows) and its book value.

The use of SVA within development management, as opposed to cash flow, makes it possible to understand how effective they were management actions taken if the distribution of the amount of added value differs by years Another important point in the calculation of the SVA indicator there is also the fact of accounting for the value added by new investments in the same year, when this investment was made.

It should be noted that unlike the EVA method, when using the SVA indicator, the emphasis is on clearly defining the build-up period advantages of the enterprise.

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[310] Ромашин О. В. Інструменти вартісно-орієнтованого управління підприємством. URL: http://svitppt.com.ua/ekonomika/instrumenti-vartisnoorientovanogo-upravlinnya pidpriemstvom.html

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Ignoring cash flows is a drawback inherent in the EVA indicator, which is eliminated when calculating the indicator of profitability of cash flows from investments (Cash Flow Return on Investment, CFROI). Thus, the advantage of this indicator over others is that it is monetary flows generated by existing and future assets and initial investment are expressed in current prices, i.e. inflation factor is taken into account. One of the main disadvantages of CFROI is that the result of calculations is not the amount of value "created" (or "destroyed"), it is a relative measure.

Other disadvantages are the complexity of calculating the CFROI indicator and the question of the procedure for determining all cash flows that are generated as a result of the use of both existing and future assets of the company.

Recently, in the practice of cost management, companies often use the Cash Value Added (CVA) model. This model is based on the concept of residual income. The CVA indicator is also called Residual Cash Flow (RCF).

According to most academics and experts in the field of finance, this value creation criterion is the best. Undoubtedly his advantage is that cash flows are used as a return on invested capital, and unlike the CFROI indicator, costs are taken into account to attract and maintain capital from various sources, that is, the weighted average cost of capital.

In the course of evaluating the enterprise's development processes, it is important to determine: how dynamic the enterprise's development is and what causes it; or, if the enterprise is functioning but not developing, what in this way, it is possible to move to the stage of development, which factors will give the enterprise an impetus to effective activity.

It is difficult to choose an economic unit for evaluating the development process a technique that will provide not a static, but a dynamic predictive characteristic of economic processes, reveal the potential opportunities of the enterprise, build a predictive model of its work efficiency. One the modern concept of evaluating the quality of enterprise management with elements of forecasting

is value-oriented evaluation of management the company.

One of the main goals of cost-oriented management is to promote the long-term development of the enterprise through the coordination of strategic decision-making and management motivation. This is due to that the value of the enterprise is determined by the amount of future cash flows.

Value-oriented enterprise management (VBM, VOU) – this is the management of the development of the enterprise, which is carried out by researching and evaluating the future value of its assets, taking into account previous infusions of funds and other economic costs.

The main advantages of value-oriented enterprise management consist of the following:

by its nature, it is most in line with natural interests owners in enrichment due to improvement of the enterprise;

enterprise owners, trying to improve welfare, ensure the adoption of management decisions that take into account the interests of interested parties, stimulating the development of all market participants;

cost as an economical category can be used on all enterprise management levels;

serves as a measure of the effectiveness of enterprise management processes;

value orientation creates effective levers for attracting capital for further development, which leads to an increase in its competitiveness and investment activity[311].

The interest in VBM is caused by the fact that this method allows analyzing and evaluating the results of the company's activities taking into account all changes, that occur in a business environment. But don't consider VBM as the prerogative of large enterprises: the effectiveness of investments does not depend from

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[311] Шевчук Н. В. Аналітичні моделі вартісно-орієнтованого управління підприємством. URL: http://www.slideshare.net/alegre380/4-shevchuk-n.

the scale of the business. Even medium-sized enterprises with a narrow circle of owners need an integrated management system that would help business to ensure proper competitiveness.

Such a system can be created on the basis of cost approaches. Attracting financing makes any enterprise a full participant in value creation. Successful implementation of the indicator system, applied in VBM is achieved through management's awareness of value creation factors (financial and managerial perspectives) and through their adequate interpretation. The evolution of priorities in value-oriented management has its own peculiarities and problems, which must be resolved for the successful adaptation of this concept to the conditions of domestic enterprises. For a clearer understanding of the concept of value-based management, VBM should be considered as a comprehensive system management of an organization that organically combines four main modules: valuation, strategy, finance and corporate governance. But the practical application of VBM by enterprises does not yet have a single conceptual apparatus directly adapted to domestic realities, because inconsistency of the regulatory and management framework in the field of business. Departure from the accounting approach of determining the results of activity the enterprise deals primarily with the valuation module and the finance module, followed by the other two modules. Value-based management offers a financial model of capital management instead of an accounting model. The financial model takes into account an additional type of expenses – capital expenses, which reflect, on the one hand, the rate of expenses on equity capital, necessary in view of the risk, and on the other – the amount of capital invested by the owners. The main difficulties in applying the value-oriented approach arise within the framework of the market value assessment module enterprise and search for the optimal method of its determination.

The development of measures to increase the value of the enterprise is carried out within the framework of the general financial strategy. Financial strategy is a subsystem of the

company's strategy aimed at its development financial and management potential, increasing the level of financial stability and independence, improvement of the financial management system and achievement of strategic financial goals. As experience shows implementation of cost management, the most successful in this way enterprises are changing approaches to management accounting, moving on accounting systems "by functions and types of activity" (activity based costing, ABC). Such a system makes it possible to identify the factors of enterprise value at each stage of the value creation chain and distribute them overhead costs according to the contribution of a specific factor to the creation cost.

At Ukrainian enterprises, interest in value-oriented management is reduced to theoretical considerations without finding mass practical application. It is necessary to overcome a large number of barriers, before adopting the successful experience of foreign colleagues regarding the implementation of the concept of value-oriented management. Among them is the following to indicate the established traditions of analysis and management, the factors of which are: underdevelopment of financial planning systems and lack of development predictive data; weak relationship between financial and marketing planning; inadequacy of internal management systems accounting, which do not allow or make it difficult to separate data by segments business, by separate levels of management and centers of responsibility, by individual business functions; lack of culture of business process analysis. Therefore, it is necessary to form a holistic vision of business value creation, which covers all aspects of business activity, both external and internal risks – through the prism of the analysis of the external environment (trends in the macroeconomics, development in the industry) and the business itself (through the prism of the analysis of the financial condition, the presence of a business reputation, quality assessment the work of management, technological risks and the level of corporate governance).

Understanding and applying in practice the concept of value-oriented management is a very important argument that prompts

to assign due attention to the analysis of financial indicators; to create a corporate culture, where the main goal for each employee, regardless of hierarchy of positions, is the maximization of the market value of the enterprise.

The experience of world-leading companies that apply value-oriented management in practice shows that its implementation can to become a tool that will allow more effective use financial resources of the enterprise and form prerequisites for increasing the welfare of the enterprise owners through the maximization of its market value.

Public sector businesses are created by legal proceedings, totally or partially owned and managed by the government. They produce marketable goods and services, have a clear or definable budget, and are expected to cover operational expenses with their funds. Public sector enterprises differ from other subsets of the public sector (SOEs and the public sector institutions). In a public sector company, the government directly or indirectly owns the majority of equity shares through SOEs or ministries. It also has direct or indirect influence over decision-making through appointed authorities. Organizational structures for public sector businesses typically include three main ways: departmental undertakings, statutory corporations, and joint stock firms.

Statutory corporations, on the other hand, are businesses typically involved in manufacturing or economic activity while being established by legislative acts. Government-owned general and life insurance firms in Bangladesh or Airports Authority in India are an example of statutory corporations. These businesses are separate legal entities from the government. However, the government owns and controls these corporations because it owns the shares that are registered in its name. Statutory corporations usually have a great deal of legal autonomy. The governmental act of their creation specifies its rules, goals and responsibilities.[312]

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[312] Public Sector Enterprise. Banglapedia. URL: https://en.banglapedia.org/index.php/Public_Sector_Enterprise

CONCLUSIONS

1. An enterprise is a special type of property, which has received the name "unified property complex". It consists of heterogeneous elements, each of which can act as an independent object of civil rights, and combining them into such a functional aggregate as an object makes it possible to use enterprise for a certain purpose – for the implementation of entrepreneurial activity.

2. The specifics of the enterprise as an object of civil rights is determined by its complexity and is manifested both in property and spatial uncertainty of its composition at the time of conclusion of the relevant deed. The properties inherent in the enterprise as a specific object of civil rights require to be abandoned as universal, as well as from limited concepts of its turnover capacity. The enterprise may be the subject of those civil law acts, which are allowed by the regulatory mechanism use it.

3. Therefore, the implementation of value-oriented management will allow to rebuild the system of international management of the enterprise and create prerequisites for balanced and systematic development of the economic entity in the conditions of rapid changes in the external market environment.

4. Evaluation process the cost of the enterprise is related to the analysis of large amounts of information. The main current costs during the assessment related to the search and further processing of various information, necessary for the implementation of the assessment goals. Therefore, the development of international information support for the work of evaluators is one of the most important factors successful performance of evaluation works. With this in mind, today is common task of state authorities and public associations of evaluators the formation of a single information base for conducting evaluations procedures. The use of objective and comprehensive information in the evaluation process will allow not only to obtain an objective result of the assessment of the value of the property, but also to strengthen the image of the

appraiser, who uses only transparent and truthful information in his activities.

Enterprise as a Civil Rights Object is a rigorous and methodical evaluation of the legal nature and civil rights of the enterprise as an object of civil rights, defining the most pertinent concepts and theories in the definition and implementation of the legal rules concerning the enterprise, and offering advice for the settlement of the defined issues and advancement of the current regulatory oversight in light of the findings from foreign nations and comparative law.

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PRIVATE AND FAMILY LIFE: THE PROBLEM OF DETERMINATION

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INTRODUCTION

It is a well-known fact that since the ratification by Ukraine of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, according to the Law of Ukraine No. 475/97-VR of 17.07.1997, the law of the ECHR has become mandatory for application on the territory of our state. At the same time, it should be noted that these requirements were not actually implemented in practice during the administration of justice in our country. Thanks to the Revolution of Dignity, when the people of Ukraine determined new guidelines and vectors for the future development of our state, real reform of the judicial branch of government in Ukraine became possible, and, not surprisingly, human rights became the cornerstone on which the new Ukrainian state is being built. Thanks to this, the role of the Convention in the processes of reforming the judicial system of our country acquires extreme relevance and becomes vitally necessary. In connection with the implementation of the mentioned processes, the problematic of the application of the practice of the ECHR by the courts in Ukraine is exposed. After all, it is not a secret that the courts on the territory of Ukraine hardly used the practice of the ECHR in order to justify the decision or sentence of the court during the administration of justice. Nowadays, the use of ECHR case law in the processes of the judicial branch of government in Ukraine is becoming a vital necessity. It is the fact that gives us reasons to assert that the study, theoretical analysis and practical application of the precedent law of the ECHR is an extremely urgent necessity for the successful further administration of justice in our country.

On the other hand, it should be noted that the specified analysis should be structured and systematic in order for the achieved results to have practical significance for the Ukrainian justice system. In our opinion, in the process of its implementation, the structural features that are inherent in the Convention itself should be followed, as well as the specified analysis should be carried out on an ongoing basis, because the Court in its own activities should reflect those social changes that occur along with the evolution of society and are determined by their inherent dynamism. In turn, thanks to the newly created precedent practice of the Court, there is a constant need for its analysis, which must be carried out by relevant specialists both in the theoretical and in the field of practical application of the precedent practice of the ECHR.

That is why, when choosing the subject of research for this work, I faced certain difficulties. After all, any article of the Convention, which is designed to protect this or that human right, is extremely important for society, and its study would bring some benefit both to theoretical legal science and to the practice of law enforcement in our country. And that is why a difficult, in my opinion, path was chosen. After all, the right to respect of private and family life, which is guaranteed by article 8 of the Convention, is the most broad, multifaceted, and therefore difficult. Based on the content of the above argumentation, I chose the topic of the work, which is directly related to the issue of researching the right to respect for a person's private and family life.

I. THE NATURE, LEVEL OF DEVELOPMENT AND METHODOLOGY OF RESEARCH INTO THE SPHERES OF AN INDIVIDUAL'S PRIVATE AND FAMILY LIFE

Let's pay attention to the remarkable fact that the content of one or another article of the Convention at one time became the subject of research by legal scholars. In particular, various legal aspects of the activity of the European Court for the protection of human rights, as well as the meaning and role of its precedent practice, were

investigated in works by such domestic scientists as S. Fedyk[313], who studied the peculiarities of the interpretation of legal norms regarding human rights, based on the materials of the practice of the ECHR and the Constitutional Court of Ukraine, L. Pastukhova[314], which examined the effectiveness of international legal means of ensuring the implementation of the European Convention on Human Rights and Fundamental Freedoms, K. Andrianov[315], who analyzed the role of the Convention control mechanism in the process of implementing its norms. D. Suprun[316] researched the organizational and legal principles and jurisdictional bases of the activity of the ECHR. In turn, V. Kapustynskii[317] analyzed in detail the factors influencing the activity of the ECHR on the formation of national human rights protection systems and compliance by states with human rights protection standards.

The issue of the implementation of decisions of the European Court of Human Rights and the norms of international legal acts in

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314 Пастухова Л.В. Ефективність міжнародно-правових засобів забезпечення реалізації Конвенції про захист прав і основних свобод людини : автореф. дис. канд. юрид. наук : 12.00.11/ Л.В. Пастухова ; Київ. нац. ун-т ім. Т. Шевченка, К., 2003, 21 с.

315 Андріанов К.В. Роль контрольного механізму Конвенції про захист прав і основних свобод людини в процесі реалізації її норм : дис. канд. юрид. наук : 12.00.11 / Київський національний ун-т ім. Тараса Шевченка, К., 2002, 185 с.

316 Супрун Д.М. Організаційно-правові засади та юрисдикційні основи діяльності Європейського Суду з прав людини : автореф. дис. канд. юрид. наук : 12.00.11 / Д.М. Супрун ; Київ. нац. ун-т ім. Т.Шевченка, К., 2002, 22 с.

317 Капустинський В.А. Вплив діяльності Європейського суду з прав людини на формування національних правозахисних систем і дотримання державами стандартів захисту прав людини : автореф. дис. канд. юрид. наук : 12.00.11 / В.А. Капустинський ; Інститут законодавства Верховної Ради України, К., 2006, 20 с.

the criminal process of Ukraine appeared as a subject of scientific research by V. Uvarov[318]. The peculiarities of the implementation of the decisions of the European Court of Human Rights in the field of criminal procedural legislation of Ukraine in terms of the regulation of pre-trial investigation were thoroughly analyzed by S. Butenko. Judge of the ECHR from Ukraine – G Yudkivska studied the problems of the presumption of innocence in the criminal process of Ukraine and the practice of the European Court of Human Rights. We should also note that V. Kononenko considered the problem of the customary nature of the precedential nature of the decisions of the European Court of Human Rights.

The problems of the application of the treaties of the Council of Europe in the field of criminal law and their implementation in Ukraine were considered by S. Voychenko[319] in sufficient detail. The existing conceptual aspects of the prohibition of improper treatment of a person and their evolution in the activities of the Council of Europe were analyzed by E. Shishkina. A. Yakovlev[320] considered international legal cooperation in the system of the Council of Europe.

Even taking into account the rather significant contribution of international legal scholars to the field of studying the practical experience of the ECHR and the theoretical foundations of its activity, which are contained in the European Convention on Human Rights and Fundamental Freedoms of 1950, in the science of international law there has not been a thorough study of all aspects of protection

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[318] Уваров В.Г. Реалізація рішень Європейського суду з прав людини та норм міжнародно-правових актів у кримінальному процесі України : автореф. дис. д-ра юрид. наук : 12.00.09 / В. Г. Уваров, Харків, 2014, 40 с.

[319] Войченко Є.В. Договори Ради Європи в кримінально-правовій сфері та їх імплементація в Україні : автореф. дис. канд. юрид. наук : 12.00.11 / Є.В. Войченко ; Нац. ун-т «Одес. юрид. акад.», О., 2010, 20 с.

[320] Яковлєв А.А. Міжнародно-правове співробітництво у захисті права власності в системі Ради Європи : автореф. дис. канд. юрид. наук : 12.00.11 / А.А. Яковлев ; Нац. юрид. акад. України ім. Я. Мудрого, Х., 2009, 20 с.

of the right to respect human's private and family life.

While working on this research, I used a whole complex of philosophical, general scientific and special legal methods. Namely: the system method, which turned out to be the basis for a comprehensive and holistic study of the legal nature of the right to respect for an individual's private and family life; definition and study of the dynamics of the influence of the right to respect for private and family life on the processes of formation of integral elements of the existence of an individual within the framework of the functioning of the right to respect for private and family life was carried out within the limits of the dialectical method, the application of which found its own specification in the process of understanding the dialectical unity of private and public interest, abstract and concrete, essential and proper. As one of the leading methods widely used in the field of research into phenomenological aspects of human rights protection, the method of critical analysis was used in the process of research to determine the level and nature of the development of the research topic. A descriptive method was also used at all stages of the research. Comparative-legal and systemic-structural methods provided opportunities to analyze the content of decisions on cases that were considered by the ECHR and granted the status of precedent practice of the Court. Hermeneutic and axiological methods were used in the process of determining the influence of ECHR decisions related to the protection of the right to respect for private and family life of an individual on the processes of formation of modern law in Ukraine.

II. ONTOLOGICAL ESSENCE AND AXIOLOGICAL PARADIGM OF THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

A person's life is determined by the most important axiological category of existence, both of an individual in particular and of society in general. In turn, life, as an ontological phenomenon, is distinguished by its inherent multifacetedness. In fact, each person, as well as his life, is unique, because during his activity he penetrates into the most diverse spheres of both his own and social existence. Each individual has his own life path, which is extremely

difficult to predict, because the life of each person acts as an individual category.

However, applying the method of generalization, we can assume that, despite the extremely high level of diversity, the life of each individual can be divided into certain time stages, as well as find certain algorithms of its development common to society, under the definition of which the vast majority of people fall. Each individual has a certain set of interests and vital needs, thanks to which a person can get opportunities for self-expression or self-realization. So, in particular, the life of each individual includes elements of privacy, each of which affects his life in a different way. Also, the vast majority of people, along with the privacy of their own lives, during their lifetime are enter into the sphere of family relations, which are extremely connected with the private life of an individual.

That is why the protection of the right of private and family life, given their inherent extraordinary importance for the individual, was reflected in the text of European Convention on Human Rights[321], adopted on November 4, 1950, and which entered into force on September 3, 1953.

It should also be noted that the spheres of private and family life are extremely diverse and, based on the content of the specified feature, cannot exist in isolation from other spheres of a person's life, including those that are also reflected in the content of the specified Convention.

In particular, the text of Article 8 of the Convention, which is called "Right to respect for private and family life", states the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

[321] Конвенція про захист прав людини і основоположних свобод від 04.11.1950 р. URL: http://zakon.rada.gov.ua/laws/show/995_004

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The scope of application of the article is quite wide. After all, the sphere of interests protected by it is distinguished by its breadth of coverage and diversity. That is why it is not surprising that the sphere of protected interests of an individual, guaranteed by Art. 8 of the Convention is quite closely intertwined with the scope of human rights that belong to the ontological spheres that are also protected by other articles of the aforementioned Convention. In particular, from another point of view, the content of Article 8 of the Convention is quite closely intertwined with the content of Article 2 of the Convention, the subject of protection of which is the right to life. After all, private and family life are actually constituent categories of life in the broad sense of this word. That is why the positive duties of the state include the protection of human life as such, as well as its private and family members.

In turn, if we conduct a discussion on the correctness of the existence of various connections between the content of Article 8 of the Convention and the content of Article 3 of the Convention, which, in turn, prohibits the use of torture, it can be extremely effective, because the formulated visions can be proved not only on the basis of our logical-philosophical assumptions and conclusions, but also to document them, referring to the content of the relevant decisions of the European Court of Human Rights. Indeed, the use of torture by state authorities is not only a violation of Article 3 of the Convention, but also, in a mandatory manner, and Article 8 of the specified Convention. In order to prove the formulated hypothesis, you can refer to the relevant decision of the European Court of Human Rights. In particular, in the case "Soderman v. Sweden"[322] dated November 12, 2013, the state is assigned a positive

[322] Рішення Європейського Суду з прав людини по справі «Содерман (Soderman) проти Швеції» від 12.11.2013 р. URL: Режим доступу https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22fulltext%22:[%22soderman%22],%22createdAsDate%22:[%2220131112000 0%22,%22201311122359%22]}:

obligation to maintain and actually apply relevant adequate legislation that guarantees and provides adequate protection against violent attacks by private individuals.

That is, in this case, the Court attributes to the positive obligations of the state to refrain from the use of torture by representatives of the relevant state bodies, and also obliges to create and apply the appropriate legislation that will guarantee the protection of the individual from encroachments that may take place on the part of any private person. That is, in this case, the Court protects any individual who is under the jurisdiction of one or another state from the use of torture against his person, but also indirectly establishes the protection of the private and family life of the specified person.

Also, according to the content of § 63 of the case "Raninen v. Finland"[323], it can be noted that in the case of detention of a person with non-compliance with the conditions of detention, in the event that they do not reach the level of severity that may cause a violation of Article 3 of the Convention, may cause a violation of Article 8 of the Convention (prohibition of communication with relatives, etc.).

Also interesting in the section of this issue is the content of § 39-41 of the decision in the case "Szafrański v. Poland"[324], according to which the Court established that the local authorities did not fulfill their direct obligation to ensure the minimum necessary level of individual privacy in relation to the applicant case, the Court established the fact of violation by the state of Article 8 of the Convention, as the applicant had been forced to use the toilet in the presence of other prisoners and, accordingly, had been

[323] Рішення Європейського Суду з прав людини по справі «Raninen проти Фінляндії» від 16.12.1997 р. URL: https://www.legal-tools.org/doc/0a3145/pdf/

[324] Рішення Європейського Суду з прав людини по справі «Szafrański проти Польщі» від 15.12.2015 р. URL: https://www.rpo.gov.pl/sites/default/files/Szafra%C5%84ski%20przeciwko%20Polsce%20wyrok%20%28en%29.pdf

deprived of a basic level of intimacy and privacy in his daily life, during his imprisonment.

Also, a stable connection is clearly evident between the content of Article 8 of the Convention and Article 6 of the Convention, which guarantees an individual the right to a fair trial. After all, violation by the state of the right to a fair trial will, in any case, lead to a violation of the human right to private and family life. Moreover, the procedural component inherent in Article 8 of the Convention is quite closely intertwined with the interests of the individual, which, in turn, are guaranteed and protected by Article 6 of the Convention. After all, from the content of Article 6 of the Convention derives from the procedural aspect of guaranteeing human rights – the right not to any judicial protection of an individual's interests by the state, but to a fair trial, which will establish balance in society in general and in a separate court case in particular.

The substantive side of the guarantee of respect for private and family life covers not only the protection of these rights during the judicial process, but also during the implementation of certain administrative procedures appropriate to the circumstances. These listed measures are only a certain part of a grander, more global goal, which is manifested in the need to properly ensure appropriate respect for personal and family life, the specified aspect is directly or indirectly manifested in the content of the decisions of the European Court of Human Rights in the case "Tapia Gasca and D. v. of Spain" (§ 111-113)[325]; in the case of "Bianchi (Bianchi) v. Switzerland" (§ 112)[326]; in the case "McMichael

[325] Рішення Європейського Суду з прав людини по справі «Tapia Gasca and D. проти Іспанії» від 22.12.2009 р. URL: file:///C:/Users/123/Downloads/ID1291%20-%20Full%20text%20-%20FR.pdf

[326] Рішення Європейського Суду з прав людини по справі «Б'янчі (Bianchi) проти Швейцарії» від 22.06.2006 р. URL: file:///C:/Users/123/Downloads/ID0869%20-%20Full%20text%20-%20FR.pdf

(McMichael) v. United Kingdom" (§ 91)[327]; on the case "V. against the United Kingdom" (§ 65-67)[328]; on the case "Golder (Golder) v. the United Kingdom" (§ 36)[329] and others. From the content of Article 6 and Article 8 of the Convention, it follows that despite the common subject of their protection, each of these articles has its own purpose, the difference between which can play the role of grounds for checking the same specific circumstances of the case in relation to the grounds of protection as per Article 6, as well as under Article 8 of Convention.

Moreover, the provision of Article 8 of the Convention is broader than the provision of Article 6 of the Convention, because during the consideration of a case by the ECHR, in the event that the applicants refer to Articles 6 and 8 in their complaint submitted to the court, the ECHR can make a decision on the investigation of the facts of the case only in relation to the content of Article 8, this actually declares a certain priority of the protection of personal and family life in relation to the right to a fair trial. Also, the Court in the decision on the case "MacReady v. Czech Republic" (§ 41)[330] established that the very respect for family life formulates requirements for the relationship between parents and child in the

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[327] Рішення Європейського Суду з прав людини по справі «МакМайкл (McMichael) проти Сполученого Королівства» від 24.02.1995 р. URL: https://www.globalhealthrights.org/wp-content/uploads/2013/10/McMichael-UK-1995.pdf

[328] Рішення Європейського Суду з прав людини по справі «В. проти Сполученого Королівства» від 08.07.1987 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-57453%22]}

[329] Рішення Європейського Суду з прав людини по справі «Голдер (Golder) проти Сполученого Королівства» від 21.02.1975 р. URL: http://europeancourt.ru/uploads/ECHR_Golder_v_the_United_Kingdom_21_02_1975.pdf

[330] Рішення Європейського Суду з прав людини по справі «MacReady проти Чехії » від 22.04.2010 р. URL: file:///C:/Users/123/Downloads/ID1159%20-%20Full%20text%20-%20FR.pdf

future to be determined with appropriate consideration of all circumstances, and not only from time .

In the decision on the case "Y. v. Slovenia" (§ 114-116)[331] , the Court subjected to a careful examination the circumstances regarding the provision by the national judicial authorities of the appropriate balance between the protection of the applicant's rights to respect for private life and personal integrity and the rights to the defense of the accused, in the case where the applicant was subjected to cross-examination of the accused during criminal proceedings regarding the allegation of assault with intent to rape.

The provision of Article 8 of the Convention is also quite closely intertwined in terms of legal protection with the provision of Article 9 of the Convention, which guarantees the protection of freedom of thought, conscience and religion. In particular, during the consideration of the case "Folgero and others v. Norway" (§ 98)[332], the Court pointed out that information about personal religious and philosophical beliefs can concern some of the most intimate aspects of private life. The Court notes that imposing on parents the mandatory disclosure of detailed information about their religious and philosophical beliefs to the school administration may constitute a violation of Article 8 of the Convention and possibly also Article 9 of the Convention. Thus, the Court established a precedent that the disclosure of information about personal religious and philosophical views and beliefs may also fall under Article 8 of the Convention, since the above beliefs may concern some of the most intimate aspects of an individual's private life. That is why, in the content of this precedent, the formulation of a certain recommendation regarding the compliance

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[331] Рішення Європейського Суду з прав людини по справі «Y. проти Словенії» від 28.05.2015 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-154728%22]}

[332] Рішення Європейського Суду з прав людини по справі «Folgero та інші проти Норвегії» від 29.06.2007 р. URL: file:///C:/Users/123/Downloads/002-2665.pdf

of the verification of aspects of private and family life for compliance with the content of Article 8 of the Convention during the judicial review of cases related to the personal religious and philosophical beliefs of an individual.

Returning to the content of the Court's decision in the case "Folgero and others v. Norway", I would like to note that in this case, parents cannot in any way have an obligation to disclose their own beliefs, because there is a need guaranteed by Article 8 of the Convention regarding the right of parents to respect for their private lives. As can be seen from the facts, the provisions of Article 8 and Article 9 of the Convention also closely overlap with regard to the subject of their legal regulation.

The provision of Article 8 of the Convention is also quite closely intertwined with the provision of Article 10 of the Convention in terms of the subject of legal regulation, which guarantees the state's observance of the freedom of expression of individual views. After all, in the content of the case "Couderc and Hachette Filipacchi Associes v. France" (§ 91)[333], the Court stated that during the consideration of cases attention should be paid to the need to balance the right to respect for private life and the right to freedom of expression. In particular, the court must take into account the following during the consideration of these cases: criteria developed on the basis of precedent practice; contribution to the discussion of one or another issue of general interest; how well-known the relevant person is to the general public and what is the subject of the message about him; what was the previous behavior of the relevant person; content, form and consequences of the publication; the circumstances under which the photograph of the person was taken.

Thus, taking into account the precedent practice of the Court, it can be pointed out that respect for an individual's private and family

[333] Рішення Європейського Суду з прав людини по справі «Couderc and Hachette Filipacchi Associes проти Франції» від 12.06.2014 р. URL: http://www.5rb.com/wp-content/uploads/2014/06/Couderc-and-Hachette-Filipacchi-Associes-v-France.pdf

life is quite closely related to freedom of expression. After all, the freedom of expression of views during its own implementation should not directly or indirectly violate the individual's right to his private and family life. That is, freedom of expression must meet a number of relevant criteria, formed thanks to the precedent practice of the Court, and serve as certain "safeguards" against the violation of rights and freedoms guaranteed by Article 8 of the Convention.

It is also possible to point to the fact of the existence of a direct connection between the content of Article 8 and Article 14 of the Convention, which guarantees the right to non-discrimination. In particular, during the consideration of the case "Oliari and others v. Italy" (§ 178, §§ 180-185)[334], the Court attached great importance to the requirements of the international movement for the legal recognition of same-sex unions, but already during the consideration of the case "Schalk & Kopf v. Austria" (§ 108)[335], effectively left open the state's ability to limit access to marriage for same-sex couples. That is, in this case, the Court, on the one hand, protects the rights of persons who are already in a same-sex marriage, but does not consider the possibility of concluding such a marriage, its legal registration, to be discrimination, leaving this issue to the discretion of individual states that have joined the Convention.

In the process of protecting the rights of the individual, guaranteed to him by the provisions of Article 8 and Article 14 of the Convention, the Court proceeds from the position that there is a need to put forward and substantiate sufficiently strong reasons for the difference in the treatment of a child based on his birth in marriage or out of wedlock. This provision is contained in the

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[334] Рішення Європейського Суду з прав людини по справі «Oliari та інші проти Італії» від 21.07.2015 р. URL: http://www.articolo29.it/wp-content/uploads/2015/07/CASE-OF-OLIARI-AND-OTHERS-v.-ITALY.pdf

[335] Рішення Європейського Суду з прав людини по справі «Schalk & Kopf проти Австрії» від 24.06.2010 р. URL: http://www.menschenrechte.ac.at/uploads/media/Schalk_und_Kopf_gg_OEsterreich_Urteil_01.pdf

content of the cases "Mazurek v. France" (§ 49)[336], "Camp and Bourimi v. the Netherlands" (§§ 37-38)[337]. That is, in this case, the Court points out that the actions of the state regarding the discrimination of a person can violate both his private and family life. And thus actually violate not only the provisions of Article 14 of the Convention, but also Article 8 of the Convention.

II. "INTEGRITY" OF INDIVIDUAL: PHYSICAL, PSYCHOLOGICAL AND MORAL COMPONENT

Based on the analysis of the literal part of the title of Article 8 of the Convention "Right to respect for private and family life", we can come to the conclusion that the provision of the specified article not only protects the right to respect for private and family life, but also clearly delimits the specified concepts, making a distinction between they have a fairly clear, but in fact conditional line of demarcation. After all, the sphere of family life is an integral part of a person's private life. If the sphere of private life is much wider and covers the sphere of a person's family life, why then, in the process of creating the Convention, these two legal categories were separated into different positions? Why did the legislator in this case follow the path of not combining these concepts? What is the axiological essence of these actions, and how are they reflected in the ontological sphere of an individual's life?

Faced with the problem of defining such a legal concept as "private life" during its practical activity, the ECHR came to the conclusion that this concept is extremely broad, which in fact does not and cannot have its own comprehensive meaning. Instructions

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[336] Рішення Європейського Суду з прав людини по справі «Mazurek проти Франції» від 01.02.2000 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-58456%22]}

[337] Рішення Європейського Суду з прав людини по справі «Camp and Bourimi проти Нідерландів» від 03.10.2000 р. URL: ttps://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-58824%22]}

regarding the existence of the mentioned phenomenon are contained in the texts of the Court's decisions in the following cases: "E.B. v. France" (§ 47)[338], "Niemietz v. Germany" (§ 29)[339], "Pretty v. United Kingdom" (§ 57)[340]. However, the fact that it is impossible to define the concept of "private life" does not relieve the member states of the Council of Europe of the obligation to comply with the provisions of Article 8 of the Convention regarding the protection of the private life of every individual under their jurisdiction. The ECHR also faced the issue of judicial protection of a defined scope of rights and their actual meaning. That is why the Court, thanks to its own precedent practice, formulated a number of guidelines regarding the scope and meaning of a person's private life in order to implement the protection of human rights within the provisions of Article 8 of the Convention. Also, in the course of the social and technological development of mankind, the need to resolve a considerable number of new situations, which had direct or indirect significance in light of the Convention's protection of an individual's private life, appeared before the Court over time. It is thanks to these processes that the precedent practice of the Court is not characterized by stability, but being under the influence of the latest socio-technological factors, is subject to appropriate changes and additions.

In the content of a number of decisions of the ECHR, the Court emphasizes the peculiarity of the phenomenon of "private life", its

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[338] Рішення Європейського Суду з прав людини по справі «E.B. проти Франції» від 22.01.2008 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-84571%22]}

[339] Рішення Європейського Суду з прав людини по справі «Niemietz проти Німеччини» від 16.12.1992 р. URL: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Niemietz%22],%22documentcollectionid222documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57887%22]}

[340] Рішення Європейського Суду з прав людини по справі «Pretty проти Сполученого Королівства» від 29.04.2002 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-60448%22]}

multifaceted nature. In particular, the concept of "privacy" is not limited to the "inner world" of an individual, which includes only one's own personal life and completely excludes objects and phenomena belonging to the "outer" world. The court points out that respect for a person's private life should also include the right to establish, maintain and develop relationships with other members of society. That is, the Court directly emphasizes that the term "private life" should not be understood in its literal meaning, but should be taken beyond the life factors of an individual, because its content also includes general social factors, which directly or indirectly include influence as on the private life of individuals, as well as on the existence of society as a whole.

Taking into account the fact that the private life of an individual covers an extremely wide range of issues and various phenomena, the cases, which by their subject matter of court proceedings fell under this issue, in order to introduce a certain classification for the convenience of using precedents, were grouped into three main categories: a) physical, psychological or moral integrity of a person; b) personal privacy; c) identity of the person[341]. For the comprehend-siveness, completeness and objectivity of the examination of the mentioned issues, we will consider some key aspects, according to which the list of cases considered by the ECHR, which belong to one or another of the categories indicated by us, was formed.

The fundamental moment in the process of determining the existence of the phenomenology of the physical, psychological or moral integrity of an individual was the review and decision of the ECHR in the case "X. and Y. v. the Netherlands" (§ 22)[342]. The subject of consideration of this case was the fact of sexual violence against

[341] Guide on Article 8 of the European Convention on Human Rights II ECHR, august 2018. – p. 18.

[342] Рішення Європейського Суду з прав людини по справі «X. та Y. проти Нідерландів» від 26.02.1998 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-57603%22]}

a mentally ill girl who reached the age of sixteen and the lack of relevant norms of criminal law in the legislation of the Netherlands in order to provide her with practical and effective protection.

The court also notes that the content of Article 8 of the Convention directly formulates a positive obligation for states to provide their citizens with the opportunities of normative grounds for the effective protection of their psychological and physical integrity. The specified rule found its own clear formulation in the content of the decisions of the Court in the cases "Odievre v. France" (§ 42)[343], "Pentiacova and others v. Moldova"[344]. In addition to the regulatory component, this obligation may also directly include the possibility of applying specific measures to ensure an affordable and effective way of protecting the right to respect for an individual's private life. This statement directly follows from the analysis of the content of the decisions of the Court in the cases of "Airey v. Ireland" (§ 33)[345], "McGinley and Egan v. the United Kingdom" (§ 162)[346]. Quite interesting in this context is the decision of the ECHR in the case "Hamalainen v. Finland" (§ 64)[347], in which it is noted that the parties

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[343] Рішення Європейського Суду з прав людини по справі «Odievre проти Франції» від 13.02.2003 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-60935%22]}

[344] Рішення Європейського Суду з прав людини по справі «Pentiacova та інші проти Молдови» від 2005 р. URL: https://www.globalhealthrights.org/health-topics/health-care-and-health-services/pentiacova-and-ors-v-moldova/

[345] Рішення Європейського Суду з прав людини по справі «Airey проти Ірландії» від 09.10.1979 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-57420%22]}

[346] Рішення Європейського Суду з прав людини по справі «McGinley та Egan проти Сполученого Королівства» від 28.01.2000 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-58452%22]}

[347] Рішення Європейського Суду з прав людини по справі «Hamalainen проти Фінляндії» від 16.07.2014 р. URL:

agree that there was a fact of state interference with the applicant's right to respect for her private life. It was precisely this fact that she was refused a new "female" identification number. In particular, the Court pointed out that the subject of consideration also consists in the fact that the respect for the applicant's private and family life creates a positive obligation towards the state to provide effective and accessible procedural means that would enable the applicant to legally recognize her new gender, while remaining married. That is why the Court decided that it is expedient to analyze the applicant's complaints in terms of the positive aspect contained in the content of Article 8 of the Convention.

Even at the first stages of the Court's work, since its establishment, it was determined that the state bears the burden of positive responsibility for the protection of individuals from violence by third parties. This issue is particularly relevant in the context of the protection of children and victims of domestic violence. The usual practice in such cases is mainly a violation of Article 2 and Article 3 of the Convention. Article 8 of the Convention also finds its own application in the specified situations, because the very fact of the existence of violence threatens not only the physical integrity of an individual, but also the right to his private life. After all, according to the axiological content of Article 8 of the Convention, the state has a direct obligation to protect the physical or moral integrity of an individual from encroachments by other persons. In this case, as follows from the content of the decision of the Court in the case "Sandra Jankovic v. Croatia" (§ 45), the state must introduce and apply in practice legal restrictions of an adequate nature, which rely on ensuring protection against violence by any private person.

Regarding the facts of the existence of violence in the family, the Court, in the decisions of the cases "Hajduova v. Slovakia", "Kalucza v. Hungary" and "B. v. Moldova", it is directly stated that the state bears responsibility for the protection of victims in cases

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https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-145768%22]}

where official state bodies are aware of the existence of a risk of violence and in cases when officials do not apply appropriate measures aimed at protecting persons from violence. Also, according to the decision of the Court in the case "Eremia v. Republic of Moldova", the state bears a direct positive responsibility for the protection of children from domestic violence. And from the decision of the Court in the case "Y.C. v. United Kingdom", it follows that the Court is obliged to exercise its jurisdiction over the custody of children and the care of the sick, and especially in cases of deprivation of parental rights based on the existence of facts of domestic violence.

But in terms of the issues under consideration, it should be emphasized that in the process of considering the specified categories of cases, the Court pays direct attention to the factors of the existence of a cause-and-effect relationship between the action of the state authorities and the alleged damage. Thus, in the event of the existence of such a fact as a schoolboy fight, the Court may declare such a case inadmissible.

Also, attention should be paid to the fact that the conditions of a person's detention may lead to a violation of Article 8 of the Convention, in particular, if the conditions of detention do not actually reach the minimum level of cruelty necessary for a violation of Article 3 of the Convention. This fact follows from the decision of the Court in the case "Raninen v. Finland" (§ 63)[348]. Also, from the content of the decision of the Court in the case "Milka v. Poland" (§ 45)[349], the requirement to undergo a personal examination with the use of complete undress may constitute a fact

[348] Рішення Європейського Суду з прав людини по справі «Raninen проти Фінляндії» від 16.12.1997 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-58123%22]}

[349] Рішення Європейського Суду з прав людини по справі «Milka проти Польщі» від 15.09.2015 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-157346%22]}

of interference in the private life of an individual, which in turn is a direct violation of Article 8 of the Convention.

Reproductive human rights are a significant and almost the most important element of every individual's life and necessarily fall within the scope of protection guaranteed by the axiological content of Article 8 of the Convention. In fact, this element is part of both private and family life. After all, the reproductive function is present in the subconscious of almost every person, it is an integral part of his private life, in turn, as a family life, it acts as a certain algorithm for its implementation for the vast majority of the population of our planet.

In turn, the state, as a guarantor of human rights, is entrusted with a number of obligations of a mostly positive nature regarding the protection of human reproductive rights, in the context of ensuring, according to Article 8 of the Convention, respect for its private and family life. Also, it should be noted that the Convention grants the state a certain amount of rights to determine and settle at its own discretion certain problematic issues that are included in the scope of rights to private and family life.

In particular, the state at its own discretion, based on social, cultural, customary, religious and other factors, can at its own discretion regulate such issues as, for example, termination of pregnancy. But in this matter too, the state undertakes a number of positive obligations designed to protect the private and family rights of people under its jurisdiction.

In particular, based on the content of the decision in the case "A. B. and C. v. Ireland" (§ 214 and § 245)[350], the Court directly indicated that the prohibition of termination of pregnancy (abortions), in cases where there is a threat to the health or well-being of an individual, directly belongs to the scope of the right to

[350] Рішення Європейського Суду з прав людини по справі «A. B. and C. проти Ірландії» від 16.12.2010 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22], %22itemid%22:[%22001-102332%22]}

respect for a person's private life in accordance with Article 8 of the Convention. Moreover, in the context of this issue, the Court recognized that the state may also have certain obligations of a positive nature, which are absolutely necessary to effectively guarantee respect for an individual's private life. In particular, in the content of the decisions of the Court in the cases of "A. B. and S. v. Ireland" (§ 245)[351], "R.R. v. Poland" (§ 184)[352] and "Tysiac v. Poland" (§ 110)[353], it is noted that the specified positive obligations may provide for the introduction of a number of specific measures that will be directly or indirectly aimed at ensuring respect for the sphere of a person's private life, his relations with other individuals, which will include not only the creation of an appropriate private law base for the purpose of its use in judicial and executive mechanisms for the protection of human rights, but also, in cases of need, the introduction of appropriate measures of a special nature.

An interesting factor in this case is that among the cases considered by the ECHR regarding human reproductive rights, a fairly large percentage are cases in which Poland acts as a defendant. This is explained by the fact that in this country, the Catholic Church occupies a rather strong position in society, which has a rather strict and uncompromising attitude to the prohibition of abortion operations.

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[351] Рішення Європейського Суду з прав людини по справі «A. B. and C. проти Ірландії» від 16.12.2010 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-102332%22]}

[352] Рішення Європейського Суду з прав людини по справі «R.R. проти Польщі» від 26.05.2011 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-104911%22]}

[353] Рішення Європейського Суду з прав людини по справі «Tysiac проти Польщі» від 20.03.2007 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-79812%22]}

In turn, a more thorough analysis of the cases directly related to the mentioned issues allows us to identify certain features that arise in the process of their consideration by the Court. In particular, in the content of the case "P. and S. v. Poland" ECHR clearly states the very concept of private life within the meaning of Article 8 of the Convention, which applies both to a person's decision to become a father (one of the parents) and to the decision not to be a father (one of the parents). The development of the Court's clarification of this issue can be found in the process of analyzing the decision in the case "Evans v. the United Kingdom" (§ 71)[354], in particular, in the text of the specified decision, it is noted that the term "private life" is quite broad and includes various aspects of social and physical the identity of the individual, including the right to personal independence and development of the individual, the creation of support and the development of various relationships with other people and the outside world, including the decision about whether the individual becomes a parent (one of the parents) or not. In this case, along with the protection of human reproductive rights, the Court interpreted the term "private life". In turn, the very concept of personal autonomy is an extremely important principle that is at the heart of guarantees of respect for private life. So, private life and personal autonomy are inseparable and complementary categories. The concept of private life directly concerns such categories as a person's gender identification and sexual orientation, his sexual life and his physical and psychological inviolability. The Court also formulated a precedent regarding the fact that the concept of private life in the context of Article 8 of the Convention is directly applicable to a person's decision to become a parent (one of the parents) of a child, or to adopt, as well as whether or not to have a child.

The protection of the right to respect for private and family life

[354] Рішення Європейського Суду з прав людини по справі «Evans проти Сполученого Королівства» від 10.04.2007 р. URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-80046%22]}

in the context of Article 8 of the Convention is a rather specific problem, because it directly or indirectly affects a rather specific sphere of human existence. The life of any individual is unique, versatile and specific. This diversity includes not only those aspects of private and family life that society is accustomed to perceive as such, but also includes such elements as the provision of specific medical care to an individual, for example, in the case of treatment of mental illnesses.

It is no secret that medical science includes a whole range of human health disorders in the circle of mental illnesses. The specified variety is caused not only by the medical nature of these diseases, but also by a certain social burden inherent in them. After all, members of society can show their own attitude towards individuals who suffer from mental disorders in completely different ways, and also persons who have contracted certain types of mental illnesses can be recognized in a court of law as limited or completely incompetent.

Also, in the case of a severe course of some types of mental illness, the manifestations of which may be inadequate behavior of an individual and his aggressive state, such a person for the good of society, and such a person himself, can be forcibly isolated from society altogether. It should be noted that such isolation leads to the actual loss of will of such an individual and causes him and his close people a certain psychological trauma. That is why it is necessary to approach various situations related to the provision of specified specific medical care to an individual with extreme caution. The importance of this issue is confirmed by the precedent practice of the ECHR, according to which this type of medical care is also included in the objects of human rights protection according to Article 8 of the Convention.

CONCLUSIONS

1. Taking into account the rather significant contribution of learned international lawyers to the field of studying the practical experience of the ECHR and the theoretical foundations of its activity, which are contained in the content of the European

Convention on Human Rights of 1950, so far in the science of international law no thorough study of all aspects has been carried out protection of the right to respect for private and family life.

2. Despite the extremely high level of diversity, the life of each individual can not only be divided into certain time stages, but also common to these society algorithms of its development can be found, under the definition of which the vast majority of people fall. Each individual has a certain set of not only interests, but also vital needs, thanks to which a person can get opportunities not only for self-expression or self-realization, but which are gathering signs of necessity. The life of each individual actually includes elements of privacy, each of which affects his life in a different way. Also, the vast majority of people, along with the privacy of their own lives, during their existence are in the sphere of family relations, which are extremely connected with the private life of an individual. That is why the protection of the right of private and family life, given their inherent extraordinary importance for the individual, was reflected in the text of the European Convention on Human Rights.

3. The term "private life" should not be understood in its literal sense, but should be taken beyond the life factors of an individual, because its meaning also includes general social factors that directly or indirectly influence both the private life of individuals, and the existence of society as a whole. "Private life" is a broad concept that cannot be given an exhaustive definition.

4. The Contracting Parties, in parallel with the assumed positive obligations, also have a positive obligation regarding the formation and implementation of relevant normative acts, which oblige both public and private health care institutions to take appropriate measures to protect physical integrity their patients, as well as mandatorily provide victims of medical negligence with appropriate access to proceedings, according to which they would be given the opportunity to receive compensation for causing harm.

5. The term "private life" is a rather broad concept, which includes inter alia (among other things or affairs), the right to personal development and personal autonomy. Private life and

personal autonomy are inseparable and complementary categories. The very concept of private life directly concerns such categories as a person's gender identification and sexual orientation, his sexual life and inviolability in physical and psychological terms.

6. An individual's mental health should also be considered as a fairly important part of private life, which, in turn, is directly related to aspects of the moral integrity of the individual. Preservation of mental stability in the context of the mentioned issues is a necessary attribute of the effective implementation of the right to respect for private life.

7. In the process of consideration of cases related to the protection of the rights of persons who have become victims of violence, direct attention should be paid to the factors of the existence of a cause-and-effect relationship between the action of state authorities and the alleged harm.

8. Such an intimate side of an individual's life as sexual orientation and sex life also falls within the sphere of a person's private and family life, and therefore is also the object of protection, which is covered by Article 8 of the Convention.

9. The sphere of private life covers the right of a person to form and break relationships with other people, including relationships that are of a professional or business nature. Article 8 of the Convention protects the rights aimed at the development of the individual and at the formation and termination of relations with other people and the surrounding world. The concept of private life does not exclude the professional or business activities of an individual, because it is in the sphere of professional life that most people get quite large opportunities to develop relations both with individual representatives of society in particular and with the surrounding world in general.

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PART III

HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

PECULIARITIES OF THE IMPLEMENTATION AND APPLICATION OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE NATIONAL RIGHTS PROTECTION SYSTEM

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INTRODUCTION

One of the current global ubiquitous problems is the issue of human rights and their provision, which can only be solved by the collective efforts of states and the international community. The Council of Europe is called to contribute to the coordinated solution to this challenge on the European continent. It has created a unique mechanism for the international protection of human rights, the basis of which is the jurisprudence of the European Court of Human Rights (hereinafter – the Court, the European Court, the ECtHR), which is based on the norms of the Convention on the protection of human rights and fundamental freedoms of 1950 (hereinafter referred to as the Convention, ECtHR).

The extent to which the national courts of the member states of the Convention can ensure the rights and freedoms guaranteed by it, considering cases about the action or inaction of the authorities, largely depends on the solution to the question of the extent to which national courts can directly apply the provisions of international treaties in general, in particular, the Convention and, accordingly, the decisions of one of its main bodies – the European Court of Human Rights. In Ukraine, before 2014, the practice developed by the ECtHR was practically not used by our country's judicial institutions during the administration of justice for justifying decisions or sentences. In modern conditions, there has been an increase in the application of ECtHR decisions in the

process of justice in Ukraine, which is a crucial and necessary element in the effective implementation of the protection of human rights. Furthermore, the specified aspect gives us indisputable grounds to assert that the study, research, and practical implementation of the provisions of the Convention and the requirements of the ECtHR case law are relevant for the successful further development of the human rights protection system in Ukraine.

I. OBLIGATIONS OF THE MEMBER STATES OF THE COUNCIL OF EUROPE REGARDING THE IMPLEMENTATION OF THE DECISIONS OF THE STRASBOURG COURT

Executing decisions of the ECtHR is a rather complicated process, including a) payment of compensation to the debt collector; b) taking additional measures of an individual nature; c) taking measures of a general nature and taking into account the fact that the Court in its decisions can take both individual and general measures against the state defendants, the implementation of which can be quite long. Article 46 of the Convention on the Protection of Rights and Fundamental Freedoms of 1950 (Convention, ECtHR – hereinafter) provides for implementing decisions of the Strasbourg Court.

Guaranteeing a wide range of rights and freedoms, the Convention protects each individual against violations in any territory over which the respondent state not only has direct jurisdiction but also indirectly controls such territory. In the ECtHR case "Loizidou v.Turkey", the Court recognised a violation of the property rights of the Cypriot woman Loizidou, who lost the opportunity to dispose of her land due to Turkey's occupation of a part of Northern Cyprus. The court found a violation of Article 1 of Protocol 1 of the Convention, pointing out that Turkey fully controls the occupied part of the island and has a specific jurisdiction there. Therefore, the obligation to ensure the rights and freedoms

guaranteed by the 1950 Convention in such a territory derives from the very fact of control over it by the state party to the Convention.

If the Court recognises the violation of the ECtHR, it may, following Art. 41 of the Convention, to recognise the injured party's right to compensation as just satisfaction for the (material and moral) damage experienced. In the judicial practice of the ECtHR, this happens quite often. Regardless of the provision of compensation to the injured party (according to Article 41 of the ECtHR) provided for by the domestic law of the defendant, if the Court recognises the violation of the Convention, in the same decision, the Court adopts a resolution on just satisfaction6. The decision of the European Court of Human Rights in the case "Assanidze v. Georgia"7 2004 became decisive in its judicial practice: the Court assumed the responsibility and exceptionally obliged the respondent state to take a specific measure, namely: the ECtHR, having established the fact of arbitrary imprisonment of the applicant (violation of Part 1, Article 5 of the European Convention), ruled that Georgia should ensure the applicant's release.

Since one of the primary obligations of the state is the payment of the sums determined by the ECtHR as fair compensation to the applicant, and the restoration of the previous legal status of the applicant, as far as possible (restitutio in integrum), which is carried out, as a rule, through a retrial case or compensation of debts by a decision of a national court. According to Art. 41 of the Convention on the Protection of Human Rights and Fundamental Freedoms, the ECtHR can oblige the state to compensate the applicant for both material and moral damages and legal costs. Payment of these amounts is mandatory, clearly defined in the Court's decision.

The very nature of ECtHR decisions is specific, and their implementation does not depend on the applicant's will. The state is obliged to carry out the Court's decision in favour of the person, and it can release itself from this obligation only when the person himself refuses in writing to receive the amount awarded by the

Court's decision. The state's duty is not only to pay fair compensation, in the ECtHR's opinion but also to take other measures of an individual or general nature. Actions of an individual character are taken in favour of the applicant to stop the situation that violates the law and compensate for the consequences caused by it. As for measures of a general nature, they are created to prevent similar human rights violations in the future. Depending on the features and specifics of the dispute, there are other measures of an individual nature.

An example of this is the European Court of Human Rights decision in the case "Olexandr Volkov v. Ukraine". Here, the ECtHR obliged Ukraine to facilitate the fastest reinstatement of a person in the previous position of a Supreme Court of Ukraine judge. The decision of the ECtHR is unique because the Court concluded that the resumption of the proceedings in the national Court would not be able to implement the proper form of compensation for the violation of the applicant's rights since, unfortunately, there is no reason to claim that shortly this case will be considered depending on the principles of the Convention.

Unlike compensation for pecuniary damage, the Court cannot indicate to the state what special measures it should take to restore the violated rights of the applicant and to prevent further violations because, according to the Convention, states are given the right to independently choose which measures of a general or individual nature to adopt.

Measures of a general nature involve taking specific actions to eliminate the very reasons that became the basis for a person's appeal to the ECHR. The most frequent examples of such measures can be called the introduction of changes to the current legislative acts of the state and their application in practice; making changes to administrative practice; ensuring the examination of new draft laws, as well as other measures that make it impossible to violate the Convention in the future and ensure maximum compensation for the consequences of violations that have already occurred. Making changes to legislation or carrying out legal or legislative

reforms is a rather painstaking and challenging way of implementing the Court's decision, as it requires significant resources and time.

The burden of ensuring the execution of a court decision against the state rests primarily on state bodies. The right to enforce a final court decision is a separate element of the right to justice according to the practice of the Court. However, back in 2004, the ECtHR, in the cases of "Zhovner v. Ukraine" and "Voytenko v. Ukraine" for the first time, established the existence of the problem of non-enforcement of decisions of Ukrainian national courts. In 2009, the situation only worsened, and the number of complaints to the ECtHR only increased, as a result of which it was decided to apply the procedure of the pilot decision in the case "Yuri Mykolayovych Ivanov v. Ukraine".

In the decision of the ECtHR in the case "Immobiliare Saffi v. Italy » 1999, the Court pointed out that when the domestic legislation of a state allows non-execution of a final judgment to the detriment of one of the parties, the right to a judicial review becomes illusory. Executing a court decision passed by any court should be considered an integral part of court proceedings. Court proceedings and administrative proceedings are, respectively, the first and second stages of one proceeding (decision of the Court as part of its Grand Chamber "Scordino and others v. Italy" 2006). Thus, executive proceedings cannot be separated from judicial proceedings, and these two proceedings must be considered as a whole process.

The following circumstances are not an excuse for long-term non-implementation of the final court decision: lack of funds in the state budget (the conclusion of the Court in the case "Voytenko v. Ukraine" dated 29.06.2004 p.). And enforcement of the Court's decision begins from the date when it becomes binding and enforceable. As an example, the ECHR cases "Bochan v. Ukraine" dated May 3, 2007, and "Bochan v. Ukraine (No. 2)" can serve. In this case, the ECtHR concluded the admissibility of this complaint; having assessed the systematic appeals of Ukrainians against their

state to the Court, it applied the procedure of the pilot decision of the Court in the case "Yuri Mykolayovych Ivanov v. Ukraine", which refers to the non-execution of judgments of national courts, for the implementation of which Ukraine is responsible responsibility and in connection with which the parties whose rights are violated do not have adequate means of legal protection. Therefore, the Court obliged our state to introduce an adequate legal remedy protection or a complex of such legal protection means, capable provide adequate and sufficient compensation for non-performance or delays in the execution of decisions of national courts in accordance with principles established by the practice of the Court.

To implement the decision of the ECtHR in the case "Yuri Mykolayovych Ivanov vs Ukraine" in 2012, to overcome the problem of long-term non-implementation of final decisions of national courts, Ukraine adopted the Law of Ukraine "On State Guarantees for the Execution of Court Decisions" (Law No. 4901 – hereinafter), which provided, that the state undertakes to fulfil the decisions of national courts, where the debtor is a state body, state enterprise or legal entity. In particular, Article 3 of Law No. 4901 specifies that the execution of court decisions on the recovery of funds for which the state body is the debtor is carried out by the central executive body, which implements the state policy in the field of treasury service of budget funds, within the limits of the appropriate budget allocations by writing off funds from accounts of such a state body. In case the said state body does not have the proper appointments – at the expense of the funds provided for under the budget program to ensure the execution of court decisions.

However, Law No. 4901 only partially solved the problem of non-execution of national court decisions, as the budget program contained insufficient funds to repay all debts. In addition, several legislative acts included norms that provided social payments, for example, to children of war, pensioners, etc. Funds in the state budget were not provided for such charges, which led to an increase in the number of appeals to national courts and, accordingly, to an

increase in the number of decisions of national courts that were not implemented.

In October 2017, the Grand Chamber of the ECtHR passed an unprecedented decision in the ECtHR case "Burmych et al. vs Ukraine", thus combining more than 12,000 complaints filed against Ukraine into one case. All the complainants in these cases were to be paid the sums awarded to them, including moral compensation of 2,000 euros each. The Committee of Ministers imposed a penalty of 3% for late payment. As for future similar cases, they are also sent to the Committee of Ministers for consideration as part of general measures to implement the above-mentioned pilot decision of the Court in the case "Yuriy Mykolayovych Ivanov vs Ukraine."

Thus, public authorities should put in place at the national level a targeted mechanism to provide redress to all current and potential applicants with valid complaints under the Convention.

Since the member states of the Council of Europe recognise the decisions of the ECtHR as binding acts, it is sufficient to bring these decisions to the attention of the state authorities that violated the norms of the Convention without any additional orders from higher authorities. Thus, non-observance of a reasonable term of court proceedings is a violation of Clause 1 of Art. 6 of the Convention. When a state party to the Convention recognises a breach of this nature, the decision of the ECtHR is sent by the state to all national courts for their information. The publication of the decision of the ECtHR in official gazettes to inform the public is another measure of a general nature. It is applied during the implementation of each decision of the ECtHR, in which a violation of the provisions of the Convention by the respondent state is ascertained. This is the least expensive way, which, by the way, contributes to better application of the provisions of the Convention in the state. In our opinion, the importance of taking measures of a general nature to implement decisions of the ECtHR is that such measures should prevent and make impossible similar violations of the Convention and such in such a way as to eliminate the reasons for the referral to the ECtHR

against Ukraine regarding the problem that has already been considered in the Court.

Therefore, the implementation of ECtHR decisions creates a need for more global measures to protect rights. The ECtHR gives the state the right to choose the necessary measures to implement its decisions. The standards of the Council of Europe assert that all decisions taken by the ECtHR significantly impact the development of the national legislation of a state that is a member of the European Convention. The implementation of ECtHR decisions consists of the fact that the state must prevent and make impossible similar violations of the ECtHR and thereby eliminate the reasons for the submission of applications against Ukraine to the ECtHR regarding a problem that has already been the subject of consideration at the ECtHR. That is, the state's duty in implementing the Court is to pay the sums determined by the ECtHR as fair compensation to the applicant and restore the person's previous legal status (as far as possible) restitutio in integrum). Implementing ECtHR decisions is not necessarily only the payment of monetary compensation, but quite often, it is measures of a general nature (amendments to legislation, administrative practice, etc.).

II. CONTROL OVER THE EXECUTION OF ACTS OF THE JUDICIAL BODY OF THE COUNCIL OF EUROPE

The execution of court decisions of the ECtHR is an activity of its participants, which includes: applying findings for execution, monitoring their execution, and solving issues that arise both during and after their execution. The same level of organisation of such control, as well as its types, form, and method of its implementation, is essential for high-quality monitoring of the implementation of ECtHR decisions. The state's image at the international level largely depends on its organisation. But still, during the period of the Court's activity, examples of long-term non-implementation of ECtHR decisions have been recorded.

The decisions of the Court, by Article 2 of the Law of Ukraine

"On the Implementation of Decisions and Application of Practice of the European Court of Human Rights" dated February 23, 2006, are binding for Ukraine. By Article 46 of the ECtHR, as amended by Protocols No. 11 and No. 14, the Committee of Ministers oversees the implementation of decisions of the European Court of Human Rights. The Committee of Ministers adopts a final resolution in which there is a conclusion that it has fulfilled its functions of monitoring the implementation of the decision by the second part of Article 46 of the Convention.

At the national level in Ukraine, the following types of control can be distinguished, depending on the entities that implement the decisions of the ECtHR: 1) control carried out by the Government Commissioner for ECtHR; 2) control carried out by the Secretariat of the Government Commissioner for ECtHR; 3) control carried out within the State Executive Service of Ukraine; 4) control carried out by the Minister of Justice of Ukraine; 5) judicial control, etc. According to Clause 8, Part 1, Art. 3 of the Law of Ukraine "On Enforcement Proceedings", the decisions of the ECtHR are subject to enforcement, taking into account the features provided for by the Law of Ukraine "On the Execution of Decisions of the European Court of Human Rights". Yes, by part 5 of Art. 19 of the Law of Ukraine, "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights", the Minister of Justice of Ukraine ensures systematic control over compliance within the departmental subordination of administrative practice that corresponds to the ECtHR and the practice of the ECtHR. However, given the provisions of the CMU Resolution No. 784 and the provisions of the Government Commissioner for ECtHR cases, control over the implementation of ECtHR decisions is entrusted to the Government Commissioner for the European Court of Human Rights and its Secretariat. According to Clause 3 Clause 4 of the Regulation on the Ministry of Justice of Ukraine, approved by Resolution No. 228 of the Cabinet of Ministers of Ukraine dated July 2, 2014, the Ministry of Justice of Ukraine is tasked with: protecting the interests of Ukraine at the ECtHR,

during the settlement of disputes and proceedings in foreign courts jurisdictional bodies of cases involving foreign entities and Ukraine.

The procedure for the interaction of the Department of the State Executive Service and the Secretariat of the Government Commissioner for ECtHR cases during the provision of representation of Ukraine in the Court and the implementation of the decisions of the ECtHR dated January 12, 2008 No. 26/5 regulates the procedure for carrying out control actions. Yes, within 10 days from the date of receipt of case materials from the ECtHR, in which Ukraine's position should be submitted, the Secretariat sends the appropriate request to the Department to obtain the necessary information and materials, in this case, setting a deadline for its implementation.

At the state level, Ukraine has created a multi-level system of control that helps monitor the implementation of ECtHR decisions. At the supranational level, having at their disposal the means of exclusively political influence on the state, the bodies of the ECtHR have created an effective mechanism for monitoring compliance with its guarantees. However, today, during the entire period of the Court's activity, there are examples of long-term non-implementation of the Court's decisions.

So, taking into account all of the above, in our opinion, the importance of control at the stage of execution of court decisions, in particular decisions of the European Court of Human Rights, is as follows: procedural activity at this stage provides the necessary prerequisites for the direct implementation of the means adopted in the decision; helps to form people's belief in social justice and faith in the rule of law; ensures protection of the rights and legitimate interests of individuals; timely and accurate execution of the decision of the ECtHR contributes to the fulfilment of the tasks of the judiciary. To create an effective mechanism of guarantees for the protection of the rights and legitimate interests of individuals at the supranational and state levels and the implementation of effective law reforms, it is crucial to study the problem of monitoring the implementation of ECtHR decisions.

Thus, the importance of monitoring the execution of ECtHR decisions consists, firstly, in monitoring and checking the activities of bodies that have the function of implementing relevant ECtHR decisions, by the requirements of current legislation, and secondly, in a warning and correcting possible errors and wrongdoings that prevent such activities. Successful and effective implementation of control over the implementation of ECtHR decisions directly depends on the level of organisation and types of control, forms, and methods of its implementation. An essential purpose of this control is to ensure the interests of society and the state. The Committee of Ministers of the Council of Europe performs this supervisory function regarding the fulfilment by the member states of the requirements of the Convention and its Protocols, as well as the decisions of the Court. In particular, the Committee monitors whether states take measures to eliminate human rights violations on their territory and what measures states take to prevent violations.

III. PECULIARITIES OF THE APPLICATION OF DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE UKRAINIAN HUMAN RIGHTS SYSTEM

Doctrinally, domestic scientists point to the importance of applying the practice of the European Court in the domestic human rights protection system. In particular, according to S.E. Fedika, the legal nature of ECtHR decisions and the legal enforcement of their implementation are not unambiguous and depend on the level of implementation of the Convention into the national legislation of the member states of the Council of Europe. These decisions are an important source of bringing the national legislation of the participating states into compliance with European standards for the protection of human rights. Prof. Karvatska S.B. considers: "The correct application of the somewhat abstract evaluative norms of the Convention on the Protection of Human Rights and Fundamental Freedoms by the courts of the member states is possible only in connection with a thorough study of cases, both

accepted and not accepted for consideration by the ECtHR and its practice in general."

In our opinion, the state, in the person of its bodies, should not violate international obligations in the field of human rights and create a national legal mechanism for the protection of human rights, which would be based on the norms of international law and judicial acts of the ECtHR. However, not all member states of the Council of Europe fulfil their obligations, which leads to the destruction of the integrity of the human rights system, which the member states have been building for decades.

At the same time, it is worth remembering that the ECtHR is not a so-called "supra-national" cassation instance about national judicial bodies. In particular, the competence of the Court does not belong to the consideration of alleged errors regarding questions of fact or law, which national courts committed unless the errors violated the rights and freedoms protected by the Convention (for example, in the decision of the ECtHR in the case "Garcia Ruiz v. Spain" 1999 .).

However, the situation of the case "Bochan v. Ukraine" of 2015 is interesting, where since 1997, the applicant – Maria Ivanovna Bochan, unsuccessfully claimed part of the house, which Mr M. owned at the time of the events, and the land on which the house was built. National courts repeatedly considered the applicant's claim. In the end, after the Supreme Court of Ukraine (hereinafter referred to as the Supreme Court of Ukraine) referred the case to lower courts with different territorial jurisdictions, the applicant's claim was refused. In 2001, the applicant applied to the Court, complaining, in particular, about the unfairness of the proceedings in her claim in the domestic court. She also complained about the length of the proceedings and the alleged violation of property rights under Article 1 of the First Protocol and Art. 6 "Fair trial" to the Convention. The court ruled that there was a violation of paragraph 1 of Article 6 of the Convention and that there was no need to consider the applicant's complaint following Article 1 of the First Protocol because she did not raise a separate issue.

On June 14, 2007, the applicant submitted a complaint to the Supreme Administrative Court "on review of court decisions in connection with exceptional circumstances" in accordance, in particular, with Articles 353-355 of the Civil Procedure Code of Ukraine of 2004. Referring to the ECtHR's decision of May 3, 2007, she asked the Supreme Court of Ukraine to annul the court's decision in her case and to make a new decision to satisfy her claim in full. On March 14, 2008, a panel of 18 judges of the Judicial Chamber in Civil Cases of the Ukrainian Armed Forces, having considered the complaint in a closed court session and referring to Article 358 of the Civil Procedure Code of Ukraine of 2004, refused to satisfy the applicant's complaint, stating that the decision of the ECtHR of May 3, 2007, lacks arguments of the complaint regarding the unfairness of the proceedings and regarding the violation of Art. 1 of the first protocol was found to be acceptable, the rest of the complaint was found to be inadmissible. That is, the ECtHR did not indicate anything in the decision about the violation of the applicant's property rights.

The applicant again appealed to the ECtHR. In 2015, the Court issued a decision establishing a violation of property rights and indicated that "the Supreme Court of Ukraine grossly distorted the conclusions of the Court's decision of May 3, 2007. In particular, the Supreme Court noted that Court found that the decisions of the domestic courts in the applicant's case were legal and justified and that she was awarded damages in connection with the violation of the guarantee of "reasonable time", and these statements are incorrect.

Therefore, using the practice of the ECtHR, national judicial bodies can distort the facts and misinterpret the Court's decision, which can lead to a violation of human rights. Therefore, the ECtHR can sometimes, as an exception, focus the attention of the respondent state on such situations and oblige the state to take measures when there is a flagrant gross violation of the norms of the Convention.

Usually, the Court does not review issues such as the importance given by national courts to specific evidence or conclusions in cases pending before them. The Court should not act as a fourth instance and therefore will not question the decisions of national courts unless their conclusions can be considered arbitrary or manifestly unfounded. So, for example, in 2000, the Court issued a decision in the case "Dulaurans v. France", where it established that the right to a fair trial was violated since the only reason why the French Court of Cassation made the contested decision to leave the applicant's cassation appeal unsatisfied as inadmissible was the result of a "manifest error of assessment". The idea behind this concept is that if a domestic court's error on a question of law or fact is so apparent that it can be characterised as a "plain error" (that is, an error that a reasonable court could not have made), it may violate the fairness of the proceedings. In the decision in the case "Andelkovic v. Serbia", The Court established that the arbitrariness of the decision of the national court, which in principle had no legal basis under national law and had no connection between the facts, the applicable law, and the results of the proceedings, constituted a "denial of justice".

According to Part 1 of Art. 46 of the ECtHR, the (final) decisions of the Court are binding on the States parties to the Convention. The Convention does not grant the Court the authority to oblige any state to conduct a retrial in the case or to annul the sentence passed (decision of the ECtHR in the case "Lyons and Others vs the United Kingdom", 2004).

Thus, in the ECtHR case "Yaremenko v. Ukraine" of 2015. The court confirmed the end of the new trial in the case where the applicant was sentenced to life imprisonment for the murder of a taxi driver to complain to the ECtHR about the torture allowed to him, Art. 3 "prohibition of torture" of the Convention, after recognition, which became part of the evidence base, was obtained under duress and without the presence of a defence attorney. In

2008, the Court established a violation of Art. 3 of the Convention. However, the Supreme Court, reviewing the case in the order of exceptional proceedings (Article 400 of the Criminal Procedure Code of Ukraine of the 2008 edition), did not take into account the provisions established by the ECtHR and left Yakymenko's sentence unchanged. The applicant appealed again to the ECtHR with a statement of violation of Art. 6 of the Convention on the right to fair justice. In 2015 The court established a violation of Art. 6 of the Convention. It emphasised that "... the new decision adopted in the applicant's case was largely based again on the same evidence obtained in violation of the applicant's procedural rights, and at the same time there were serious allegations, which the authorities did not refute, that all the confessions the testimony was obtained under duress, and therefore they were "fruit of the poisonous tree."Thus, in its judgments against Ukraine, the ECtHR noted that when a court convicted a person following a trial that did not meet the requirements of the Convention on fairness, the appropriate way to remedy such a violation may, in principle, be a new trial, review or reopening of the proceedings at the request of the applicant.

However, the ECtHR has repeatedly noted that, according to its established practice, paragraph 1 of Article 6 of the Convention does not guarantee the right to reopen proceedings and is usually not applicable to complaints regarding the extraordinary reopening of proceedings in completed court cases, unless the nature, scope and specify the features of the proceedings regarding a particular complaint in the relevant legal system are not such that the proceedings on such a complaint would be covered by the scope of application of paragraph 1 of Article b of the Convention and the guarantees of a fair trial, which it provides to the parties to the proceedings (ECtHR case "Yaremenko v. Ukraine (No. 2)", p. 52).

Along with that, as noted in the joint opinion of judges Yudkivska and Lemmens in the case "Bochan v. Ukraine (No. 2)", the possibility of resuming the proceedings in the case, which was

completed, is first of all provided for by the national legislation of Ukraine, and therefore the review of the case in an exceptional manner the proceedings are covered by the scope of application of paragraph 1 of Article b of the Convention.

Recommendation (2000) of the Committee of Ministers of the Council of Europe to member states "Regarding the re-examination or resumption of proceedings in certain cases at the national level after the adoption of decisions by the European Court of Human Rights" emphasises that as the practice of the Committee of Ministers of the Council of Europe shows in monitoring execution of the Court's decisions, in exceptional cases retrial of the case or resumption of proceedings is the most effective, if not the only means of achieving restitution in integrum (restoration of the previous legal position that this party had before the violation of the Convention). Analysis of the status of Ukraine's implementation of ECtHR decisions, which were determined by the Committee of Ministers as implemented, showed a positive trend in Ukraine's implementation of ECtHR decisions, in particular in 2014 – 7 ECtHR decisions; in 2015 -14 decisions of the Court; in 2016 – 4 ECtHR decisions; in 2017 – 100 decisions of the ECtHR; in 2018 – 318 ECtHR decisions, 2021 – 1,129 ECtHR decisions. However, as of November 2021, the Committee of Ministers of the Council of Europe was considering 635 cases against Ukraine, which remain unfulfilled.

Thus, if, according to a specific court decision, the defendant state, found guilty by the Court of violation of the Convention, is obliged to harmonise the domestic legal order with the norms of the Convention in the light of the interpretation of its provisions by the ECtHR. After all, a significant number of applications received by the ECtHR testify to the imperfect internal system of the state regarding human rights guaranteed by the Convention. The ECtHR in its practice indicates that the respondent state must legislatively and through administrative practice supplement the means of legal protection in force in its legal system to ensure her fulfilment of the

contractual obligation by Art. 46 of the ECtHR. And the system of national remedies should also include a mechanism to ensure the provision of reasonable satisfaction to the injured party in the event of a violation of human rights protected by the Convention.

Also, it is worth paying attention to the problem of conflicts arising about the norms of the national legislation of Ukraine and the Convention; it is evident that the preference in such cases is given to the international act. To avoid this problem, judicial bodies should be more thoroughly familiar with the practice of the ECtHR, which will make it possible to prevent human rights violations when considering cases at the national level. Also, as a confirmation of the fact that Ukraine is trying to build standards for the protection of human rights, the pilot case of the ECtHR "Yuriy Mykolayovych Ivanov v. Ukraine" can be cited after the Court established a violation of Art. 1 "Property rights" of Protocol No. 1 to the Convention, the government of Ukraine is obliged to pay just satisfaction and take measures of a general nature. In June 2012, Ukraine adopted the Law of Ukraine "On State Guarantees for the Execution of Court Decisions", which provided that budgetary institutions owe the relevant persons funds for social benefits; the state undertakes this obligation to reimburse the owed funds.

Unfortunately, based on practice, we often face a problem that most of the Ukrainian population does not fully understand the importance of ECtHR practice. Most Ukrainian citizens are convinced that they can contact the ECtHR directly if they violate their rights, bypassing national remedies, including their country's court. Also, a significant number of the population asks the lawyer to draw up an application to the ECtHR for violation of their rights by other individuals or legal entities and does not understand the principle of court.

Thus, the work of the domestic government should be aimed at developing a strategy for reducing the number of unfulfilled court decisions against Ukraine. After all, from 2018 to 2021, the ECtHR considered 10056 against Ukraine. Basically, they relate to social

payments, conditions of detention in prison, the right to a fair trial, etc. The court issued several rulings on the acceptability of Ukrainian citizens.

In addition to individual statements, in 2014, the ECtHR opened proceedings in Ukraine against Russia under No. 210958/14. Accusation concerns Russia's violation of 12 articles of the European Human Rights. It is about Art. 2 (right to life), Art. 3 (prohibition of torture, inhuman and humiliation), Art. 5 (right to freedom and security), Art. 6 (right to a fair court), Art. 8 (respect for private life), Art. 9 (freedom of religion), Art. 10 (freedom of speech), Art. 11 (freedom of assembly), Art. 13 (right to effective treatment), Art. 14 (prohibition of discrimination) and two articles on additional protocols – the right to ownness, in particular the expropriation of the Crimean authorities of Ukrainian property in the Autonomous Republic of Crimea and free movement. The case is currently under consideration in court.

Given the information about the large number of appeals from Ukraine to the ECtHR, work is being done in Ukraine to ensure the proper execution of court decisions in its territory, but it still needs improvement. Considering that the role of human rights protection, guaranteed by the Convention, belongs to the courts and institutions that are equated to them, these authorities believe the most effective means of protection at the national level necessary for the use of national remedies when applying to the ECtHR. It is confirmed by the case of the Court of "Archpillas and Others v. Ukraine" 2017, where the applicants complained, in particular, that the duration of criminal proceedings was incompatibly demanding a "reasonable time" and the lack of an effective means of legal protection in this regard.

Thus, there can be no doubt about the need to use the ECtHR Convention and Decisions in order to prevent Ukraine's obligations in the future. After all, the ability to effectively protect the Human Rights guaranteed at the national level is significant, so it is worth listening to the Council of Europe's recommendations on the need

to bring current domestic legislation to European standards for human rights protection. Therefore, it is better to spend the state budget funds on reform than constantly search for funds to repay payments for just satices. Therefore, taking the necessary measures to restore the rights and freedoms of the complainant should be considered for our country, one of the main areas of activity in Ukraine's human and citizen's rights protection system.

Unfortunately, on the basis of practice, we often face a problem that a large part of the population of Ukraine does not fully understand the importance of the European Court of Human Rights practice.

The majority of Ukrainian citizens are quite convinced that in case of violation of their rights, they can apply directly to the European Court of Human Rights while omitting national remedies, in particular judicial authorities of their state. Also, a significant number of people ask a lawyer to make a statement to the European Court of Human Rights for violation of their rights by other individuals or legal entities and do not understand the principle of the Court's action.

Thus, the work of the national government should be aimed at developing a strategy to reduce the number of unimplemented decisions of the Court against Ukraine. In fact, between 2018 and 2021, the European Court of Human Rights considered 10056 against Ukraine. They mainly relate to social benefits, detention conditions in places of detention, the right to a fair trial, etc. The court issued several resolutions on the acceptance of the applications of Ukrainian citizens.

In addition to individual statements, in 2014, the European Court of Human Rights opened proceedings in the case "Ukraine against Russia", No. 210958/14. The accusation concerns a violation by Russia of 12 articles of the European Convention on Human Rights. It is about art. 2 (right to life) art. 3 (prohibition of torture and humiliating handling), art. 5 (the right to freedom that bees), art. 6 (right to a fair trial), art. 8 (respect for private life), art.

9 (freedom of religion), art. 10 (freedom of speech), art. 11 (freedom of assembly), art. 13 (right to effective treatment), art. 14 (prohibition of discrimination) and two articles on additional protocols – the right to property, in particular, about the expropriation by the Crimean authorities of the Ukrainian authorities in the Autonomous Republic of Crimea and free movement. The case is currently under consideration by the Court.

Given the information on a large number of appeals received from Ukraine to the European Court of Human Rights, Ukraine is still working to ensure the proper execution of decisions of the Court on its territory but still needs improvement. Given that the role of the protection of human rights guaranteed by the Convention belongs to the courts and institutions that are equal to them, that is why these authorities consider the most effective means of protection at the national level necessary for the use of national means of protection in the case of the Court of Archiv and other v. Ukraine of 2017, where the applicants complained, in particular, that the length of criminal proceedings was incompatible with the requirement of a "reasonable time" and the lack of an effective means of legal protection in this regard.

Thus, there can be no doubt about the need for the courts of Ukraine to use the Convention and the European Court of Human Rights decisions to prevent future violations by Ukraine of its obligations. Because the ability to effectively protect the rights guaranteed by the Convention at the national level is significant, it is worth listening to the recommendations of the Council of Europe on the need to bring the current domestic legislation to European standards of human rights protection. Therefore, it is better to spend the funds of the state budget for carrying out reforms and then to search for funds for repayment of payments to reasonable satisfaction. Therefore, taking the necessary measures to restore the rights and freedoms of the citizen of Ukraine should be considered for our state as one of the main directions of activity in the system of protection of human rights and citizens of Ukraine.

CONCLUSIONS

1. The execution of decisions of the ECtHR is a rather complex process and includes the obligation of the defendant state to pay compensation to the debt collector (just satisfaction) and to take additional measures of an individual nature, which are defined in the Court's decision. This can be the restoration of the previous state, and a new consideration of the case, as well as the possible adoption of measures of a general nature, which concerns more global changes, for example, amendments to legislation or the introduction of a system of improving the qualifications of authorities, etc. In its practice, the ECtHR declares a relationship between the operation of the human rights protection system and the jurisdiction of the contracting states. Given this, it is problematic to assess the actions of the states participating in the Convention, which they carry out outside the borders of their state territory. In the case of such "extra-territorial" actions, compliance with the Convention by a state party is mandatory when it directly or through units controlled by it exercise control over the relevant territory. In addition, with the aim of the maximum possible protection of the rights of persons who apply for protection to the judicial body of the Council of Europe, the ECtHR, gives states a free choice of means of implementing the Court's decision, in certain cases, allows the narrowing of the options to the only possible ones and thereby obliges the state to specific actions.

The implementation of decisions of the ECtHR in Ukraine is provided for by the special Law of Ukraine "On the implementation of decisions and application of the practice of the European Court of Human Rights". According to this the defendant state, represented by the state executive service of Ukraine, is obliged to fulfill the Court's decision in favor of the person, in particular, to pay the just satisfaction determined by the Court within three months. One of the important problems regarding the implementation of decisions of the ECtHR against Ukraine is the length of non-implementation of decisions of national courts, which was

repeatedly emphasized by the ECtHR in its practice ("Yuri Ivanovych Ivanov v. Ukraine", "Bochan v. Ukraine", "Burmych and others v. Ukraine"). Therefore, it is proposed to improve the national legal system by bringing the legislation of Ukraine to European standards for the protection of human rights, updating the legislative provisions so that they correspond to modern realities, and also to provide for the number of funds in the state budget not less than for the previous year, and in case of their insufficiency or significant debt, to be covered at the expense of the special fund of the state budget.

2. The issue of monitoring the implementation of ECtHR decisions is considered at special meetings of the Committee of Ministers of the Council of Europe. Also, the Committee of Ministers may submit to the Court a request for an advisory opinion on legal issues related to the interpretation of the provisions of the Convention. It is worth emphasizing that thanks to the judicial reform in 2018, the Committee of Ministers of the Council of Europe closed the supervision of the execution of 318 cases of the ECHR regarding Ukraine. Despite the positive dynamics, Ukraine is still among the countries for which the implementation of ECtHR decisions is under the increased control of the Committee of Ministers, which indicates the need to improve the legal system for the protection of human rights in Ukraine.

3. From the beginning of its existence, the ECtHR took the position of the doctrine of judicial precedent, it refers to its previous precedent practice since this legal achievement is key to the protection of human rights.

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THE MAIN CATEGORIES OF DISPLACED PERSONS FLEEING ARMED CONFLICTS AND THEIR CORRELATION IN THE CONTEXT OF RUSSIAN INVASION OF UKRAINE

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Introduction

Bearing in mind different armed conflicts in the world during last half a century, including ones in European countries, issues of forcible displacement, human rights protection of displaced persons fleeing armed conflict zone within or beyond the territory of countries of their residence, have been extremely important in Europe. In 2011, thousands of refugees from Libya, Tunisia and some other countries tried to reach EU borders; a few years later, refugee crises engulfed Europe as a result of armed conflicts in Syria, Afghanistan. Some of EU countries were at the edge of humanitarian catastrophe because of large numbers of refugees that led to EU migration and asylum policy reforms. On the other hand, such countries as Cyprus, Bosnia and Herzegovina, Serbia, Macedonia, Croatia, Kosovo, Georgia, Azerbaijan, Armenia, Turkey, Russia faced the internal displacement. In 2014 Ukraine came across to the largest flow of internally displaced persons (IDPs) in modern history of Europe due to Russian occupation the Eastern part of Ukraine and the annexation of the Crimean Peninsula; 1,8 million persons were officially registered as IDPs in the middle of 2016. It means that in XXI century in the center of Europe millions of people have to move to another place within their own country or to another county not because of seeking better life and higher incomes, but for protection reason, saving their lives due to armed conflicts.

However, all these refugee crises in Europe, numbers of refugees and internally displaced persons couldn't be compared with the numbers and the situation of forced displacement in Ukraine and Europe that have begun since 24 February 2022. A large-scale Russian invasion has put Ukraine into the largest and fastest displacement crisis in the world since WWII – both internal and external. Not thousands, but millions of people tried to flee the war in first weeks of invasion.

Having visa-free regime with the EU, Ukrainians fleeing the war zone will be able to choose not only the possibility to find safer area within the territory of Ukraine, but they can also cross the state border and stay at the EU for three months or apply for international protection. Understanding the unpreparedness of the EU asylum system for millions of new asylum seekers, the system of temporary protection adopted at the EU in 2001 was rapidly activated. The absolutely majority of those who left Ukraine fleeing the war applied for this particular type of protection of displaced persons, comparing with the number of applications for the refugee status. However, the question about types or categories of displaced person and human rights that should be guaranteed for people of each category is very relevant and important not only for theoreticians and academics, but also from a practical standpoint for states granting such statuses and displaced persons themselves. The necessity of researches of different aspects of correlation and interdependence between different categories of displaced persons fleeing the war is determined by the possibility of an open choice of each status for each citizen of Ukraine (except some categories of people who are not allowed to leave the country), changing the status and transition from one to another, the possibility of an independent choice of a country for temporary protection, and even a periodic return to their country without losing the protection. Moreover, the understanding of different statuses and the scope of rights guaranteed to a displaced person within the framework of each of them and the corresponding state policy take on particular importance because of the continuation of the war. Six months since the beginning of the Russian invasion, the status of

several million displaced persons abroad has not been determined, based on general statistics and numbers of persons in each category of displaced persons. states' Wrong decisions or policies can lead to large-scale negative consequences and catastrophic humanitarian problems in Europe.

The concept of the displaced persons

Displaced persons can be understood as an integrated, complex concept that means persons who are force to flee from their places of living due to conflicts, violence, climate change, environmental and natural disasters. It means the presence of certain factors, circumstances that force people to leave to save their lives and health. That's why another term – "forcibly displaced people" (as well as forced displacement) is used very often to emphasized the level of danger and such "push factors" as armed conflict, situations of generalised violence or serious violations of human rights, natural or human-made disasters. In this situations people have been forced or obliged to flee or to leave their homes.

The definition of displaced persons was enshrined in the art 2(c)) of the Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, adopted on 20 July 2001 (Temporary Protection Directive, TPD).[355] In the mentioned article of the Directive, displaced persons are defined as third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in

[355] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, adopted on 20 July 2001. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0055

that country, who may fall within the scope of Article 1A of the Geneva Convention relating to the status of refugees or other international or national instruments giving international protection. Two categories of persons have been identified: persons who have fled areas of armed conflict or endemic violence and persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.[356]

At the same time, within its humanitarian assistance the EU uses the term "forcibly displaced persons",[357] for people who are forced to leave their homes due to conflict, violence, human rights violations, persecution, disasters and the adverse effects of climate change.

The UNHCR, on the contrary, overwhelmingly applies the term "forcibly displaced persons", talking about people who were forced to flee their homes due to conflicts, violence, fear of persecution and human rights violations.[358]

Considering mentioned definitions, these two terms can be used with the same meaning in case of armed conflicts, the most important element of which is the obvious necessity for people to flee their homes.

However, it should be underlined that in some cases of grave and imminent threat to life of people in exact region, the displacement can be obligatory in accordance with the order of the state authority. For example, in Turkish government provided obligatory evacuation of hundreds of thousands of people of in the rural areas of the Kurdish south-east where the state of emergency

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[356] Ibid.

[357] Forced displacement: refugees, asylum seekers and internally displaced persons (IDPs). European Civil Protection and Humanitarian Aid Operations/European Commission/ URL: https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/forced-displacement-refugees-asylum-seekers-and-internally-displaced-persons-idps_en

[358] UNHCR. Global trends. URL: https://www.unhcr.org/globaltrends.html

was announced during 1984-1999.359 In the case "Doğan and Others v Turkey"[360] of the European Court of Human Rights, the applicants stated that they had been forced to evacuate from their village by security forces that had destroyed their homes to force them to leave their places. They also complained that even in years, their forced displacement has been continued due to Government's refusal to allow them to return. The Government, on the contrary, stated that the return to their places of living was forbidden for security reasons.

Another recent example of mandatory evacuation that can be provided is the decision of Ukrainian Government on mandatory evacuation from Donetsk region due to the active military actions of Russian army and total lack of possibility of heating on this part of the territory of Ukraine. The main reason was outlined by the Minister for reintegration of the temporarily occupied territories of Ukraine as absolute lack of gas supply in Donetsk region and permanent destruction of every repaired gas pipelines by Russians, that will cause the total absence of heating in winter. However, unlike the Turkish forced evacuation, the Ukrainian authorities emphasized that in cases where someone refuses to evacuate, they will be forced to sign a refusal form about their understanding all the consequences and the responsibility for their lives. Forcible evacuation of children will be with the consent of one of the parents.[361] Therefore, within the forced displacement people explicitly can have no choice or little chance to not be displaced.

Under the EU data, there were almost 90 million displaced

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[359] Anke Stock, Right of return. Doğan and Others v Turkey/ EHRAC bullletin issue 4 Winter, 2005. URL: http://repository.londonmet.ac.uk/529/1/EHRAC%20bullletin%20issue%204%20Winter%202005%20A.%20Stock.pdf

[360] Doğan and Others v Turkey, applications No 8803-8811/02, 8813/02 and 8815-8819/02, judgment of the European Court of Human Rights, GC 29.6.2004

[361] Petrenko Roman Ukraine starts mandatory evacuation of people from Donetsk region. /Ukrainska Pravda. Saturday, 30 July 2022. URL: https://www.pravda.com.ua/eng/news/2022/07/30/7361091/

people worldwide at the end of 2021[362], but some months later, a full-scale Russian invasion of Ukraine in February 2022 caused the largest and fastest displacement crisis since WWII in the world history and the general account of displaced persons exceeded the 100 million mark. By the middle of May 2022 the total numbers of people who left Ukraine reached 6.8 million people and according to IOM statistics in the beginning of May, over 8 million people were estimated to have been internally displaced in Ukraine since 24 February 2022.[363] During just first several months of Russian invasion, Ukraine received more internally displaced persons than the numbers that have ever been registered in Syria during the years with the maximum account of IDPs at the level of 6,6 millions. Furthermore, this is the largest numbers of IDPs than any other country in the world have at the end of 2021 because of conflicts and violence and more than seventh part from the total number of this group of IDPS (53, 2 millions) according to the Internal displacement monitoring center's Global Report on Internal Displacement, published in 2022.[364]

The main categories of displaced persons

The given statistics and description of general situation in displacement show two main groups of displaced persons. The

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362 Forced displacement. Factsheets. The European civil protection and humanitarian aid operations. European Commission. URL: https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/forced-displacement-refugees-asylum-seekers-and-internally-displaced-persons-idps_en

363 IOM, Needs Growing for Over 8 Million Internally Displaced in Ukraine. 10 May, 2022. URL: https://www.iom.int/news/needs-growing-over-8-million-internally-displaced-ukraine

364 Global Report on Internal Displacement 2022. URL: https://www.internal-displacement.org/global-report/grid2022/#:~:text=There%20were%2059.1%20million%20internally,as%20a%20result%20of%20disasters.&text=Typhoon%20Rai%20triggered%20the%20largest%20number%20of%20disaster%20displacements%20in%202021.

understanding of types or different categories of displaced persons or forcibly displaced persons has more importance than the different approaches to the terminology that was mentioned.

Fleeing the armed conflicts, people can try to leave conflict zone within the territory of their country, moving to another more secure region or people can leave the territory of the state of residence. In this context this kind of people have the right to obtain different statuses:

- become internally displaced persons (IDPs) in case of displacement without crossing the state borders. Sometimes, under national legislation the fact of displacement is not enough for receiving the special status and the additional protection for IDPs. In Ukraine, the fact of displacement isn't enough for the obtaining status of IDPs, it's necessary to officially apply for IDP status (officially be registered as IDP),
- people who left the territory of the country can apply for international protection (refugees, asylum seekers, applicants for subsidiary international protection) or temporary protection. Considering visa liberalisation process, people from some countries don't need a visa for crossing the border, especially between the EU and other countries. For instance, Ukrainians with biometric passports don't need visa for entering the EU countries and have the right to stay there without any formalities up to 3 months (90 days within any 180-day period).[365] However, this visa – free regime allows to visit EU countries and Norway, Iceland, Liechtenstein, and Switzerland with purpose other than working, that means prohibition any work, including temporary, seasonal work even for less than 90 – day period.

Therefore, persons who displaced within the territory of their country can only be IDPs or in some cases have no additional statuses

[365] Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine)

at all. At the same time, in case of leaving the territory of the country the person has the rights to obtain different statuses depend on certain circumstances. Usually, it can be refugees and asylum seekers for the period of waiting for the decision or persons who can apply for international protection (subsidiary international protection or humanitarian protection, depends on national legislation).

For those who have left their own country and want to obtain refugee status, this status must be distinguished from asylum seeker status that person has during the waiting period for the host country authorities' decision about grunting refugee's status. After all, they are provided for a sufficiently different amount of human rights in the host country.

Refugees and asylum seekers

According to the main international document relating to refugees – Convention relating to the status of refugees 1951- the refugee is "a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[366] At European level almost the same definition was given in the Article 2 (d) of the Recast Qualification Directive 2011/95/EU.[367] For the definition of refugee, the Council of Europe also applied one that was enshrined in the Convention 1951. For example, in the European Agreement on Transfer of

[366] Convention and Protocol Relating to the Status of Refugees, Art. 1 A (2)/ UNHCR. URL: https://www.unhcr.org/3b66c2aa10

[367] Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted of 13 December 2011. URL: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF

Responsibility for Refugees "refugee" means a person to whom the Convention relating to the status of refugees of 28 July 1951 or, as the case may be, the Protocol relating to the status of refugees of 31 January 1967, applies. At the same time, it should be noted, that broader approach to the definition of refugee was applied in the Convention Governing the Specific Aspects of Refugee Problems in Africa, which also covers people threatened by indiscriminate violence, and Cartagena Declaration on Refugees, which includes other circumstances that seriously disturbed public order. European States do not collectively apply an extended refugee definition which includes people fleeing indiscriminate violence.

Some attempts to use a broad meaning of the term "refugee" were made by the Council of Europe. In 2001, the Committee of Ministers of the Council of Europe recommended the granting of subsidiary protection to persons who are not refugees in the meaning of the Refugee Convention in its Recommendation Rec (2001) 18 to Member States on Subsidiary Protection.[368]

In other words, the meaning and understanding of "refugee" is the same at Universal and European levels as a person who has well-founded fear under five group of grounds enshrined in the Convention 1951, crossed the border of the country of residence (it can be stateless persons as well) and cannot return to this country because of fear and cannot be protected by this state.

Moreover, international protection includes not only refugee status, but also subsidiary protection due to the lack of grounds for the refugee status under the Convention 1951 and its Protocol. It means, that in addition, persons outside of the country of residence who cannot be qualified as refugees under international or regional law may also ask for subsidiary international protection, humanitarian protection (in some countries it could be the same type of protection) in certain circumstances as a risk of suffering serious harm if returned to his or her own country. The provisions

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[368] Recommendation Rec(2001) 18 of the Committee of Ministers of the Council of Europe to Member States on Subsidiary Protection, 27 November 2001

about subsidiary protection can be found in the Art. 2(f) of the Recast Qualification Directive 2011/95/EU. Under the Directive the protection can be given to a third-country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown that in case of returning it would be a real risk of suffering serious harm. Serious harm is interpreted as serious and individual threat to a civilian's life, including in situations of international or internal armed conflict. In accordance to this Directive, EU asylum system covers all persons who need international protection under Convention 1951 and those who need it but are not covered by the Convention. In general, the EU has adopted a range of EU legal acts in the sphere of asylum and refugee issues. Except Dublin Regulations, New Pact on Migration and Asylum, Asylum Procedures Regulation Directive 2013/32/EU (on common procedures for granting and withdrawing international protection), Reception Conditions Directive 2013/33/EU, Qualification Directive 2011/95/EU, Union Resettlement Framework, etc. were adopted.

Several documents were also adopted by the Council of Europe, such as Recommendation of the Parliamentary Assembly 773 (1976) on the situation of de facto refugees, 26 January 1976, 775 (1976). A list of minimum rights that have to be guaranteed to de facto refugees was prescribed in the document mentioned.

Thus, despite the absence of any European conventions on refugees or asylum seekers there is a special developed detailed EU legislation and range of the Council of Europe documents, that enshrines a broad range of human rights of refugees and asylum seekers or other persons who can apply for international protection. An important role in formulating European standards of refugees, asylum seekers human rights protection, especially regarding to non-refoulement principle and the prohibition of ill-treatment plays the European Court of Human Rights and its case-law.

Rights and status of refugee is very close to rights of nationals, except suffrage. They have the right to social protection and assistance, access to healthcare, employment and self-employed activities, education, etc. However, it should be also underlined that

the period of waiting for the decision about refugee status or subsidiary protection can be rather long. Asylum-seekers, i.e. persons who applied for refugee status or other international protection, can be in this uncertain situations for a rather long period, in some cases up to several years, with less set of rights then refugee has. Undoubtedly, basic rights must be guaranteed for applicants for international protection. The Reception Conditions Directive 2013/33/EU of the European Parliament and of the Council, adopted 26 June, 2013 lays down the following rights for applicants for international protection (recast):[369] access to housing, food, clothing, financial allowances, a decent standard of living and medical and psychological care. Meanwhile, the right to access to labour market can be not given or provided with 9-month period, there can be some restrictions in the sphere of free movement etc. Taking into account the case-law of the European Court of Human Rights, the majority of stated violation have been made in situations of waiting the refugee status rather than after its obtaining. In the case "M. S. S v. Belgium and Greece" the European Court of Human Rights considered among other facts, the situation with living conditions for asylum seekers in Greece. It was noticed in the reports that very often asylum seekers had nowhere to live, slept on the streets, in certain parks in Athens, they had "permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.)".[370] It was also noticed that a special card for asylum seekers ("pink card") didn't provide such kind of persons with social benefits, assistance or even free medical treatment; and furthermore, they couldn't obtain the work permit because of different bureaucratic obstacles as a

[369] Directive 2013/33/EU of the European Parliament and of the Council of 26 June, 2013 laying down standards for the reception of applicants for international protection (recast). URL: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF

[370] M. S. S v. Belgium and Greece, app. 30696/09, judgment of the European Court of Human Rights 21 January 2011. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-103050%22]}

necessity to have tax number what was impossibly without a permanent place of living.[371]

It is also need to be stressed that very often term "refugees" is used by media and even international organisations and UN refugee agency with the broad understanding as common term for all persons left the country and stay outside their countries of origin and who are in need of international protection because of a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder, etc. [372] For example, on the official web-portal of UNHCR the data on 7 million refugees from Ukraine can be found, despite the information about around 50 000 of applications for the international protection. They are not refugees or even asylum seekers yet (except those who applied), but they have this right to apply for international protection and, theoretically, can apply for it.

In this context special attention should be paid to the situation and statuses for people who fled the war in Ukraine. Russian large-scale invasion, started on 24 of February 2022, has changed the situation with forced displacement in Europe drastically and fundamentally. Almost 8 million people had left Ukraine due to the war, though some of them have returned, millions are still staying abroad, mostly in the counties of the EU, since the only possible way

[371] Ibid.

[372] UN General Assembly, Note on International Protection, 7 September 1994, A/AC.96/830, www.refworld.org/docid/3f0a935f2.html. UNHCR's refugee-protection mandate, per Article 6A(ii) of its Statute, originally covered '[a]ny person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality [or habitual residence, for those without nationality] and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country.' For subsequent General Assembly resolutions extending the High Commissioner's competence, see eg GA res 3143 (XXVIII), 14 Dec 1973; GA res 1673 (XVI), 18 Dec 1961; GA res 2294 (XXII), 11 Dec 1967; ECOSOC res 2011(LXI), 2 Aug 1976, endorsed by GA res 31/35 of 30 Nov 1976; GA res 36/125, 14 Dec 1981; GA res 44/150, 15 Dec 1988; GA res 48/118, 20 Dec 1993.

to do this – cross the border with EU countries (Poland, Hungary, Slovak Republic, Romania) or Moldova.[373]

Temporary protected persons

Considering the fact that Ukraine is one of the biggest European states by population, the consequences of the displacement can hardly be estimated at present. The largest influx awaits Europe, the European Union for the first time has activated the Temporary Protection Directive since its adoption in 2001. Thus, a rather new status, that applied by different states only at national level, in practice has been longed in Europe.

There has been no particular international treaty on temporary protection or any international document at Universal level until 2014, except the draft of the Guidelines on temporary protection elaborated by the International Law Association in 2002.[374] It was recognised in the Guidelines that in the case of large-scale influxes, "not only persons that are treated as refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees but also other persons fleeing the indiscriminate effects of armed conflict or situations of generalized violence are in need of protection", temporary protection can be offered to broad range of people in need in this situation and can be a pragmatic response to specific protection needs. Understanding of the main objective of temporary protection was formulated in para. 2 of section 1 of the Guidelines: temporary protection is an "element within the framework of a more comprehensive approach to situations of mass influx, involving concerted efforts on the part of the international community to assist States particularly affected by such an influx in a spirit of international solidarity and burden-sharing, and to achieve a solution to the conflict or strife in order to enable those who have

[373] The possibility and consequences of crossing the borders with Russia and Belarus as well as the number of Ukrainians done this voluntary is not the subject of this paper.

[374] Guidelines on Temporary Protection. Resolution 5/2002 on Refugee Procedures 6 April 2002, 5/2002, adopted by the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002 /International Law Association, International Law

fled to return in safety and dignity".[375] Under the principles of the Guidelines persons who have fled the indiscriminate effects of armed conflict can be temporarily protected.

In 2014, the Guidelines on temporary protection and stay arrangements were published by the United Nations High Commissioner for Refugees for giving recommendations on arrangements for entry, reception, changing the statuses, termination this status that can be activated in times of "humanitarian crises and complex or mixed population movements", especially when the systems in force are not able to manage the situation.[376] These Guidelines also enshrines minimum standards of treatment that have a very important meaning as a minimum range of human rights for the categories of people who can enter within this type of protection. Furthermore, it is said that temporary protection or stay arrangements should be understood as an additional status or complementary tools to refugee regime and international protection and they are "pragmatic tools of international protection".[377] However, there is no consensus among scholars as to whether temporary protection should be considered as one of the types of international protection. The presence of different approaches to understanding of temporary protection was probably associated with the absence of both international documents regulating this issue and the widespread use of the status of temporary protection by states. Today, the situation has changed radically, the application of the relevant EU Directive, which will be discussed later and which was considered a "dead document", can start an active discussion on the conversion of temporary protection to one of the most effective types of international protection in general.

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[375] Ibid.

[376] Guidelines on Temporary Protection or Stay Arrangements, 14 February 2014. High Commissioner for Refugees. URL: https://www.unhcr.org/542e99fd9.pdf

[377] Ibid., para.3

The Guidelines on temporary protection of International Law Association 2002 as well as the Guidelines on Temporary Protection or Stay Arrangements 2014, adopted by UNCHR, mentioned the EU Temporary Protection Directive and underlined that they are based on existing regional arrangements. Among existing regional protection instruments and arrangements UNHCR enumerates the followings: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Cartagena Declaration on Refugees, Bangkok Principles on the Status and Treatment of Refugees and Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences thereof.[378] This list shows that only the EU Directive deals exclusively with issues of temporary protection.

Indeed, the Directive is the only legal act that formulates the rules for temporary protection for the whole region. This Directive was adopted because of the conflict in the former Yugoslavia but had never been activated until Russian large-scale invasion of Ukraine 24 February 2022, despite some refugee crises before 2022, including crisis in 2015, as well as several official requests of its activation (from Italy and Malta[379]). The International Center for Migration Policy Development stated that there were unprecedented number of refugees mostly from Syria, Afghanistan, but also from Eritrea, Nigeria and Somalia and some other countries to the shores of the EU in 2015. The total number of arrivals to the EU, Norway and

[378] See references to para. 2 of the Guidelines on Temporary Protection or Stay Arrangements, 14 February 2014. High Commissioner for Refugees

[379] Study on the Temporary Protection Directive. Final report, January 2016 / Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden/ European Commission. Directorate-General for Migration and Home Affairs. URL: https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf

Switzerland that year was about 1,3 million people.[380] In UN High Commissioner for refugees' statement to the UN Security Council about the situation in Ukraine at 28 of February, on the fourth day of Russian military invasion, it was informed about more than half a million people have already crossed the borders of Ukraine with neighbouring countries and exponential growth of the numbers every hour.[381] Thus, the number of arrivals to the EU only in the first days of the war cannot be compared with the number of refugees that caused crises in the EU earlier. Therefore, the reaction and decisions of the EU had to be immediate and had been able to resolve the situation, at least temporarily, and to prevent a humanitarian catastrophe and the collapse of existing migration, asylum systems. Even only these reasons were more than enough as the grounds for activation of the Directive. The activation of the EU Temporary Protection Directive was made by the Council decision, adopted 4 March 2022[382], in a week after the war began. And this has and will have the crucial importance for maintenance the EU migration system, security and stability, support of Ukraine, the development of international protection system, etc.

The definition of "temporary protection" is formulated in Article 2 of the Directive[383] and mentioned on its official web-site of

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[380] Number of Refugees to Europe Surges to Record 1.3 Million in 2015. Pew Research Center. URL: https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/

[381] Grandi Filippo High Commissioner' statement to the United Nations Security Council on Ukraine. 28 February, 2022. URL: https://www.unhcr.org/admin/hcspeeches/621d33da4/high-commissioners-statement-united-nations-security-council-ukraine.html#_ga=2.104901699.1569218365.1662143433-586255668.1651151836

382 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection

[383] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced

the European Commission.[384] It was emphasized that "temporary protection is an exceptional measure to provide immediate and temporary protection in the event of a mass influx or imminent mass influx of displaced persons from non-EU countries who are unable to return to their country of origin…" and one more purpose for temporary protection in case of mass influx that was indicated is a risk for stability and efficient operation of the EU asylum system. The European Commission also saw the Directive is an exceptional tool for the EU to manage such situation.[385]

Three main categories of people displaced from Ukraine due to Russian invasion, who can be given temporary protection are fixed in the Article 2 of Directive: "Ukrainian nationals residing in Ukraine before 24 February 2022, stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022", and family members of all these categories. [386] Also temporary protection or other adequate international protection should be given to nationals of other than Ukraine countries or stateless persons who have permanent residence permit in Ukraine before abovementioned date, if there is no possibility for safe returning to their own country. That's why not all foreigners who fled the war in Ukraine will be able to receive the protection in EU countries.

Granting temporary protection was aimed to reduce the need to immediately apply for international protection, as temporary protection provides people fleeing the war in Ukraine with a residence permit and the rights associated with it, such as rights to access to labour market and self-employed activities, medical care, access to education for children, suitable adequate accommodation,

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persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

[384] Temporary protection. European Commission. URL: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en

[385] Ibid

[386] Ibid., Art.2

social welfare and means of subsistence if needed etc. Thus, temporary protection status gives recipients immediate and effective protection and basic rights, so, persons don't need to wait for medical care asses, asses to labour market etc. as they do in case of application for international protection. All administrative formalities for temporary protection are kept to a minimum due to the urgency of the situation. The whole procedure could take less than an hour or several days. For example, in Bulgaria the procedure takes from 5 to 15 minutes, temporary protection is provided immediately upon verbal request to the border police, the State Agency for Refugees or other bodies of the Ministry of Internal Affairs (migration, police) to all persons who meet the above conditions.[387] Under Hungarian legislation, temporary protection should be given maximum up to 45 day-period. In Czech Republic decision about granting temporary protection has to be given up to 60 days, the period was extended because of large group of Ukrainian Roma people with both Ukrainian and Hungarian citizenship. Taking into account the absence of Hungarian propositions and programmes for their support, they moved to other EU states. However, such periods are negligible compared to the waiting times for refugee status, which can be as long as two years or more that have been already mentioned. Temporary protection is more collective in nature, that is, granted to everyone who falls under the criteria defined in the decision, while refugee status is individual.

That's exactly why activation of abovementioned Temporary Protection Directive is called the rapid response of the EU to the large-scale Russian invasion of Ukraine. What is more, this decision actually prevented a major migration crisis or, in the case of a protracted war, delayed it, giving the EU the opportunity to take appropriate measures while developing and adopting subsequent decisions.

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[387] Яка різниця між «тимчасовим захистом» та «міжнародним захистом»? 29.04.2022. URL: https://ukraine.gov.bg/ua/faq/evacuation-qa/what-is-the-difference-between-temporary-protection-and-international-protection/

At least two things should not be forgotten: firstly, temporary protected status has a short period of validity and can be canceled at any moment if the situation in the country of origin changes. The initial period could be prolonged for up to three years in total. Refugee status, on the contrary, is given to three years minimum. Secondly, the possibility to apply for the temporary protection doesn't deprive persons of opportunity to apply for international protection and refugee status. The person is able to choose which status is better to apply for or apply to international protection being a temporary protected person (TPP) in time of application. Nowadays, among these options the vast majority of Ukrainians who fled the war in Ukraine choose to be temporary protected persons and didn't even attempt to apply for refugee status. Totally, less than 50 000 applications have been received from more than 7 million people have left the territory of Ukraine since 24 February and almost 4 million received temporary protection status.[388]

Process of obtaining the temporary protection doesn't provide withdrawal of passports or other identification documents of applicants. Thus, all temporary protected persons are able to return to Ukraine at any moment, even while saving this protection, or change the host state of temporary protection or cancelling the temporary protection and freely move to any country if have the rights to enter. This is fundamental difference from the procedure for obtaining refugee status, in which a passport of applicant is taken away.

And what is more important for understanding the unique, distinguishing feature of the temporary protection status under the EU Directive and its comparison with refugee status is the possibility to its obtaining in any EU country (except Denmark), despite the country of first entrance. States are able to regulate this issue by themselves that could cause problems. For instance, for some period of time in Poland there was a rule on granting the status of temporary protection only to those who arrived from Ukraine after February 24 by crossing the Ukrainian-Polish border.

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[388] Ukraine refugee situation. Operation data portal. URL: https://data.unhcr.org/en/situations/ukraine

Some scholars and practitioners emphasized the almost identical rights of temporarily protected persons with citizens' rights of the respective country. It might not have been a fair comparison even in the first months of the Russian invasion. Even during this initial period, social security rights could not be compared with the scope of social rights of citizens, and what is more, their scope differed radically in different EU countries. Gradually, some states stated to reduce benefits and scope of rights for persons who have been already grunted the status of temporary protection. For example, in Czech Republic, the duration of free medical insurance was limited to 150 days instead of the one year that was indicated in the documents earlier. States have different approaches to the issue of continuation of the payment of social benefits (if any), which was provided for a short period, usually 6 months. Payments may be reduced or cancelled. This situation is not typical for both refugees and internally displaced persons, payments to whom, as a rule, are provided for a longer period.

Currently, it's fair to state that temporary protection was the best possible solution for both the EU countries and Ukraine. The scope of temporary protected person's rights is far more than asylum seeker's, but obviously less than refugee has. And a lot of similarities can be found between refugee's rights and temporary protected person's rights. However, it's clear that after the ending or cancellation of temporary protection status temporary protected people wouldn't have rights to stay in the EU further.

Considering the small social benefits or their absence (depend on national regulations, different approaches to social allowance and its duration for temporary protected persons that are provided by different EU states) Ukrainians have to search for a job and do even nonqualified work despite the previous working experience in a short period after registration. At the same time, Ukrainians are used to working hard, millions had, at least, short working experience in EU countries, such as Poland. According to the Ministry of Labor and Social Affairs of the Czech Republic, at the end of July, almost 100,000 Ukrainians found job in the country out of

almost 400,000 temporarily protected persons.[389]

At the same time, German data on the large influx of refugees observed between 2014 and 2016 show very gradual integration into the labour market over time, with only 17% of working-age refugees being in employment after two years in the country and less than 50% after five years.[390] On the other side, it should be stressed that temporary protection is an additional status and at any moment Ukrainians (temporary protected or not) are able to apply for international protection.

It should be pointed out that the general situation and the total amount of temporary protected persons and refugees would depend not merely on situation in the country of origin, but also on ensuring the rights of another category of displaced persons – internally displaced persons.

Internally displaced persons

Like refugees or temporary protected persons, internally displaced persons (IDPs) left their homes because of threats to their lives, but without crossing a state border. Internally displaced persons fleeing the armed conflict can be more vulnerable, scared and need psychological assistance and help. At the same time, IDPs stay within their own country and remain under the protection of its government, having the same rights and freedoms as others. However, because of displacement they occur in a vulnerable position and need additional protection, for instance, they need special social benefits and assistance, adequate housing or shelter, food, clothing, clean water, sanitation, etc. There are also can be problems of realisation the right to education, medical care, access to labour marker without discrimination etc. In general, under

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[389] Скільки українських біженців влаштувалося на роботу в Чехії. 9 липня 2022
URL: https://zakordon.24tv.ua/robota-za-kordonom-skilki-ukrayintsiv-pratsevlashtuvalisya-chehiyi_n2120570

[390] Vasco Botelho The impact of the influx of Ukrainian refugees on the euro area labour force. *ECB Economic Bulletin, Issue 4/2022, European central Bank.* URL: https://www.ecb.europa.eu/pub/economic-bulletin/focus/2022/html/ecb.ebbox202204_03~c9ddc08308.en.html

Principle 3 of the Guiding principles on internal displacement "national authorities have primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction".[391] According to this Principle, the responsibility of states is based on the provision, protection and support of their population without any discrimination, including IDPs, and it also follows that in order to ensure equal treatment of IDPs in comparison with other persons, states are obliged to provide for special protection measures and assistance to IDPs that correspond to their level of vulnerability.

The Parliamentary assembly of the Council of Europe in its Recommendation on Internal Displacement in Europe, adopted in 2003, referred to the UN Guiding Principles and called on the Council's member states to adhere to them and implement their provisions into national legislation. In this document, the Parliamentary assembly emphasized the difference between the protection of refugees and internally displaced persons, thus pointing at the particular vulnerability of IDPs, noting that "internally displaced persons as such, unlike refugees under the protection of the 1951 Geneva Convention relating to the Status of Refugees, are not protected by any an international legally binding document, and their fundamental rights cannot be ensured at the international level by means of any specific instrument. The issue of IDPs is often perceived as an internal issue of the respective country and receives much less attention from the international community than the issue of refugees".[392]

Except UN Guiding Principles on Internal Displacement, there are a set of Council of Europe documents devoted to the rights of IDPs in view of the fact that more that 10 out of 46 members of the Organisation (before the exclusion Russia there were 47 Member

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[391] Guiding principles on internal displacement 1998. URL: https://www.unhcr.org/43ce1cff2.pdf

[392] Recommendation 1631 (2003) of Parliamentary Assembly of Council of Europe, 25 November 2003. URL: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17163&lang=en

States) had or still have IDPs and IDPs protection and problems of specific situation with them are common issue for Council of Europe members. A range of human rights of internally displaced people were the subject of European Court of Human Rights cases. Broad practice and legal positions were formulated by the European Court in cases on IDPs' right to housing in accordance with article 8 of the European convention on human rights or property rights and right to compensation for destroyed, damaged property etc. within article 1 of the Protocol 1 to the Convention and social security rights, pension rights within article 1 of the Protocol 1 to the Convention. In addition to the above-mentioned areas, during the years of conflicts in Europe, the European Court has developed practice regarding internal displacement related to armed conflict, at least on such issues: documentation, effective control and jurisdiction, private life, family life, restrictions on freedom of movement, education, language of education, elections etc. In general, the Council of Europe elaborated the standards of protection of human rights of internally displaced person by adopting soft law documents, such as recommendations, resolutions of the Parliamentary assembly, the Committee of Ministers, documents of other organs and structures and case-law of the European Court of Human Rights, etc.

The EU declared its strongly support to the Guiding Principles on Internal Displacement, but the special EU acts that regulate this issue have never been adopted.

The correlation between different categories of displaced persons fleeing armed conflicts

As mentioned above, displacement of people due to armed conflict can occur both within and outside territory of states, which accordingly divides displaced people into two large groups: those who apply for international protection and those who become internally displaced persons.

The main type of international protection is the application for asylum and, accordingly, refugee status, the receipt of which guarantees a person a wide range of human rights, close enough to the rights of citizens of the corresponding state. A refugee receives a fairly long-term right to residence, social assistance, housing, the

right to work, the right to education, etc. States support refugees for a sufficiently long period, facilitating integration into the host community. However, obtaining this status that has an individual basis, as a part of the administrative procedure, the state authorities consider all the circumstances of the case of a particular person over a fairly long period, which can take several years, during which the asylum seeker has very limited rights and an uncertain future. In 1979, the Executive Committee of UNHCR stated that as a temporary, intermediate step on the way to a permanent solution the temporary protection has been used.

Nowadays, after the activation of the EU Temporary Protection Directive due to Russia's large-scale invasion of Ukraine, it may be assumed that a new effective innovative type of protection the displaced person left the territory of the country of residence is found and provided at the EU level at the moment. The scope of human rights guaranteed to temporary protected persons to some extent is very similar to refugees' rights, with the exception of social benefits. The biggest priority of temporary protection status is its collective character and very quick and simple procedure. And one of the main disadvantages of temporary protection is the temporary unstable nature and the possibility of cancellation or reduction of its validity period depending on the situation in the country, where the conflict occurs. Unlike a refugee, a temporarily protected person does not lose contact with the country of citizenship or permanent residence, having the right to go there at any time for a certain period and return without losing temporary protection status. However, the full characteristics and effectiveness of temporary protection not as an intermediate, but as an independent tool of protection of displaced persons beyond the territory of their country, will be analysed after the end of the war in Ukraine and the termination of its action. Even before the end of temporary protection in the EU countries, Ukrainian government has already started to think about methods of encouragement of people to return, because this status appeared to be comfortable enough for many of them. After half a year of the war and almost 4 million of temporary protected persons in the EU, advantages of temporary protection status compared to refugee status is understandable clearly.

On the contrary to international protection and temporary protection, internally displaced persons as it has been mentioned moving within the territory of their state remain under its jurisdiction and have the same rights and freedoms as before displacement. Unfortunately, they became vulnerable category of people who very often lost everything and as asylum seekers or temporary protected persons they also need the basic things to live: shelter, food, clothing, medical care, etc. The better IDPs are provided, the more the state and host local communities help to find them a job, restore their psycho-emotional state, the fewer people will leave the country and, accordingly, apply for asylum or temporary protection. Thus, at the beginning of autumn 2022, it becomes clear that many buildings in Ukrainian cities, villages where active hostilities have taken place or are taking place, in settlements that are under occupation will be unsuitable for living in winter period. Accordingly, the number of displaced persons will increase and in case of lack of housing propositions in safer regions of Ukraine, a significant percentage of such persons will cross the state border. And verse versa, in case of ending the war, a lot of temporary protected persons would return without waiting the end of validity of protection.

Consequently, the state of origin/residence or host state has to guarantee and ensure all basic rights as a minimum set of rights for all categories of displaced person: internally displaced persons, persons who applied for international protection or received it, temporary protected persons. These statuses should be chosen and in many cases can be changed by the individual. The numbers of asylum seekers, refugees and temporarily protected persons from Ukraine in the EU depends on and is inextricably linked to the protection of human rights of IDPs in Ukraine and, of course, depends on general situation in Ukraine, Russians military activity, hostilities. It has to be stated, that current displacement is not only a humanitarian challenge: it is also a political, human rights, developmental and economic challenges.[393]

[393] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social

CONCLUSIONS

Europe could receive and has already come across the largest mass influx since World War II and the potential numbers of asylum seekers, IDPs and certainly temporary protected persons could be hardly estimated at the moment. Considering the international law, people fleeing the war in Ukraine could be grunted each of main statuses for displaced persons, they can change their status, for example internally displaced persons to temporary protected persons and verse versa and Ukrainians are free to stay in Shengen area for 90 days without any registration. Correlation and interdependence of numbers of IDPs, temporarily protected persons, refugees from one country during one historical moment would depend on the range of human rights that are guaranteed by each status. And it is clear, that without the activation of the temporary protection the EU would already have a humanitarian catastrophe. This new type of protection for displaced persons at international level opened the new phase of development of solving the displacement problems, at least in the short and medium term. Supporting the minimum set of temporary protected persons' rights and granting access to labour market, provide them with opportunity to earn a livelihood for themselves, being much less of a burden to the state than asylum seekers and refugees. Moreover, correlation and interdependence of numbers of internally displaced persons, temporarily protected persons, refugees from one country during one historical moment would depend on the range of human rights that are guaranteed by each status.

Issues regarding the next measures of the EU regarding the prolongation of temporary protection and the provision of international protection in the event of the continuation of the war in Ukraine, the determination of actions regarding those who do not

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Committee and the Committee of the Regions. Lives in dignity: from aid-dependence to self-reliance forced displacement and development. Brussels, 26.4.2016, COM(2016) 234 final

want to return to Ukraine and their number, as well as the determination of the directions of the future migration policy of the EU regarding such persons require further detailed researches. Their success will largely depend on understanding the differences between the main categories of displaced persons and the rights that should be guaranteed them. And it is absolutely clear, that not only the new European system of collective security should appear in the future, but the elaboration of the new system of human rights protection of displaced persons has to be started.

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THE PROBLEM OF DETERMINING THE EXISTENCE OF DISCRIMINATION: PRACTICE OF ECHR

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INTRODUCTION

Despite the restrictive formulation of Article 14 of the Convention, ECHR, through dynamic case law, has gradually presented the broad scope of the non-discrimination standards enshrined in this provision. The Court has interpreted with greater flexibility the necessary linkage between the alleged discrimination and the exercise of the right guaranteed by the Convention or its protocols, reducing the limit arising from its subsidiary nature. After long adhering to a narrow definition of discrimination, conceived as consisting in applying, without objective and reasonable justification, different treatment to people in similar situations, it recognised that its previous interpretive practice (before 2000) did not use up the concept of discrimination. Considering the development of other legal systems, particularly the European Union and the United Nations legislation, the ECHR recognised that discrimination could correspondingly exist in other cases: this is the concept of indirect discrimination. Indirect discrimination is a situation in which, as a result of the implementation or application of formally neutral legal norms, evaluation criteria, rules, requirements or practice, a person and/or a group of individuals, due to their specific characteristics and different peculiarities, have less favourable conditions compared to other individuals and/or groups of individuals, except for cases when their implementation or application has a legitimate, objectively justified objective. The methods of achieving this goal are appropriate and necessary.

Pankevych O.Z. points out that some scholars specify the concept and the principle of equality and identify differences between communitarian and liberal interpretations of the category

of non-discrimination. At the same time, other researchers criticise formal equality, clarify its goals or seek to understand inequality in a context, justify the autonomy of the principle of non-discrimination, etc[394]. However, there is a unanimous researchers' opinion about the controversy and ambiguity of using the principle of non-discrimination in the practice of the ECHR.

N.V. Dromina-Voloc emphasises the complexity of the evolutionary path towards a modern interpretation of relevant elements of the discrimination concept by the Court. The scholar also highlights that attention is drawn to the positive trend in expanding the boundaries of discrimination to include its indirect forms. N.V. Dromina-Voloc concludes that despite prominent achievements, the formal approach of the Court should undergo forced modification to properly match the dynamic strengthening of the global rejection of any form of discrimination[395].

The UN Convention on the Rights of Persons with Disabilities (CRPD), introduced in 2008, has been in force for almost ten years. The first comparative analysis of the CRPD was published in the Waddington and Lawsons study. The research highlights the interaction between human rights law, disability law, and international law by examining the role of the courts. This comprehensive study examines how courts in thirteen different jurisdictions use the Convention. This analysis not only reflects the latest models of case law and interpretation of the Convention but also affects a new area of international comparative law in the field of human rights[396].

The spread of the practice of indirect discrimination in many countries that have signed the Convention requires a deeper study and understanding of the interpretation in the practice of the ECHR of the concept of equality, which is designed to protect socially vulnerable and potentially vulnerable groups.

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394 Pankevych O. Z. Protection of human right for non-discrimination in the practice of the European Court of Human Rights. S.332

395 Dromina-Voloc N. V. The principle of non-discrimination in the practice of the European Court of Human Rights.

396 Waddington Lisa, Lawson Anna. The UN Convention on the Rights of Persons with Disabilities in Practice: comparative analysis of the role of courts. Oxford University Press , 2018.

I. UNDERSTANDING OF DISCRIMINATION IN THE PRACTICE OF THE ECHR

The development of legislation on non-discrimination in other legal procedures undoubtedly contributed to the outcome of the events. Within the framework of the United Nations, along with the non-discrimination clauses included in the two Covenants of 1966, several specialised conventions were adopted to combat specific discrimination: International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979) and Convention on the Rights of Persons with Disabilities (2006). The European Union has also played an essential role in expanding anti-discrimination legislation. Initially, due to the restriction of its powers in this matter, the EU's contribution concerned only equal treatment without difference of sex or nationality of the Member State. But the new powers granted to the EU by the Treaty of Amsterdam (1997) allowed it to expand its activities to combat discrimination on racial or ethnic origin, religion, disability, age and sexual orientation, which deal with the 2000/43 and 2000/78 directives adopted in 2000[397]. The European Court of Human Rights practice on Article 14 is an exciting outlook of evolving habits and mentalities in European societies and indicates new discussions that cross them. From 1949 to today, the concept of family, the vision of gender relations, and the perception of homosexuality have been profoundly transformed. European societies are very diverse in cultural and religious terms. The issues of racism and cultural isolation that affect certain ethnic groups are in the spotlight. The view on disability has changed considerably, mainly since 2000; all these transformations are simultaneously reflected and brought to light by the practice of the Court.

However, because of the findings about the violation of Article 14, the Court strengthens this dynamic and helps spread it to all the states of the Council of Europe. On some issues, however, it may be

[397] Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

cautious and rely on national freedom of judgment in resolving public issues that it considers too vague or too controversial. Yet, its position may change: as far as Article 14 is concerned, judicial practice is rich in illustrations of the abolition of judicial practice[398]. Still, this proposal was rejected by the Advisory Assembly and the Committee of Ministers. The preparatory work does not explain this decision. One might think that the reasons are of the same order as the reasons that prompted the rejection in 1965 of the Consultative Assembly's proposal to enshrine the right to equality before law and non-discrimination in Additional Protocol No. 4 to Convention 12. The Committee of Experts appointed by the Committee of Ministers justified this choice on two grounds. On the one hand, it doubted the usefulness of such an article, since the right to equality before the law, according to it, is already basically guaranteed by the Convention, in particular by Articles 6 and 14. On the other hand, it feared that such a provision would give rise to "dangerous legal arrangements" and would overreach the powers of the Convention's supervisory bodies, forcing them to assess whether national courts are applying national law on the rule of equal treatment correctly.

The draft convention presented by the European Movement to the Committee of Ministers of the Council of Europe in July 1949, on which the Consultative Assembly was chiefly inspired in developing its draft, contained provisions declaring "equality before law" and "protection against all discrimination on the grounds of religion, race, national origin, occupation, political view or any other opinion.[399]"

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[398] Ringelheim Julie. LA NON-DISCRIMINATION DANS LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME BILAN D'ETAPE. Université catholique de Louvain
Institute for Interdisciplinary Research in Legal sciences (JUR-I) Centre for Philosophy of Law (CPDR). Bilan d'étape, Cridho Working Paper, 2017-2. DOI: 10.13140/RG.2.2.35429.70880
https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP-2017-2-JR.Art.14.pdf

[399] L'article 2, § 2 du Pacte international relatif aux droits économiques, sociaux et culturels énonce une règle similaire.

But this proposal was rejected by the Consultative Assembly and the Committee of Ministers[400]. The preparatory work does not explain this decision. One might believe that the reasons are of the same order as the reasons that prompted the rejection in 1965 of the Consultative Assembly's proposal to enshrine the right to equality before the law and non-discrimination in Additional Protocol No. 4 to the Convention. The Committee of Experts, appointed by The Committee of Ministers, justified this choice on two grounds: on the one hand, it doubted the usefulness of such an article since the right to equality before the law, according to it, is already basically guaranteed by the Convention, in particular by Articles 6 and 14; on the other hand, it feared that such a provision would give rise to "dangerous legal arrangements" and would overextend the powers of the Convention's supervisory bodies, forcing them to assess whether national courts are correctly applying national law on the rule of equal treatment.[401] The Committee of Ministers decided to draft Protocol No. 12. This protocol, opened for signature in 2000, contains a general clause prohibiting discrimination. [402]

Art. 14 of the Convention determines that the use of rights and freedoms recognised in the Convention must be guaranteed without discrimination on any basis: gender, race, skin colour, language, religion, political or other beliefs, national or social origin, belonging to national minorities, property status, birth, or on other grounds. And within these frameworks, the state and its bodies are obliged to act in order to prevent violations on the abovementioned or "other" grounds. An exception is a justified, legitimate restriction. Nonetheless, the "other signs" in the convention provide a non-

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[400] Recommandation n°38 de l'Assemblée consultative du 8 septembre 1949.

[401] *Recommandation 234 (1960), Recueil des travaux préparatoires du Protocole n° 4 à la Convention reconnaissant certains droits et libertés autres que ceux figurant déjà dans la Convention et dans le Premier protocole additionnel à la Convention, 1976, pp. 137-138.*

[402] Ringelheim Julie. LA NON-DISCRIMINATION DANS LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME BILAN D'ETAPE. Université catholique de Louvain

exhaustive list of signs that appear in EU directives[403], or other signs, for example, HIV infection[404], a woman's obligation under national law to change her surname after marriage[405]. In the case of Stec and Others v. the United Kingdom (12 April 2006), the ECHR indicated that referred to in Art. 14, the list is not exhaustive and includes "any other status ("toute autre situation" in the French text, by which individuals or groups of people differ from each other[406]). However, the ECHR does not identify the principle of non-discrimination with the principle of equality. It allows it to be synonymous only with the principle of equal handling[407].

Concerning the direct application of the anti-discrimination rules of the Convention, one should be mindful of the fact that most often, the Court hears cases of racial hatred and insists on resolving the problem in a specific state. In particular, in the case of Sampanis v. Greece (5 June 2008), the Court stated that widespread prejudice and violence against the Romani people necessitated the continued condemnation of racism and the maintenance of the confidence of the minority in the authorities' ability to protect them from racist violence[408]. Also, in the case of Nachova and Others v. Bulgaria (6 July 2005) of the ECHR, according to Art. 14 in combination with Art. 2 and Art. 3, the Court stated that the state should investigate cases where there is a suspicion that they were committed on the grounds of racial hostility[409]. In Paraskeva Todorova vs. Bulgaria (25 March 2009), the Court emphasised the gravity of the disputed

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[403] Eweida and Others v. the United Kingdom, nos. 48420/10, 59842/10, 51671/10 and 36516/10), Jan. 15, 2013. Timishev v. Russia, nos. 55762/00, 55974/00, 13 Decemberr 2005.

[404] Kiyutin v. Russia, no. 2700/10, 10 March 2011.

[405] Ünal Tekeli v. Turkey, no. 29865/96, 16 November 2004

[406] Stec and Others v. the United Kingdom, nos. 65731/01 and 65900/01 [GC], 12 Apr 2006. Para 90.

[407] DH and Others v. The Czech Republic, no. 57325/00 [GC], 13 November 2007.

[408] Sampanis v Greece, Application no. 32526/05, 5 June 2008. Paras 72, 94-96.

[409] Nachova and Others v. Bulgaria, nos. 43577/98 and 43579/98, 6 July 2005. Para 172.

facts and the need to eradicate racism as a priority in Europe's multinational societies[410].

Council of Europe expert on European anti-discrimination law E. Oliinyk summarises and concretises the understanding of discrimination in the practice of the ECHR as a "violation of the principle of equality" 1) through the application of different treatment; 2) without objective and reasonable justification when the difference in behaviour does not pursue a legitimate goal or the difference in behaviour does not ensure the proportionality of the measures taken to the set goal; 3) regarding individuals who are in the same situation; 4) when the only reason for the difference is a personal characteristic (or a set of such characteristics); 5) when exercising convention rights (Article 14) or any rights provided by national law (Article 1 of Protocol No. 12).

Regarding the direct application of the Convention's anti-discrimination norms, it is noteworthy to state that most frequently, the court hears cases about racial hatred and insists on solving the problem in a specific state. In particular, the case of Campanis v. Greece (5 June 2008) states that widespread prejudice and violence against the Roma make it necessary to constantly condemn racism and maintain the confidence of minorities in the ability of the authorities to protect them from racist violence. [411]

Likewise, in the case of Nachova and Others v. Bulgaria (6 July 2005), ECHR, based on Art. 14 in combination with Art. 2 and Art. 3, it is indicated that the state should investigate cases where there is a suspicion that they were committed based on motives of racial hatred[412]. In the Paraskeva Todorova vs. Bulgaria case (March 25, 2009), the court emphasised the seriousness of the disputed facts and the need to eradicate racism as a priority task in the multinational societies of Europe.[413]

The issue of the prohibition of discrimination is relevant for all

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[410] *Paraskeva Todorova vs*. Bulgaria, no. 37193/07, 25 March 2009.

[411] Sampanis v Greece, Application no. 32526/05, 5 June 2008. Paras 72, 94-96.

[412] Nachova and Others v. Bulgaria, nos. 43577/98 and 43579/98, 6 July 2005. Para 172.

[413] *Paraskeva Todorova vs*. Bulgaria, no. 37193/07, 25 March 2009.

member states of the Convention. Only 20 member states out of 47 have ratified Protocol No. 12, including Ukraine. According to Art. 1 of the Law of Ukraine "On Principles of Prevention and Counteraction of Discrimination in Ukraine", dated September 6, 2012, discrimination is a situation in which a person and/or a group of individuals based on their race, skin colour, political, religious and other beliefs, gender, age, disability, ethnic and social origin, citizenship, family and property status, place of residence, linguistic or other characteristics that were, are and may be valid or assumed (from now on – specific features), is subject to restrictions in the recognition, exercise or use of rights and freedoms in any form established by this Law, except when such a restriction has a legitimate, objectively justified goal, and the means of its achievement are appropriate and necessary.

According to Article 2 of the Law of Ukraine, "On Principles of Prevention and Counteraction of Discrimination in Ukraine", it is determined that the legislation of Ukraine is based on the principle of non-discrimination, which provides regardless of specific characteristics: 1) ensuring equality of rights and freedoms of individuals and/or groups of individuals; 2) ensuring equality before the law of people and/or groups of people; 3) respect for the dignity of each person; 4) ensuring equal opportunities for individuals and/or groups of individuals.

According to Art. 6 of the Law, following the Constitution of Ukraine, generally recognised principles and norms of international law and international treaties of Ukraine, all people, regardless of their special features, have equal rights and freedoms, as well as equal opportunities for their implementation. Forms of discrimination on the part of state bodies, authorities of the Autonomous Republic of Crimea, local self-government bodies, their officials, legal entities of public and private law, and individuals, as defined by Article 5 of this Law, are prohibited.

Yet, the question arises as to how frequently national courts in Ukraine apply Art. 14 of the Convention and the relevant practice of the ECHR. Analysis of the decisions of national courts allows us to deduce that the most common in judicial practice is the reference to the decision in the case "Pichkur v. Ukraine", which became final

on February 7, 2014. In this decision, under Art. 17 of the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights," the legal position is set out, according to which the deprivation of a citizen who has moved to a permanent place of residence abroad of the right to pension in Ukraine, where he/she has acquired the relevant experience and paid insurance premiums, and/or the restriction of such a right is a violation of the principle of non-discrimination defined in Art. 14 of the Convention, and violation of the right of a person to peacefully own their property, defined in the first Protocol to the Convention.

The UN Convention on the Rights of People with Disabilities, introduced in 2008, functioned for almost ten years. The first comparative analysis of CRPD international law, Waddington and Lawsons study, illuminates the interaction between human rights law, disability law and international law by examining the role of courts. This comprehensive study examines how courts in thirteen different jurisdictions use the Convention. That is, this analysis reflects not only the latest models of application of judicial practice and interpretation of the Convention but also affects the new field of international comparative law in human rights.[414]

Not so long ago, the ECHR considered the case of Carvalho Pinto de Souza Morais (25 July 2017), in which the issue of determining the presence of discrimination under Art. 14 and Art. 8 of the Convention turned out to be quite controversial, not so much concerning the establishment of the fact of discrimination itself, as concerning the concept of age and age needs, which required the interpretation of the Court. The applicant, a 50-year-old woman, suffered significant health problems after a gynaecological operation due to nerve damage (pain, difficulty in moving and sitting, inability to have sex) and also needed the help of housekeepers and therefore turned to the clinic for compensation for damages. However, her compensation was significantly reduced due to the previous duration of the disease and

[414] Waddington Lisa, Lawson Anna. The UN Convention on the Rights of Persons with Disabilities in Practice: comparative analysis of the role of courts. Oxford University Press, 2018.

the fact that sexual relations are not so crucial for a woman at a mature age compared to a young woman. The Supreme Administrative Court of Portugal took age and gender as the rationale for the decision. The ECHR's interpretative comments emphasised that the main problem is the assumption that sexuality is not as crucial for the applicant, a mother of two children, as it is for a younger woman, and thereby "ignores its physical and psychological significance for the self-realisation of women as individuals"[415]. Consequently, discrimination is possible not only based on age and gender but also on such a unique characteristic as the ability to lead a normal sexual life, which indicates the evolutionary approach of the ECHR to interpretation in this situation. To summarise, the court drew particular attention to the fact that the problem of stereotyping of a certain group in society is that it prohibits individual assessment of their capacity and needs.[416]

In a separate opinion, the ECHR judge from Ukraine, Hanna Yudkivska, emphasised that it was "a stereotypical consideration in this case that led to discrimination" and "prejudice, which is passed down through the millennia and is a heavy burden that threatens both the present and the future."[417]

Discrimination in employment did not seem to go beyond Article 14, given the lack of recognition of the right to work and the right to access to civil service in the Convention. However, the Court has recognised that a person holding a civil service post and dismissed for reasons relating to one of the guaranteed rights, such as freedom of expression, association or religion or even the right to privacy, may denounce its abolition under the Convention. The Emel Boyraz v. Turkey case of 2 December 2014 gives this principle an extensive scope of application. Dismissal of a woman from the position of a security officer is seen as interfering with her right to privacy and family life, protected by Article 8, simply because it is motivated solely by her sex. “The notion of "private life" extends to aspects of personal identity, and a person's gender is an integral

[415] Carvalho Pinto de Souza Morais. Application no. 17484/15, 25 July 2017. Para 52.

[416] Ibid. Para 46.

[417] Carvalho Pinto de Souza Morais. Application no. 17484/15, 25 July 2017.

part of one's identity. Thus, such a decisive measure as dismissal solely based on sex negatively affects a person's personality, self-perception, self-esteem and, as a result, their private life. The court added that the applicant's dismissal had affected her private and family life, as the loss of her job had evidently affected her financial well-being, the ability to maintain relations with others and to practice a profession appropriate to her qualifications[418]. Therefore, Article 14 and Article 8 apply to the present case. Although the Court has not yet taken this step, it appears that such considerations might potentially be applied, by analogy, to a case in which the applicant got refused in employment only due to her sex.

Article 14 seems to play only a modest role in European Convention on Human Rights (ECHR) legislation. The main limitation is that it prohibits discrimination only in exercising the rights and freedoms guaranteed by the Convention, which is subsidiary to other provisions. Unlike other international documents, it does not mention the general right to equality before the law or the obligation to prohibit discrimination between private individuals.[419]

In the Danuté Mockienè v. Lithuania case, the Court confirms the possibility of distinguishing between public officials and private individuals without considering this discrimination. In fact, in the present case, since the Constitutional Court of Lithuania substantiated the difference in treatment between recipients of social benefits by the fact that some insured persons fall under the

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[418] ECHR (2014). Emel Boyraz v. Turkey, n°61960/08, § 44.

[419] Ringelheim Julie. LA NON-DISCRIMINATION DANS LA JURISPRUDENCE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME BILAN D'ETAPE. Université catholique de Louvain
Institute for Interdisciplinary Research in Legal sciences (JUR-I) Centre for Philosophy of Law (CPDR). Bilan d'étape, Cridho Working Paper, 2017-2. DOI: 10.13140/RG.2.2.35429.70880
https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP-2017-2-JR.Art.14.pdf

general system and, therefore, the system of social contributions, while others depend on funds received directly from the state budget, the ECHR did not try to analyse the legitimacy of this distinction. The reason is that since the considered seniority pensions are received directly from state funds, in the Constitution of Lithuania, they are interpreted differently; consequently, the state is free to use its power of discretion in this decision.

Due to its subsidiary nature, Article 14 always applies in conjunction with another Article of the Convention. As a general rule, the Court begins by assessing whether there has been a violation of the substantive right referred to, considered separately. Once a violation has been found, it is often unnecessary to investigate further to determine whether there was a vivid case discrimination. It is explained in the Airy Court in the following way: such an examination, in general, "is not necessary when it reveals a violation of the requirements of the first Article, taken by itself," except "where a manifest inequality of treatment in the exercise of the right concerned is a fundamental aspect of the dispute."[420] The choice made by the Court in this regard is sometimes surprising. The Marckx Court, finding that the restriction of family and inheritance rights of children born out of wedlock violated the right to respect for family life guaranteed by Article 8, considered the facts from the point of view of Article 14 in conjunction with Article 8 and discrimination between children based on birth[421]. In the Chasagno case, which concerned the obligation imposed on the applicants as landowners to join communal hunting societies and to allow this activity to be carried out on their property, the Court was not satisfied with finding that there had been a violation of their freedom to associations and the right to respect for their property. It notes that they are also victims of property discrimination because the relevant law allows only

[420] CEDH, 9 octobre 1979, *Airey c. Irlande,* n°6289/73, § 30 CEDH, 15 janvier 2013, *Eweida et autres c. Royaume-Uni,* n°48420/10

[421] CEDH, 9 octobre 1979, *Airey c. Irlande,* n°6289/73, § 30. CEDH, 13 juin 1979, *Marckx c. Belgique,* n°6833/74.

large landowners to avoid these restrictions[422]. On the other hand, in the Dudgeon case, after finding that the criminalisation of male homosexual acts in Northern Ireland violated the applicant's right to respect his private life, he found "no legitimate interest in determining whether he suffered additional discrimination in comparison with others individuals who are subjects to lesser restrictions on the same right".[423]

Conversely, it is sometimes the case that the Court starts with an Article 14 because it considers that the central issue in the dispute is whether there has been the specific facts of discrimination. Having found a violation of Article 14, it assumes it unnecessary to determine whether there was also a violation of a substantive right, which is referred to separately.

I. OBJECTIVE AND REASONABLE INTERPRETATION OF DISCRIMINATION: PURPOSE AND PROPORTIONALITY

It is often not difficult for states to convince the Court that the contested measure was adopted to achieve a legitimate aim. Thus, the conclusion of the absence of a legitimate purpose is a particularly harsh condemnation: the processing in question is not only condemned as a disproportionate means of achieving the goal, which is itself legitimate, but also devoid of any valid justification. Such a conclusion can arise in two situations: either the Court considers that the goals invoked by the state are not legitimate. Or he believes that the contested measure does not meet the purposes set forth by the government. The court came to this conclusion, especially in terms of gender differences. For example, concerning the Swiss authorities' refusal to allow a husband who chose his wife's surname to use his surname to precede that name with his own, when such an option existed for wives who chose a surname, the Court finds that the objectives relied on by the government are to protect family unity and preserve tradition – are insufficient to

[422] CEDH [GC], *Chassagnou c. France,* 29 avril 1999, n°25088/94 et al.
[423] CEDH, 22 octobre 1981, *Dudgeon c. Royaume-Uni,* n°7525/76, § 69.

justify the event[424]. In general, since the 2000s, she has insisted that references to tradition, social attitudes or majority stereotypes about gender roles cannot justify gender differences. In Emal Boyraz, cited above, the Government, in order to justify the dismissal of the applicant as a security officer, argued that she could not adequately perform that function because it entailed risks and responsibilities such as 'the obligation to use firearms and physical force in the event of an attack. The court noted that this rationale was based on the assumption that a woman, by definition, cannot face these risks and bear these responsibilities. Reflecting simple stereotypes about women in general, this cannot be a valid reason for depriving the person concerned of a job.[425] Biao v. Denmark applies this anti-stereotype approach to ethnic discrimination: it establishes that the majority's general assumptions or social attitudes about people who have acquired their citizenship through naturalisation cannot be a valid justification for granting them a less favourable attitude.[426]

Extraordinary evidence of this is the judicial practice regarding differences related to sexual orientation, which is marked by noticeable changes. Thus, regarding measures aimed at protecting the family, the Court states that the State must choose the measures to be taken for this, "taking into account the evolution of society, as well as the changes arising in the process of perceiving the problems of society, civil status and problems relationships, including the idea that there is more than one path or choice regarding the way private life and family can be conducted.'' Couples, forcing it to grant the Greek state only a reduced discretion in this area.[427] On the other hand, regarding the opening of marriage to same-sex couples, he notes in the Oliari judgment that, despite gradual development, there is no single consensus on this

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[424] Oddny Mjoll ARNARDOTTIR, *Equality and Non-Discrimination under the European Convention on Human Rights,* Martinus Nijhoff, The Hague, London, New York, 2003, pp. 43-45.
[425] Emal Boyraz, précité, § 53.
[426] CEDH [GC], 24 mai 2016, *Biao c. Danemark,* n°38590/10, § 113.
[427] *Vallianatos,* précité, § 84.

issue; since states have amended their legislation, this meaning remains in the minority in the Council of Europe. Therefore, he believes that states should be left a broad discretion and concludes that they remain free in deciding the issue of granting permission for same-sex marriages.

Birth discrimination is also an area in which the Court has shown marked rigour. In the case of Inze v. Austria, it states that none of the purposes put forward by the Government to justify the preference given to children born in wedlock over children born out of marriage in the inheritance of landed property is convincing."[428] By contrast, in Mazurek v. France, which concerned the difference between the treatment of legitimate and "false" children, the Court stated, "that it cannot be ruled out that the objective invoked by the Government, namely the protection of the traditional family, may be regarded as legitimate." Thirteen years later, in the case " Fabrice v. France." France notes that the government no longer offers any justification for this type of discrimination.[429]

When the Court finds that the disputed difference in treatment pursues a legitimate aim, the State, to avoid a charge of discrimination, must still establish the existence of "a reasonable relationship of proportionality between the means used and the aim pursued. This condition provides that the disadvantage suffered by people who have suffered a restriction is not excessive concerning the legitimate objective pursued by the government. Thus, in the Mazurek case cited above, while recognising that the desire to protect the traditional family can be considered a legitimate objective, the Court held that punishing an individual in her mother's inheritance because of her ci's marital status at the time of birth is not an adequate and proportionate means of achieving this goal. In Vallianatos et al., Greece notes that the protection of the family in the traditional sense and the protection of the best interests of the child are certainly legitimate aims66 but that depriving same-sex couples of the right to a "registered

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[428] CEDH, 28 octobre 1987, *Inze c. Autriche,* n°8695/79, § 43.

[429] CEDH [GC], 7 février 2013, *Fabris c. France,* n°16574/08, § 64.

partnership"[430] recognised by heterosexual couples is not necessary to achieve these goals ileus In some judgments, the Court emphasises that, to be considered proportionate, the measure must constitute the means that least seriously infringes the fundamental right in question to achieve the legitimate aim pursued. However, checking the existence of other means that allow achieving the same goal is not systematic in judicial practice.

In directives adopted by the European Union since 2000, indirect discrimination is now defined as occurring when a neutral provision, criterion or practice "is likely to cause particular harm" to persons affected by the benchmark, discrimination against other individuals if a legitimate purpose does not justify this measure, and the means used are appropriate and necessary[431]84. One of the critical characteristics of this concept is the separation of the concept of discrimination from the idea of discriminatory intent: it is about the effects of the measure on the protected group that it is necessary to determine whether there is discrimination, regardless of whether the perpetrator intended to harm the persons concerned.

The Thlimmenos v. Greece held on April 6, 2000, is the first significant step forward for the European Court of Human Rights in this regard.[432] It recognises for the first time that a standard that does not differentiate between people in its formulation can be a source of discrimination. However, this decision contains a different concept than the concept of indirect discrimination. The court established that under certain circumstances, there might be an obligation to apply further treatment to persons in significantly different situations. However, the concept of indirect discrimination only implies the recognition that a neutral and general norm can be discriminatory in its effects. But this does not necessarily imply an obligation to make a difference. The remedy

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[430] CEDH [GC], 7 novembre 2013, Vallianatos et autres c. Grèce, nos29381/09 et 32684/09, § 83.

[431] Art. 2, § 2, b de la Directive 2000/43 et art. 2, § 2, b) de la directive 2000/78.

[432] CEDH [GC], 6 avril 2000, Thlimmenos c. Grèce, n°34369/97.

against such discrimination may also consist of formulating a new neutral and general standard that avoids discriminatory effects.

Since then, there have been few reports of indirect discrimination. Di Trizio v. Switzerland, based on statistical data provided by the parties, note that the specific method of calculating the degree of disability applied to persons who carry out or can carry out paid activities only on a part-time basis in practice disproportionately penalises women who have had children. He concluded that discrimination had occurred without a reasonable justification for this difference.[433] And in the case of Biao v. of Denmark on 24 May 2016, This is a difference in the treatment of the right to family reunification between Danish citizens depending on whether they have had Danish citizenship for at least 28 years, which is considered to be indirectly discriminatory based on Ethnicity. In the absence of available statistical data, the Court relies on the very nature of the measure to establish that it "has the indirect effect of favouring Danes or Danish ethnic origin and impoverishing persons of foreign ethnic origin who, like the applicant, acquired Danish citizenship by birth"[434]. Since the Government failed to demonstrate compelling considerations unrelated to ethnic origin, which could justify that difference in treatment, it violates Article 14.

In the decision in the case of Çam v. Turkey, February 23, 2016, the ECHR states that "discrimination on the grounds of disability also includes the denial of reasonable accommodation." However, interestingly, it does not refer to the Thlimmenos case law. It states that Article 14 of the Convention should be interpreted taking into account the evolution of international and European law, in particular, the UN Convention on the Rights of Persons with Disabilities, which defines reasonable accommodation as "and necessary and appropriate adjustments that do not impose a disproportionate or excessive burden, introduced according to the needs of a particular situation, to ensure that persons with disabilities enjoy or exercise all human rights and all basic

[433] CEDH, 2 février 2016, *Di Trizio c. Suisse,* n°7186/09
[434] CEDH [GC], 24 mai 2016, *Biao c. Danemark,* n°38590/10, § 113.

freedoms on an equal basis with others" (Article 2). In this case, the music academy refused to admit a blind student, despite passing the entrance exam because her blindness would make her unfit to attend classes. However, the institution was unwilling to consider making reasonable arrangements to allow him to attend school.

Consequently, the Court ruled that "the applicant was denied, without objective and reasonable justification, the opportunity to study at a music academy solely because of her visual impairment[435]. Earlier, in the case of Glor v. Switzerland, the Court had already found a violation of Article 14 due to the refusal of the authorities to request the provision of accommodation on the grounds of disability, but without using the terms "reasonable accommodation". Relying on the principle of proportionality, he emphasised that "for a measure to be considered proportionate and necessary in a democratic society, the existence of the measure must less seriously infringe the fundamental right in question, and allows the achievement of the same goal should be excluded.[436]"

Concerning freedom of religion, the Court, based on Article 9 of the Convention, applied reasoning comparable to the reasonable accommodation mechanism with religious practice in prison: it found that, under its positive obligations under Article 9 of the Convention, national authorities must adapt the composition food of a prisoner when the latter so requests based on his religious beliefs, provided that this accommodation does not interfere with the proper administration of the prison or affect the quality of the food supplied to other prisoners. In another context, on the other hand, the Court is reluctant to accept the view that an a priori neutral and general rule contrary to a person's religious practice could, in the absence of finding a reasonable accommodation, give rise to a violation of the Convention.

In Sessa v. Italy, where the refusal of the judiciary to accept a request by a lawyer of the Jewish faith to postpone a hearing scheduled for a date corresponding to a Jewish holiday, the Court stated that it was

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[435] CEDH, 23 février 2016, *Çam c. Turquie*, n°51500/08, § 69.
[436] CEDH, 30 avril 2009, Glor c. Suisse, n°13444/04, § 95

convinced that this attitude could be analysed as a limitation of the right to freedom of religion. Assuming that there was interference, it was justified, in her view, by the protection of the rights and freedoms of others and was proportionate to the aim pursued. Three separate justices criticise the reasoning used by the majority. They note that the principle of proportionality "presupposes that among several means to achieve a legitimate goal, the government chooses the one that least violates rights and freedoms. From this point of view, the search for a reasonable adjustment of the situation in question may, under certain circumstances, become a less restrictive means of achieving the purpose pursued."[437] In this case, they believe, "the conditions have been met to attempt to achieve a reasonable adjustment and accommodation – that is, one that does not impose a disproportionate burden on the judiciary – of the situation. With some concessions, this would avoid interference with the religious freedom of the applicant, without jeopardising the achievement of a legitimate objective which clearly constitutes the proper administration of justice."[438]

Unlike the previous case, in the case of Stummer v. Austria (7 July 2011), the same situation in which individuals are located is the basis, the background for determining discrimination, which is manifested in different treatment of them "based on an identified characteristic or status"; such a distinction in behaviour does not pursue a "legitimate goal", there is no "reasonable relationship between the means used and the goal that was sought to be realised."[439]

I. OVERCOMING OBSTACLES AND ESTABLISHING THE OBLIGATION OF THE STATE TO FIGHT DISCRIMINATION: DEVELOPMENT OF JUDICIAL PRACTICE

Recently, the ECHR considered the case of Carvalho Pinto de Souza Morais (25 July 2017). In this case the issue of determining the presence of discrimination under Art. 14 and Art. 8 of the Convention turned out to be quite controversial, not so much about the establishment of the fact of discrimination itself, as concerning the

[437] CEDH, 3 avril 2012, *Sessa c. Italie,* n°28790/08, § 37.
[438] CEDH, 3 avril 2012, *Sessa c. Italie,* n°28790/08, § 37.
[439] Stummer v. Austria, no. 37452/02, 7 July 2011. Para 87.

concept of age and age needs, which required the interpretation of the Court. The applicant, a 50-year-old woman, after a gynaecological operation suffered significant health problems as a result of nerve damage (pain, difficulty in moving and sitting, inability to have sex), and also needed the help of housekeepers, and therefore turned to the clinic for compensation for damages. However, her compensation was significantly reduced due to the previous duration of the disease and the fact that sexual relations are not so crucial for a woman at a mature age compared to a young woman. That is, the Supreme Administrative Court of Portugal took age and gender as the basis of the decision. The ECHR's interpretative comments emphasised that the main problem is the assumption that sexuality is not as crucial for the applicant, a mother of two children, as it is for a younger woman, and thereby "ignores its physical and psychological significance for the self-realisation of women as individuals."[440] That is, discrimination is possible not only based on age and gender but also on such a special characteristic as the ability to lead a normal sexual life, which indicates the evolutionary approach of the ECHR to interpretation in this situation. Summarising, the court paid special attention to the fact that the problem of stereotyping a particular group in society is that it prohibits an individualised assessment of their capabilities and needs.[441] The then ECHR Judge from Ukraine, Hanna Yudkivska, emphasised in a special opinion that it was "stereotypical considerations in this case that led to discrimination", and "prejudice, which is passed down through the millennia, is a heavy burden that threatens both the present and the future".[442]

For the first time in the context of cases concerning allegations of police brutality committed against Roma, the Court built its case law on this issue. The court first found that to demonstrate the discriminatory nature of the violence complained, the applicants had to provide evidence "beyond a reasonable doubt". Although the applicant's arguments on this point were "strong", they were found

[440] Carvalho Pinto de Souza Morais. Application no. 17484/15, 25 July 2017. Para 52.
[441] Ibid. Para 46.
[442] Carvalho Pinto de Souza Morais. Application no. 17484/15, 25 July 2017.

insufficient to satisfy the "proof beyond a reasonable doubt" test – the judgment of the Grand Chamber in Natchova and others v. July 6, 2005. In Bulgaria, the weakening of this judicial practice is noted. Two young Roma conscripts were shot dead by a military police officer who tried to arrest them. For the first time, the Court finds a violation not only of Article 2 but also of Article 14 in conjunction with Article 2. However, this finding only concerns these provisions' procedural and non-essential aspects. The Court fundamentally states that when there are indications that racist attitudes[443] may be the origin of an act of violence, the state has a positive obligation to conduct an effective investigation into the possible existence of a racist motive. Indeed, "racial violence is a particular attack on human dignity and, given its dangerous consequences, requires special vigilance and vigorous response from the authorities. That is why they must use all the means at their disposal to fight against racism and racist violence, thereby strengthening the concept of democracy in society, perceiving diversity in it not as a threat, but as an asset."

Article 14 of the ECHR provides for the prohibition of discrimination in the exercise of other rights protected by the Convention. As the Court reminds us at the beginning of its reasoning, discrimination means different treatment, without objective and reasonable justification, with individuals in similar situations. In the case of Danuto Mockienè v. Lithuania, The Court confirms the possibility of distinguishing between public officials and private individuals without considering discrimination. And again, this is not surprising given that the Court has already ruled on this issue. However, although this seems acceptable, it is compelling to focus here on the validity of the origins of this difference. In fact, in this case, the Constitutional Court of Lithuania justified the difference in circulation between the recipients of social assistance since some insured people fall under the general system and, therefore, the system of social deductions.

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[443] CEDH [GC], 6 juillet 2005, *Natchova et autres c. Bulgarie,* nos 43577/98 et 43579/98, § 160.

In contrast, others depend on funds received directly from the state budget; the ECHR did not attempt to analyse the legality of this difference. The reason is that since the pensions are paid directly from state funds, they are treated differently in the Lithuanian Constitution (since they are not mentioned), so they are entirely at the state's discretion. However, is it a simple assignment of such a pension to the obligations of the state, simple preservation of the material criterion of "origin of funds", or is it egalitarian?

Discrimination comes not only from state authorities; it also manifests itself, and perhaps above all, in relationships between people. However, the characteristics of Article 14 of the Convention make it challenging to apply to disputes concerning discriminatory acts committed by private individuals[444]. In general, the Convention imposes obligations only on States. And unlike Article 26 of the ICCPR or EU directives, Article 14 does not directly require national authorities to prohibit discrimination in national law. Additionally, much of the discrimination between people occurs in areas that are part of the economic sphere, such as employment and housing. Therefore, the current lack of recognition of economic and social rights in the Convention prevents the possibility of questioning this type of fact based on Article 14.

In the case of Danuto Mockienè v. Lithuania, The Court confirms the possibility of distinguishing between public officials and private persons without considering discrimination. In this case, the Constitutional Court of Lithuania justified the difference in circulation between the recipients of social assistance because some insured people fall under the general system and, therefore, the system of social deductions. In contrast, others depend on funds received directly from the state budget; the ECHR did not attempt to analyse the legitimacy of this distinction. The reason is that since the pensions in question are paid directly from state funds, they are interpreted differently in the Constitution of Lithuania, so they are entirely at the state's discretion.

However, the development of judicial practice allowed the

444 CEDH, 12 avril 2016, *R.B. c. Hongrie,* n° 64602/12, § 81.

Court to partially overcome these obstacles and establish the state's obligation to fight discrimination, including in relations between private individuals, thus giving a horizontal effect to Article 14. This recognition occurred quite late compared to other provisions of the Convention. First, in the fight against hate crimes, the Court defined such an obligation from Article 14. In the case of Secic v. Croatia on 31 May 2007. It establishes a positive obligation for national authorities to take appropriate measures to prevent and punish hate crimes committed by individuals[445]. Danylenkov v. Russia, from July 30, 2009, recognises the responsibility of protection imposed on the state against discrimination in the employment area. The applicants, who a private employer discriminated against because of their trade union membership, accused the national authorities of tolerating the company's discriminatory policies and refusing to consider their complaints due to the lack of an adequate protection mechanism in national law. The Court confirms that under Article 14, taken together with Article 11, States have a positive obligation "to establish a judicial system which guarantees proper and adequate protection against discrimination by trade unions. People who are victims of discriminatory treatment must be able to challenge such treatment and take legal action for redress. The principle set out here potentially applies to discrimination other than trade union discrimination. To fall within Article 14, the impugned measure must relate to exercising a right guaranteed by the Convention. But the evolution of the interpretation of Article 8 increased the possibilities of achieving this condition. The Court has recognised that the concept of private life extends to elements of a personality, such as a gender. Thus, a measure such as a dismissal based solely on this reason affects their identity, self-esteem, and, therefore, personal life[446]. Similar considerations may apply to an estimate based on ethnic identity, as it constitutes an essential element of private life for the Court. In addition, the Court found that state liability may be imposed under

[445] CEDH, 31 mai 2007, Secic c. Croatie, n°40116/02, § 67.

[446] CEDH, Danilenkov et autres c. Russie, 30 juillet 2009, n° 67336/01, § 124.

Article 9 for failure to protect an individual from adverse treatment by a private employer because of his religion.

Discrimination in the field of employment seemed unable to go beyond Article 14, given the lack of recognition of the right to work and access public service in the Convention30. But the Court recognised that a person who holds a position in the public service and is dismissed from it for reasons related to one of the guaranteed rights, such as freedom of expression, association or religion or even the right to private life, may denounce its cancellation based on the Convention. The Emel Boyraz v. Turkey from December 2, 2014, gives this principle an extensive scope of application. The dismissal of a woman from the position of a security officer is seen as an interference with her right to private and family life, protected by Article 8, simply because it is motivated solely by her article: "The concept of "private life'' extends to aspects related to personal identity, and gender of a person is an integral part of their identity. Thus, such a decisive measure as dismissal from a position solely based on gender harms a person's personality, self-perception, self-esteem and, as a result, their private life. The Court added that the applicant's dismissal affected her private and family life, as the loss of her job must have affected her material well-being and her ability to maintain relationships with others and practice a profession corresponding to their qualifications[447]. Therefore, Article 14, taken together with Article 8, applies to this case. Although the Court has not yet taken this step, it appears that similar reasoning may be applied, by analogy, to a case where a person is denied a position solely based on gender.

Moreover, in the case of police violence or a crime committed by a private individual, some aspects of which indicate that they may be motivated by racial hatred, the national authorities must conduct an effective investigation into the possible existence of motives. More broadly, states have a positive obligation under Article 14 to combat hate crimes against a group based on ethnic origin, religion or nationality, sexual orientation, and domestic violence against women. As for the racist hate speech, the Court

[447] ECHR (2014). Emel Boyraz v. Turkey, n°61960/08, § 44.

determined, based on Article 8, the State's duty to provide victims with adequate protection and remedies.

The numerous criteria for discrimination enumerated in Article 14 and the non-exhaustive nature of this list have contributed to this development, allowing the provision to be applied to a wide variety of situations, including cases involving non-grounds, such as sexual orientation, disability or medical condition. However, the Court made an essential distinction between potential criteria of discrimination that highlights the issues underlying the Article 14 standard: where a restriction of fundamental rights imposed on particularly vulnerable groups, victims of past stigmatisation, exclusion or domination, the effects of which persist in the present, freedom state discretion will be reduced, and a high degree of justification will be necessary to avoid accusations of discrimination. It is the case when the criteria of gender, racial or ethnic origin, sexual orientation, nationality, disability or birth in or out of wedlock are considered. In other cases, the Article 14 standard applied by the Court meets the requirement that any decision to treat certain persons less favourably than others must be based on rational and just justification; in other words, it guarantees protection against arbitrariness.

CONCLUSIONS

Despite the restrictive wording of Article 14 of the Convention, the ECHR, thanks to dynamic precedent practice, gradually extended the scope of the standard of non-discrimination enshrined in this provision. Su interpreted with more flexibility the necessary connection between the alleged discrimination and the exercise of the right guaranteed by the Convention or its protocols, reducing the limit arising from its subsidiary nature.

Uncertainty and questions remain. The Court's position on whether Article 14 imposes, and if so, under what circumstances, an obligation to take affirmative action remains unclear. The state's obligations regarding discrimination committed by private individuals are still poorly developed in case law. It is necessary to explain the

conceptual formulation of the concepts of indirect discrimination, discrimination due to the same attitude to different situations and the duty of reasonable accommodation. Finally, in cases of violence committed by police officers, the question of the circumstances and intensity of the evidence provided to establish, if necessary, the discriminatory nature of the facts remains a matter of debate.

After long adhering to a narrow definition of discrimination, conceived as consisting in applying, without objective and reasonable justification, separate treatment to persons in similar situations, he recognised that his previous interpretive practice (before 2000) did not exhaust the concept of discrimination. Considering the development of other legal systems, particularly the European Union and the United Nations legislation, the ECHR recognised that discrimination could also exist in other cases – this is the concept of indirect discrimination. Indirect discrimination is a situation in which, as a result of the implementation or application of formally neutral legal norms, assessment criteria, rules, requirements or practice, a person and/or a group of persons, due to their specific characteristics, have less favourable conditions or a situation compared to other persons and/or groups of individuals, except when their implementation or application has a legitimate, objectively justified goal, the means of achieving which are appropriate and necessary.

The ECHR also established that states are obligated to guarantee real and adequate protection against discrimination committed by individuals in the areas covered by the Convention.

Court decisions concerning discrimination are generalised until they constitute case law. But it is also an interpretation of the standard enshrined in Article 14, which is significantly enriched and complicated.

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PART IV

INTERNATIONAL JUSTICE: HOW TO STRENGTHEN ITS EFFICIENCY?

THE INTERNATIONAL CRIMINAL COURT'S PURPOSE

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INTRODUCTION

The following article establishes the **role** of the International Criminal Court, by examining firstly the definition, **historical perspective** and incipit of the Court. A following **analysis of the crimes** that the Court prosecutees, while also examining the problems regarding **jurisdiction** that arise from the implementation of the Statute. A presentation of the **member states** follows, along with the particularities involved, continuing with an analysis of the **Romanian legislation** in regards to the International Criminal Court, and ending with **conclusions** regarding the role of this legal body.

HISTORICAL PERSPECTIVE

The International Criminal Court is a **court of justice** tasked with the trial of crimes that constitute the most heinous of offences, crimes that have had resounding of international levels.

The existence of such moments in human society, ever since its beginning, required the **development of international criminal justice mechanisms**. These mechanisms are part of the world community's efforts to develop an adequate legal framework that would allow the pursuit and sanctioning of international crimes that cannot be left to the discretion of national jurisdictions.

The creation of an international tribunal for the trial of political leaders accused of international crimes was first proposed during the Paris Peace Conference in 1919 after World War I[448], and later reiterated at a Geneva convention regarding the former League of Nations, which led to the conclusion that an agreement was

[448] American Journal of International Law , Volume 14 , Issue 1-2 , January 1920 , P. 95 – 154. URL: https://doi.org/10.2307/2187841

necessary to bring to justice acts of terrorism[449]. These were the initial steps taken by an international body in order to have a framework for bringing to justice people whose actions were of such a scope, for instance terrorism, that those said actions should not go unpunished by the world at large.

After the Second World War, two military tribunals were established – One in Nuremberg, entitled the International Military Tribunal, and one in Tokyo, the International Military Tribunal for the Far East, that prosecuted members of the Axis – german leaders for the one in Nuremberg, and japanese ones for the one in Tokyo. These legal entities were implemented by the allies in the World war, and served to prosecute and institute a punishment for those that had an implication in the largest conflict the world had ever seen.

The following years an international body of justice was not established, states dealing with crimes, of any level, by their own perspective legal systems. However, following the war in eastern Europe and the atrocities seen there, the United Nation established an ad-hoc tribunal – The International Criminal Tribunal for the Former Yugoslavia[450].

In 1994 the International Criminal Tribunal for Rwanda was established[451], created as a consequence of the atrocities that constituted the Rwandan genocide.

Subsequent efforts to establish an international body that could prosecute crimes, regardless of location, led to the adoption of the Rome Statue of the International Criminal Court[452], the first truly international criminal court of justice, created not as a

[449] Convention for the Prevention and Punishment of Terrorism, The League of Nations. URL: https://www.loc.gov/item/2021667893/

[450] United Nations Security Council Resolution 808 URL: https://daccess-ods.un.org/tmp/4989795.08876801.html

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[452] Rome Conference for an International Criminal Court URL: https://legal.un.org/icc/statute/99_corr/cstatute.htm

consequence of a genocide and being specialised for that particular one, but rather as a measure to bring to justice for the future, and having a general field of engagement.

By creating the International Criminal Court, the United Nations have, in effect, created a body that can prosecute crimes on an international level, however limitations were implimented within the treaty: first of all, the fact that there are four types of crimes that constitute the object of the treaty – **genocide, crimes against humanity, war crimes and** the international crime **of agression**. Secondly, the Court can only investigate when states will not investigate themselves, making the jurisdiction of the Court secondary, to the jurisdiction of national courts. Lastly, the Court can only prosecute those crimes commited within a state party to the treaty, or by a national of a state party to the treaty.

The exception to this last rule is found only if the jurisdiction is given authorisation by the United Nations Security Council.

JURISDICTION

The Rome Statue postulates, in its preliminary articles, what acts fall under its jurisdiction, codifying 4 crimes that constitute the object of activity for the Court: **genocide, crimes against humanity, war crimes and** the international crime **of agression**, and will be analysed as follows:

GENOCIDE

Genocide represents **acts commited with the intention to destroy**, in entirely or partially, a national or ethnic **group**, or a racial or religious one, by :

- Killing members of a specific national, ethnic, racial or religious group;
- Greviously injuring the physical or mental integrity of that specific group;
- Intentionally subjecting that group to conditions in existence that lead to its total or partial physical destruction;
- Measures leading to the prevention of births within the group;

- Forced transfer of children belonging to that particular group to another group;

CRIMES AGAINST HUMANITY

Crimes against humanity represent, in accordance to the Statute, certain acts that are committed in the framework of a **generalized or systematic attack** launched against a civilian population, such as:

- murder – the extinction of life of a certain population;
- extermination – representing the intentional creation of inhumane life conditions, such as the forbiddance of access to food or medicine, created to bring the destruction of a part of a population;
- slavery – the establishment of a system of ownership in regards to a population;
- deportation or forced transfer of the population from the place they live, without grounds permitted under law;
- imprisonment or other form of serious deprivation of physical freedom, in violation of the fundamental provisions of international law;
- torture, as in the intentional infliction of mental or physical pain or suffering, upon a person in custody, other than the inherent suffering of a lawful sanction;
- rape, sexual slavery, forced prostitution, forced pregnancy with the intetion of altering the ethnic composition of the population, forced sterilization or any other form of sexual violence of such gravity;
- the persecution – by intentional deprevation of fundamental rights of any identifiable group or collectivity for political, racial, national, ethnic, cultural, religious or sexual reasons
- forced disappearances of persons;
- the crime of apartheid – the acts previously mentioned, implemented within a regime of systematic oppresion, implemented by a racial group with the purpose of dominating another racial group

- other inhuman acts of a similar nature that intentionally cause great suffering or serious injury towards physical integrity or towards physical or mental health.

WAR CRIMES

The International Criminal Court has jurisdiction over **war crimes,** especially when these crimes are part of a plan or policy or when they are part of a series of similar crimes committed on a large scale. Acts are consider war crimes if the following are perpetrated:

- serious crimes against the Geneva Conventions of August 12, 1949, namely any of the facts mentioned below, if they refer to persons or goods protected by the provisions of the Geneva Conventions
- intentional homicide;
- torture and inhumane treatments, including biological experiments;
- the act of intentionally causing great suffering or seriously harming physical integrity or health;
- the destruction and appropriation of goods, unjustified by military needs and carried out on a large scale in an illegal and arbitrary manner;
- the act of compelling a prisoner of war or a protected person to serve in the forces of an enemy power;
- the act of intentionally depriving a prisoner of war or any other person protected by the right or to be judged legally and impartially
- deportation or illegal transfer or illegal detention;
- taking hostages;

Besides the aformentioned acts, other serious violations of the laws and customs applicable to international armed conflicts within the framework of the stability of international law constitute criminal acts in the shape of war crimes, namely the following:

- the act of intentionally launching attacks against the civilian population in general or against civilians who do not directly

participate in the hostilities;

- the act of intentionally launching attacks against civilian assets, i.e. those that are not military objectives;
- intentionally launching attacks against personnel, installations, materials, units or vehicles used in a humanitarian aid or peacekeeping mission under the Charter of the United Nations, provided that they are entitled to the protection that international law has it. of armed conflicts guarantees it to civilians and civilian goods;
- the act of intentionally launching an attack knowing that it will incidentally cause loss of human life among the civilian population, injuries to civilians, damage to civilian property or extensive, lasting and serious damage to the environment that would be shown to be excessive in relation to the overall concrete and directly expected military advantage
- the act of subjecting the persons of an adverse party under its power to mutilations or to medical or scientific experiments of any kind, which are not motivated by medical, dental or hospital treatment, nor carried out in the interest of these persons, but which lead to their death or they seriously endanger their health;
- the act of treasonably killing or wounding individuals belonging to the enemy nation or army;
- the act of declaring that there will be no mercy for the defeated;
- the act of destroying or confiscating the property of the enemy, except in cases where such destruction or confiscation would be imperatively ordered by the necessities of war;
- the act of declaring extinguished, suspended or inadmissible in court the rights and actions of the citizens of the opposing party;
- the act of a belligerent to compel nationals of the adverse party to take part in war operations directed against their country, even if they were in the service of that belligerent before the commencement of the war;
- plundering a city or a locality, even stormed;

- the act of using poison or poisonous weapons;
- the act of using asphyxiating, toxic or assimilated gases and any similar liquids, substances or processes;
- the act of using bullets that expand or flatten easily in the human body, such as bullets whose hard shell does not completely cover the middle or are pierced by cuts;
- the act of using weapons, projectiles, materials and fighting methods of a nature to cause unnecessary damage or unnecessary suffering or to act without discrimination in violation of the international law of armed conflicts;
- attacks on the dignity of the person, especially humiliating and degrading treatments;
- rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence constituting a serious crime under the Geneva Conventions;
- the act of using the presence of a civilian or other protected person to avoid certain points, areas or military forces not being the target of military operations;
- the act of intentionally launching attacks against buildings, material, units and means of medical transport and personnel who use, according to international law, the distinctive signs provided by the Geneva Conventions;
- the act of deliberately starving civilians, as a method of war, depriving them of the goods indispensable for survival, including intentionally preventing them from receiving the aid provided for by the Geneva Conventions;
- recruiting and enlisting children under the age of 15 in the national armed forces or making them actively participate in hostilities;

In case of armed conflicts that do not have an international character, serious violations of art. 3, of the Geneva Conventions of August 12, 1949, namely any of the acts mentioned below, committed against persons not directly participating in hostilities, including members of the armed forces who have laid down their arms and persons who have been withdrawn from the fighting due

to illness, injury, detention or any other reason:

- attempts on life and bodily integrity, especially murder in all its forms, mutilations, cruel treatments and torture;
- attacks on the person's dignity, especially humiliating and degrading treatments;
- hostage taking;
- sentences pronounced and executions carried out without a prior trial, given by a legally constituted tribunal and in compliance with judicial guarantees generally recognized as indispensable;

Other serious violations and customs related to armed conflicts that do not present an international character, within the framework of the stability of international law, namely any of the following facts:

- intentionally launching attacks against the civilian population in general or against civilians not directly participating in hostilities;
- the act of intentionally launching attacks against buildings, materials, units and means of medical transport and personnel using, according to international law, the distinctive insignia of the Geneva Conventions;
- the act of launching deliberate attacks against personnel, facilities, material, units or vehicles used in a humanitarian aid or peacekeeping mission under the Charter of the United Nations, provided that they are entitled to the protection of who has it. international law of armed conflicts guarantees it to civilians and civilian goods;
- the act of launching deliberate attacks against buildings dedicated to religion, learning, art, science or charitable actions, historical monuments, hospitals and places where the sick and wounded are gathered, provided that these buildings are not military objectives;
- plundering a city or a locality;
- rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence

- the act of recruiting and enlisting children under the age of 15 in the armed forces or in armed groups or making them actively participate in hostilities;
- the act of ordering the displacement of the civilian population for reasons related to the conflict, except in cases where civilian security or military imperatives require it;
- the act of treacherously killing or wounding an adversary combatant;
- the act of declaring that there will be no mercy for the defeated;
- the act of subjecting persons who are against another party to the conflict, fallen into his power, to mutilations or medical or scientific experiments which are neither motivated by medical dental or hospital treatment, nor carried out in the interest of these persons and which cause their death or seriously endanger their health;
- the act of destroying or confiscating the property of an adversary, unless such destruction or confiscation is imperatively ordered by the needs of the conflict;

THE CRIME AND ACT OF AGRESSION

The fourth type of crime that is under the jurisdiction of the International Criminal Court is the crime of agression, as amended in 2010 by the inclusion of an aditional situation in which the International Court can prosecute.

This situation was not found in the initial provisions, but rather was made part of the Statute by adding 3 new articles – 8bis, 15 bis and 15 ter, that extended the jurisdiction in such situations.

Therefore, the crime of agression represents the preparation, planning, initiation or execution of an act of agression by a person in a position that allows them to have control over the military or political actions of a state, acts that by their character, gravity or scale, represent a violation of the Charter of the United Nations.

In context of the Statute, and in order to be constitute acts of agression, for the jurisdiction of the International Court, acts of

agression are those actions where force of the military is used, by a state, against the independence, sovereignity, territory or independence either of another state, or in such a matter that is incompatible with the Charter of the United Nations. Examples of acts of agression are found in the amendment itself, that constitute acts of agression, regardless of the existance of a declaration of war:

- The invasion or attack by the armed forces of one state on the territory of another state, or any military occupation, however temporary, resulting from an invasion or attack, or any annexation by force of a territory another state or part thereof;
- Bombardment by the armed forces of one state against the territory of another state or the use of any weapons by a state against the territory of another state;
- Blockade of the ports or coasts of one state by the armed forces of another state;
- An attack by the armed forces of a State on land, sea or air forces or

sea and air fleets of another state;

- The use of the armed forces of one state which is on the territory of another state with the consent of the second state, in violation of the provisions the conditions in the agreement for the stay in that territory;
- The action of a state to allow its territory, which it has placed at the wishes of another state, to be used by the other state to commit an agression against a third state;
- The sending by or on behalf of a State of armed troops, groups, irregulars or mercenaries, who carry out acts of armed force against another state of an increased gravity.

As previously stated, the **fourth and final crime** under the jurisdiction of the International Criminal Court represents those acts that were not covered by the first three articles (genocide, war crimes and crimes against humanity), by extending the provisions in those situations where a person uses their own influence and power (no matter if the power is a legitimate one, or a soft power), in order to influence events in a way that represent the forceful

invasion of another state.

Therefore the agression itself constitutes a separate crime, one that is of an increased importance as to be codified, because there could be cases where such invasions exist, and the initial Statute did not contain such a provision.

The act of codifying such a situation would theoretically allow those responsible for the invasion of another country to be eventually brought to justice.

JURISDICTION

The International Criminal Court can prosecute, as with any legislation, from a certain moment, and this is made clear in article 11 of the Statue, where the fact that the Court has competence only regarding **situations that happened after the entry into force of the Statue**. Therefore, any crime commited before 2002 falls outside the scope of the legislation.

If, when it comes to the temporal issue, the situation is clear, from a spatial perspective the jurisdiction becomes complicated, since not all countries have signed or ratified the Statue, jurisdiction over crimes commited being as such – the Court can bring to justice only individuals, and not organisations or countries, for the four type of crimes commited, and only in certain cases.

The first situation is **if the crimes happened on the territory of a state that is a party to the Statue** itself. In this situation, the Statue acts as a continuous protection against the most horrible of crimes, when it comes to the integrity of the states that have implimented the Statue. These states have an increased protection in those cases where their territory suffers such crimes.

The second situation is if said **crimes were commited by a citizen of a state that is party to the Statue**. This situation exists as a correlation for the increased protection given by the Statue. If a country obtains the rights, then by effect, the obligations exist as well. Citizens of the states that are party to the Statue have an obligation not to commit war crimes, and if they do, the consequence is that they will be subjects of the Court.

The third situation is when the **crime is reffered by the**

Prosecutor of the United Nations Security Council. This is, in effect, the provision that makes the International Court have a general scope. If the UN Security Council started an investigation, and they sent towards the court the preliminary paperwork, this ensures the fact that no person can evade prosecution, no matter their position in a state. Even heads of state or head of religious bodies can be brought to justice in front of the Court.

MEMBER STATES

In order to bring to justice those that have commited the most heinous of crimes, **states can become parties of the Statue and join the International Criminal Court.**

As of the writing of this paper, out of the 193 current existing countries in the world, there are 123 member states, but the situation is not a simple one: there are countries that have signed the treaty and ratified, such as Austria, countries that have not signed the treaty, but ratified, and continue to be a member, such as Japan, states that have signed the Statute, but have not become members of the International Criminal Court, such as the United States of America, countries that have signed the treaty but withdrew from the Statute, such as Russia and states that have not signed or ratified the Statue, but accepted the jurisdiction of the Court, such as Ukraine.

There are also countries that have neither signed, nor ratified the treaty, and have never been members of the Court, such as India.

ROMANIAN LEGISLATION

As a country that has both signed and ratified the Statue, Romania had previously issued a law that dealt with an international legal body, in 1998[453], regarding the Romanian authorities' cooperation with the International Tribunal, in order to track the people having allegedly commited crimes against humanitarian international law, on the territory of former

[453] Law no 159 dated 28 of June 1998 URL: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=17312

Yugoslavia, starting with the year 1991.

This law was repealed in 2022, by the entry into force of the Law regarding the judicial cooperation between Romania and the International Criminal Court[454], stating facts that are of an importance to the process of applying the international provisions.

In the interest of the Court and in regards to the Romanian law, the following terms are defined by the law as such:

- „surrender" refers to the procedure by which the High Court of Cassation and Justice orders the execution of a request made in this regard by the International Criminal Court, in accordance with art. 89 of the Statute, in order to convict a person or execute a custodial sentence by a person;

- "requested person" refers to the person who is the subject of a surrender procedure;

- "surrendered person" refers to the person whose surrender was carried out by the Romanian authorities.

THE ROMANIAN MINISTRY OF JUSTICE

The measures requested by the International Criminal Court are carried out according to the Romanian law, except for the situations in which the law provides otherwise. According to the law, a request made by the International Criminal Court may be rejected, in whole or in part, if its execution could harm Romania's national security interests.

In executing the requests made by the International Criminal Court, Romanian has to act in a manner compatible with its obligations according to the norms of international law, including those resulting from the treaties to which Romania is a party.

While applying the law, the Ministry of Justice is the central authority.

The Ministry of Justice may request the International Criminal Court to complete or, as the case may be, rectify the attached

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454 Law no 44 dated 7 of March 2022 URL: https://legislatie.just.ro/Public/DetaliiDocument/252486

requests and documents, following the examination of international regularity.

The Ministry of Justice also initiates consultations with the competent Romanian judicial authorities and the International Criminal Court, in order to facilitate judicial cooperation, within the limits of its powers. It may also formulate a request for recovery from the International Criminal Court of some expenses, occasioned by the execution of some requests, at the behest of the Romanian judicial authorities; It may exercise any other powers resulting from the provisions of the Statute in order to fulfill the general obligation to cooperate, when appropriate. The Ministry of Justice informs the Ministry of Foreign Affairs about the measures taken whenever it deems necessary.

THE PROVISIONAL ARREST

In accordance with the law regarding the international judicial cooperation between the International Criminal Court and the Romanian legal system, requests for provisional arrests made by the International Criminal Court, in emergency situations, shall be submitted in writing to the Ministry of Justice.

The application for provisional arrest contains:

- the details of the requested person, sufficient for identification;
- a probable location of the person;
- a brief presentation of the facts, including, if possible, the date and place of their occurrence;
- a statement regarding the existence of an arrest warrant;
- a statement indicating that a request to surrender the wanted person will follow.

The Ministry of Justice performs the regularity examination within 24 hours of receiving the request. The purpose of the international regularity examination is to verify the request for provisional arrest and the documents attached to it, by referring to the provisions of the Statute and this law.

After identifying the requested person, the prosecutor can take the detention measure against him for a maximum period of 24

hours, only after listening to him in the presence of the elected or appointed ex officio defender.

If the prosecutor considers that the conditions stipulated by the law are met, there will be an immediate notification of the High Court of Cassation and Justice, in order to assess whether to take the measure of provisional arrest.

The request for provisional arrest is resolved in the council chamber, with the hearing of the requested person in the presence of the defense attorney and with the participation of the prosecutor. The court issues a motivaed decision.

An appeal may be filed, by the requested person or by the prosecutor, within 48 hours of the pronouncement or, as the case may be, of the communication. The appeal is resolved by another panel of the High Court of Cassation and Justice within 5 days. The provisional arrest warrant is issued by the panel that resolves the request in the first instance or, as the case may be, by the panel that resolved the appeal. The appeal is not suspensive of execution.

The initial duration of the provisional arrest measure is a maximum of 30 days. The maximum duration of provisional arrest, prior to receiving the surrender request, is 60 days. The requested person can consent to surrender before the expiration of the 60-day period, in which case the submission of the surrender request is no longer mandatory. The court ensures that the requested person gives his consent in full knowledge of the consequences. In this regard, a statement will be taken from the requested person, which will be signed by him, by the lawyer, by the president of the panel and by the clerk, as well as, if necessary, by the interpreter.

In this case, the court renders a final sentence. It is written within 24 hours and communicated to the Ministry of Justice, which will immediately inform the International Criminal Court and the Center for International Police Cooperation within the Ministry of Internal Affairs. Based on the final sentence, the arrest warrant will be issued for surrender. The surrendered person will be kept in custody until the actual surrender.

SURENDERING A PERSON

Surrender of a person for criminal prosecution, trial or execution of a custodial sentence is a procedure implemented by the Ministry of Justice, by its abilitated departments. As such, the request for surrender may be made by the International Criminal Court, according to the Statute, in order to carry out criminal prosecution, trial or execution of a custodial sentence.

In the surrender procedure, the International Criminal Court is represented by the Ministry of Justice and the Public Ministry. The Ministry of Justice will be summoned during the resolution of the surrender request and will be able to present written conclusions.

The surrender request is formulated in writing and addressed to the Ministry of Justice. Depending on the procedural phase, the following documents will be attached to the request:

- copies of the decisions by which a custodial sentence was imposed or, as the case may be, of the order of the preliminary Chamber or of the Court's referral act;
- copy of the arrest warrant;
- a statement of the facts for which surrender is requested;
- the information of the requested person.

The surrender request is resolved by a panel of judges of the High Court of Cassation and Justice, in the council chamber, with the participation of the prosecutor and the requested person. At the first term, the court proceeds to take a statement from the requested person, who will be assisted free of charge by an ex officio defender, if he has not appointed a chosen defender, as well as, if necessary, by an interpreter.

The requested person has the right to declare, in front of the court, that he waives his defense against the surrender request and gives his consent to be surrendered to the International Criminal Court.

Thusly, the procedure itself is similar to the one regarding the international cooperation in other cases.

If the requested person opposes the handover, he can formulate defenses and propose the administration of evidence under the conditions provided by the Criminal Procedure code. The opposition of the pursued person can only concern aspects regarding the identity or failure to fulfill the conditions provided by the Statute for surrender.

The requested person or the hearing prosecutor may request the granting of a court term for sufficiently justified reasons or for the administration of evidence. The prosecutor is obliged to contribute to the procurement of the data and documents necessary to establish whether the conditions of surrender are met.

If the requested person invokes, before the court, the incidence of the non bis in idem principle, the court orders the immediate consultation of the International Criminal Court, through the Ministry of Justice.

If, in this case, the International Criminal Court has decided on admissibility, the Romanian authorities can comply with the surrender request. If, following consultation with the International Criminal Court, it is found that a decision on admissibility is in the process of being taken, the court may order the case to be adjourned until the International Criminal Court rules on admissibility.

The court issues a sentence with adequate motivation. The requested person, the prosecutor or the Ministry of Justice can file an appeal against the sentence, within 5 days from the pronouncement or, if applicable, from the communication.

The appeal is resolved within 5 days. Based on the final sentence by which surrender was ordered, the arrest warrant for surrender will be issued. The surrendered person will be kept in custody until the actual surrender.

After the sentence becomes definitive, it will be communicated to the Ministry of Justice, which will immediately inform the International Criminal Court and the Center for International Police Cooperation within the Ministry of Internal Affairs.

The surrendered person is to be picked up by an escort designated by the International Criminal Court, from one of the Romanian state border crossing points, with the support of the International Police Cooperation Center within the Ministry of Internal Affairs.

If extradition or surrender is requested simultaneously by several states and by the International Criminal Court, either for the same acts or for different acts, the Ministry of Justice will immediately notify the International Criminal Court and the requesting state of the contest of requests.

In the event of a simultaneous request between a request sent by the International Criminal Court and a European arrest warrant or an extradition request made by a third country, the Ministry of Justice will decide on the priority of the request.

CONCLUSIONS

As we have shown, the existence of an international body that can prosecute crimes is a desire of people in the course of history.

Even if the form of such a body is rejected by some countries in the world, the ideas that are defended within the Rome Statute are universal rights, in accordance with the most basic tenents of human dignity and relationship between peoples.

The actions of men during time of crises should be ones of empathy, dignity, respect, and in accordance with human rights. Crimes of war, genocide, or crimes against humanity as well as the crime of agression should be punished, and at the time of the writing of this paper, the closest legal body to an universal court is the International Criminal Court.

Ever since the moment large groups of people came together in the spirit of understanding and working together towards a common purpose, a type natural law has been the foundation upon which all acts that emerged from the gathering reside – understanding, acceptance, a common purpose, and the need to help others.

Examples of codifications that contain such liberties are constantly found in history, such as the Declaration of Rights of Man and the Citizen, the Universal declaration of Human Rights, the European Convention of Human Rights, and virtually all declarations of independence, regardless of state, religion or moral outlook.

The fact that all humans are free and subject to the same dignity and should have the same rights as everyone else represents a basic tenent of life and legislation, and when a person or a group does not respect these basic tenets, consequences should exist, otherwise **the alternative would be one of constant impunity for the perpetrator**, a *sine die* ciminal act, that could be commited without repercursions.

While we cannot state that the Statute and the Court itself is flawless, it remains the closest legal shape the world currently has close to a truly wordly court of justice, and until such an alternative arises naturally, the **International Criminal Court should continue to exist, have jurisdiction, and prosecute and punish those that have commited the worst crimes against their fellow man.**

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3. Law no 159 dated 28 of June 1998. LEGE nr.159 din 28 iulie 1998
privind cooperarea autorităţilor române cu Tribunalul Internaţional pentru urmărirea persoanelor presupuse a fi responsabile de grave violări ale dreptului internaţional umanitar, comise pe teritoriul fostei Iugoslavii începând cu anul 1991URL: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=17312

4. Law no 44 dated 7 of March 2022 LEGE nr. 44 din 7 martie 2022 privind cooperarea judiciară dintre România și Curtea Penală Internațională EMITENTPARLAMENTUL ROMÂNIEIURL: https://legislatie.just.ro/Public/DetaliiDocument/252486

5. United Nations Security Council Resolution 808. URL: https://daccess-ods.un.org/tmp/4989795.08876801.html

6. United Nations Security Council Resolution 955. URL: https://daccess-ods.un.org/tmp/4912641.64447784.html

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WILL THE ICJ BRING RUSSIA TO JUSTICE FOR ENVIRONMENTAL CRIMES IN UKRAINE?

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INTRODUCTION

Following the full-scale Russian invasion of Ukraine on 24th February, Kyiv started a new wave of legal battles with the aggressor-state in international judicial bodies, such as the International Court of Justice (ICJ; the Court). Three weeks afterward, the ICJ responded to the Ukrainian claim, demanding Russia to "immediately suspend military operations, inevitably causing loss of life, mental and bodily harm, and damage to property and to the environment." The last word, "environment," marks not only a consistent historic shift in ICJ's case law but also opens the way to the debate of whether the Court can punish Russia for environmental crimes. According to the Ukrainian Ministry of Ecology, Russia has already committed more than 500 environmental crimes.

The ICJ, as a principal judicial element of the United Nations (UN) system, was initially created to complement the UN's philosophy on the peaceful settlement of international disputes. However, modern disputes between states entail not only questions related to territorial control but also the relation to the environment and the influence of cross-border environmental factors on the state's life.

The internationalization of environmental crimes led to the emergence of international disputes in the ICJ. The advantage of dealing with the International Court of Justice lies in the fact that it is the central UN judicial body of the United Nations. Therefore, it is endowed with general jurisdiction allowing it to hear all disputes

present to environmental disputes.

Even though, during the initial stages of its functioning, the Court was not at all active in dealing with environmental disputes, the changes in the international political and legal environment facilitated the shift toward reconsidering the importance of environmental cases. Besides, due to the new evolutionary approaches to the interpretation of founding international legal documents, the Court managed to take a broader look at the underlying principles behind these documents to apply them further to the hearing and dealing with cases of an environmental nature.

One should understand that environmental disputes are not limited merely by water or wind issues. International environmental law interacts with other disciplines such as human rights and economic law, thus acting as a particular branch of international law and not something entirely new and unknown to the intrastate regulations before. Such a feature of environmental regulation allows the Court to play a decisive role in developing international environmental rules by anchoring them more firmly within public international law.

I. THE PATH OF THE ICJ`S TOWARDS BECOMING A VITAL LEGISLATOR IN ENVIRONMENTAL LAW

A. THE ROLE OF THE APPROACH TO INTERPRETATION IN PREPARING ICJ TO HEAR ENVIRONMENTAL CASES

Initially, for the creators of the United Nations system, the disputes between States within international society were not understood as something having an environmental nature. Moreover, to settle the disputes that were brought before it, the ICJ was using a rather broad interpretation of the provisions of the treaties, even if it meant forcing a more or less direct link with the environment. As there were no fundamental treaties on the interactions with the environment in the UN system, ICJ judges

remained somewhat constrained in their legislative views.

Nevertheless, lately with the evolution of the Court's views on its interpretation powers, the situation with environmental disputes changed. According to Laurence Boisson de Chazaournes[455], professor at the Law School at the Geneva University, although not appearing as such in the Charter, the protection of the environment stems from a "teleological and evolving interpretation of the Charter." It was the evolutionary approach to the interpretation that allowed the International Court of Justice to integrate an environmental agenda into its activity.

The essential feature of the dynamic (evolutionary) approach in modern international legal reality is its clearly expressed humanity, focusing on humans as the highest value. The evolutionary approach can be seen as a specific form of a broader interpretive approach. It is used quite effectively in the practice of international courts (for example, the International Court of Justice, the European Court of Human Rights, etc.), human rights regulators (in particular, the UN Human Rights Council, the Committee on Economic, Social and Cultural Rights, et.). Modern international legal research attempts to show how the interpretive approach can be used within the positivist paradigm[456].

The dynamic (evolutionary) approach reflects the understanding that the contractual term and the provisions of the treaty have the ability to evolve. They are not fixed once and for all because, in international law, changes are objective. The ICJ confirmed such a way of thinking in its judgment in Costa Rica v. Nicaragua Case (Dispute regarding Navigational and Related Rights) in 2009. The Court stated that if the value of the term of the treaty differs from its value at the time of the treaty, one should take

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[455] Boisson de Chazaournes. La protection de l'environnement dans le système des Nations Unies. *Economica.* 2005. Vol. 3. URL: https://archive-ouverte.unige.ch/unige:12594

[456] Karvatska S. B. The role of the international court of justice in interpreting international treaties: the problems and prospects of the ICJ"s jurisdiction. *Lega şi viaţa.* 2019. Januarie. S. 50–54.

into account the meaning that is relevant at the time of interpretation[457]. As noted by U. Linderfalk, a professor at Lund University (Sweden), the evolutionary approach assumes that the parties will interpret the treaty, firstly in good faith and secondly according to the parties' common intention to the treaty. The requirement of good faith imposes on the judge of the international court the duty to hear the case reasonably, which makes unacceptable any formal approach in which the form prevails over the content[458].

In its decision in Costa Rica v. Nicaragua Case, the ICJ pointed out two categories of cases in the process of interpretation in which the evolutionary approach should be used. First, the further practice of applying the treaty, in accordance with paragraph 3 (b) of Art. 31 of the Vienna Convention on the Law of Treaties of 1969, may lead to a departure from the primary understanding of its content on the basis of tacit consent between the parties to the treaty. Secondly, there may be situations where the intention of the parties was the presumption that the content of the treaty, or some of its terms, could change: it was not indefinitely fixed[459].

Although the evolutionary approach to interpretation has recently attracted the attention of researchers, Inagaki Osamu (Kobe University, Japan) notes that its application by judicial bodies is not fully understood. The issue is complicated by the fact that one of the main characteristics of the international legal order is the lack of legislative power as such. In this case, it is not entirely clear how treaties can adapt to new situations arising after their conclusion. One of the possible ways is to change the treaty, but this process is long, so a more flexible option is to interpret international

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457 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua). Judgment of 13 Juli 2009 / ICJ Reports. 2009. P. 242. Para 64.

458 Linderfalk U. On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties. Springer, 2007. XXIV, 414 p.

459 Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua). Judgment of 13 Juli 2009 / ICJ Reports. 2009. P. 242.

treaties[460]. Inagaki Osamu identifies two stages of judicial interpretation and shows differences in approaches to interpretation in the case law of the International Court of Justice and the European Court of Human Rights. In the first stage, as the author notes, it is established whether the term or provision can be interpreted in the context of circumstances not at the time of their application but at the time of their adoption. If the result is positive, the interpretation goes to the second stage, in which the interpretation will be carried out by taking into account the various circumstances that have arisen since the conclusion of the treaty[461]. Osamu also considers the European Court of Human Rights to be the most "interpretive," in other words, one preferring evolutionary interpretation, more often taking into account the circumstances that arise after the treaty's conclusion. Such circumstances include not only further development of international law but also further case law of international courts, including the ICJ[462].

The evolutionary approach's primary contribution consisted of making an environmental case admissible, in other words, one falling under the Court's jurisdiction. The jurisdiction of the Court is composed of material jurisdiction – *ratione materiae* – personal – *ratione personae* – temporal – *ratione temporis* – and spatial – *ratione loci*. Once the jurisdiction of the Court has been confirmed, it can now use its material jurisdiction to hear the dispute. However, although it is considered general, in the sense that the Court does not prohibit itself from hearing a type of dispute, its material jurisdiction is limited by the qualification of the dispute made by the parties.

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[460] Inagaki O. Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning. Journal of International Cooperation Studies. 2015. Vol. 22. No. 2/3. P. 127–128.

[461] Ibid. P. 134.

[462] Inagaki O. Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning. Journal of International Cooperation Studies. 2015. Vol. 22. No. 2/3. P. 144.

Environmental cases were able to highlight the limits encountered by the ICJ. On the one hand, States can restrict litigation and limit environmental issues, and on the other hand, the Court has no specialized material jurisdiction in the matter. However, The ICJ was able to build its jurisdiction in environmental matters because environmental disputes were developing with regard to the traditional rules surrounding referral to the Court.

Given Article 36 of the ICJ Charter, the International Court of Justice benefits from a high level of discretion when deciding on the admissibility of a concrete case. Thus, the second paragraph of this article, foreseeing the Court`s jurisdiction on all cases involving "the existence of any fact which, if established, would constitute a breach of an international obligation" or "any question of international law," gives a broader room for meeting admissibility criteria. However, the evolutionary approach was needed to fit the notion of an environmental dispute into the broader category of international obligations, which states cannot resolve independently.

The same approach is applied to the standard of evidence. Requirements for evidence are not spelled out in the Charter or the Rules of Court; it should be based on the case law of the ICJ. A study of case law shows that, although the ICJ provides some guidance on how it evaluates certain types of evidence, it tends to apply a very open, discretionary standard of proof. The UN Security Council requires evidence in which "a level of certainty corresponds to the allegations' seriousness." The case law equally demonstrates that the ICJ sets the standard of proof on an ad hoc basis and that the standard is revealed only at the end of the process when the ICJ makes its decision.

B. THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW AND ITS INFLUENCE ON THE ICJ

One should also understand that the legal environmental framework cannot be narrowly understood as something merely related only to wind or water issues. In the same matter, one should

not associate the lack of environmental cases before the 1990s with the absence of the notion of the "environment." International environmental law does not exist as something distant from society; it also has links with other disciplines of international law. It has a "transversal"[463] character because it interacts with other disciplines such as human rights and economic law, thus acting as a particular branch of international law and not something entirely new and unknown to the intrastate regulations before.

In researching environmental law questions, scholars shall take into account the enduring influence that exists between this general law (public international law) and the specific law that results from it (international environmental law). The ongoing interaction between these two legal disciplines demonstrates how difficult it is to conceive of one without the other.

However, during the first stage of its existence, the ICJ has not heard many environmental cases. A typical international view was centered on the idea that the states could settle the environmental agenda independently without presenting such cases to the court of the highest magnitude. Such a position was also influenced by an overall global view of the environmental problems and their relative influence. Long before the times of constant discussions on greenhouse gases, carbon emissions, global warming, and the Paris Climate Agreement`s implementation, the states did not use their law-creating power in the environmental areas. The environment-focused thinking only started to get broader coverage in 1972 after the United Nations Conference on Human Environment in Stockholm.

Only after the United Nations Conference on Environment and Development (Rio Conference) of June 1992, which paved the way for the Convention on Biological Diversity, the United Nations

[463] Romi Raphaël. La transversalité, caractéristique, moteur et frein du droit de l'environnement. Confluences : Mélanges en l'honneur de Jacqueline Morand-Devillier, Paris : Montchestien. 2007. URL: https://www.worldcat.org/title/confluences-melanges-en-lhonneur-de-jacqueline-morand-deviller/oclc/833150629

Framework Convention on the Climate Change, and the United Nations Convention to Combat Desertification, the change of the paradigm approached the ICJ judges. It should be emphasized that the Rio Declaration was mainly inspired by the Stockholm one.

The Rio Convention was one of the first major documents to formulate guiding principles of international environmental law. This document, adopted by a global consensus, brings together many principles reflecting national courts` practice and, above all, identifying the trend which States are following to protect the environment.

Therefore, the normativity of the principle depends on the instrument in which it is written. The inclusion in an environmental convention does not make it possible to doubt its value. However, for declarations, the principle acquires a normative value with regard to the attitude adopted by States. If several States proclaim a principle, should this principle be considered a legal principle? On the international scene, States act as international legislators. Therefore, if a principle is proclaimed by several States, it acquires a certain degree of authority. The principles, being formulated for the most part in the declarations of the States, provide a reliable indication of the conduct adopted and followed by the States.

David Freestone, in his article on international environmental law, published in the Oxford`s Journal of Environmental Law[464], rightly notes that the Rio Summit represented a turning point in the evolution of environmental legislation. His views are also shared by Phillipe Sands, Professor of Law at University College London and a frequent counsel in the ICJ`s cases, and Jacqueline Peel, Professor at the Melbourne Law School. Sands and Peel, in their joint book[465] on

[464] Freestone David. The Road from Rio: International Environmental Law after the Earth Summit". Journal of Environmental Law. URL: https://www.jstor.org/stable/44247995?seq=1

[465] Sands Phillipe, Peel Jacqueline and others. Principles of International Environmental Law. 2018. URL: https://www.cambridge.org/highereducation/books/principles-of-international-environmental-law/B32CA39427B24F1947BDC5F884CCADC0#overview

the principles of international environmental law, state that the 1992 Rio Declaration remains a founding text which constitutes the framework for all future legal and political documents, including the Paris Climate Agreement.

Other international legal conventions that emerged after the 1992 Declaration have only either starkened the existence of general principles or proposed specific principles to complement the general ones. For example, the New Delhi Declaration on the principles of international law relating to the sustainable development of 2002 was only an additional step to the global integration of sustainable development into the environmental legal agenda.

Furthermore, during the conference, Sir Robert Jennings, at the time President of the Court himself, insisted in his presentation on the "role of the ICJ in the development of international environmental law" on "the merits of entrusting it with the settlement of disputes in the field environment." This was an open invitation to the international community to bring their environmental disputes before the International Court of Justice. A year later the 19 of July in 1993, the ICJ, certainly with a new lease of life, enthusiastically announced the creation of a special chamber for environmental issues in its structure.

The same press release also specified that of all the cases pending before the Court at the time, two of them were already of an environmental nature. It was precisely the case of the construction of the Gabikovo-Nagymaros dam (Slovakia v. Hungary) and another case on phosphate lands (Nauru v. Australia).

In 1992 the world case law did not still elaborate on a unified understanding of the environment, but such a problem was resolved during the next tears.

Even though UN documents did not foresee the definition of the term « environment » in 1993, the same year Council of Europe, in its Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, marked the definition of the environment as "natural resources both abiotic and biotic such

as air and the interaction between them; property which forms part of the cultural heritage; the characteristic aspects of the landscape."

Equally, three years after the International Court of Justice, in its advisory opinion on the legality of the threat or the use of nuclear weapons, gave its meaning of the "environment," which was even broader than the ones of the European Convention. For the ICJ environment was "not an abstraction, but the space where human beings live, on which the quality of their life and their health depend, including for future generations."

However, 30 years afterward, no case will ever have been brought before the special environmental chamber, announced by the ICJ's judge in 1992. As the Court does not have the power of self-referral, it is impossible for it to rule on a case, even of an environmental nature, as long as it has not been previously submitted to it by the interested parties. Given the total absence of environmental disputes brought before it, the Court, therefore, decided since 2006 not to proceed with the renewal of the members of the special chamber for the environment.

One should remember that given that the environmental chamber was never functioning, ICJ's judges are ones of different professional backgrounds, frequently having nothing to do with environmental law, who still need to hear cases involving an ecological component. Unlike the special judicial bodies such as the International Tribunal for the Law of the Sea, created following the 1982 UNCLOS Convention, constantly dealing with environmental questions, the International Court of Justice has limited ecological experience. Although at present, the Court has few cases related to the protection of the environment, the Court's interest in environmental issues has still been at the heart of the approach of the former ICJ Ronny Abraham[466].

[466] Speech of Ronny Abraham, President of the International Court of Justice, before the Sixth Committee of the General Assembly. October 28, 2016. URL: http://www.icj-cij.org/files/press-releases/1/19281.pdf

C. THE ROLE OF THE ICJ IN SHAPING INTERNATIONAL ENVIRONMENTAL LAW

Nevertheless, which is the contribution of the International Court of Justice in developing environmental law, and how the interactions with the environment, including its protection, are understood by the ICJ judges?

The Court plays a decisive role in taking environmental issues into account. It has contributed to developing an array of environmental rules by anchoring them more firmly within public international law. The absence of an international legislator[467] made it possible to affirm the place of the Court in the creation but also the interpretation of the environmental norms and principles. Therefore, the development of international environmental law results, in part, from the ability of the Court to develop all the normative rules in this area.

The Court has contributed to the recognition of environmental concepts as a source of inspiration for the protection of the environment, but also to the consecration of the principles of international environmental law.

In the 1995 Nuclear Tests II case (Australia & New Zealand versus France), judges affirmed the importance of environmental protection. In his introductory remarks, Judge Mohammed Shahabuddeen[468] underlines that "the need to protect the natural environment is striking, and the development of contemporary international law should take it into account." Judge Shigeru Oda[469], as a national of the only country to have suffered the effects of nuclear weapons, expresses the wish "that there will never again

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[467] Nathalie Ros. La Cour internationale de justice et les règles du droit international : contribution à l'étude de la fonction effective de la juridiction internationale permanente. 1998. URL: http://www.theses.fr/1998PA010258

[468] Separate opinion of the Judge Shahabuddeen in the Nuclear Tests II case. URL: https://bit.ly/3KEnxRm

[469] Separate opinion of the Judge Oda in the Nuclear Tests II case. URL: https://bit.ly/3Kyyns8

be, under any circumstances, any test of any nuclear weapon whatsoever". Judge Sir Geoffrey Palmer in his dissenting opinion[470] paints a picture of the development of international environmental law. Vice-President of the ICJ Weeramantry[471] lays down principles that will guide international environmental law, such as the principles of intertemporality, the rights of future generations, the precautionary principle, environmental impact assessment, and consecrates as a principle the illicit nature of the deposit of radioactive waste in the marine environment.

One year later, in the already mentioned advisory opinion on the use of nuclear weapons, the Court marked the integration of environmental protection into general international law. The ICJ did also incorporate the principle of protection into international humanitarian law. It effectively emphasizes that the protection of the environment is invoked through articles 35 paragraph and 55 of the First Additional Protocol to the Geneva Conventions of 1949.

The International Court of Justice states that the absence of reference to nuclear weapons in the First Protocol to Geneva Conventions does not allow any conclusion to be reached on the admissibility of the use of such a type of weapon. Apart from that, despite concluding that international environmental obligations did not prevent a state from resorting to self-defense in the event of an attack, the Court judged that countries must consider environmental considerations within the framework of the setting of military objectives.

Starting from the Stockholm Conference and the same year's report from the Club of Rome on the limits of growth, the notion of sustainable development, meaning responsible economic activities not harming future generations, is widely used in all modern environmental legal and political documents such as Paris Agreement.

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[470] Separate opinion of the Judge Palmer in the Nuclear Tests II case. URL: https://bit.ly/38PzIxH

[471] Separate opinion of the Judge Weeramantry in the Nuclear Tests II case. URL: https://bit.ly/382pQ3l

Sustainable development is supposed to reconcile two requirements that appear a priori contradictory: the protection of the environment and the development of States. The notion of sustainable development thus presupposes a reconciliation of these two objectives to enable States to develop in harmony with the rules of environmental law. The international community has recognized the term "sustainable development," which was enshrined in the Rio Declaration: "the right to development shall be realized in such a way as to equitably meet developmental and environmental needs of present and future generations." The concept of sustainable development does not aim to protect the environment but rather to preserve natural resources so that they can be renewed and allow populations to reach an acceptable standard of living[472].

Thus, in the Uruguay River pulp mill case (Uruguay v. Argentina), the Court stressed a linkage between future generations and sustainable development. The aforementioned case concerned the construction of pulp mills by Uruguay near the river, shared by both countries. Even though the Court found no violation of environmental legal rules because of no proven harmful effect of these factories on the river`s condition, the Court, in its response to the Argentinian order requesting the indication of provisional measures, stressed the importance of future positive obligations of both states. By noting that "in this perspective actions must be taken of the need to guarantee the continued protection of the environment of the river as well as the right to the economic development of the riparian States"[473], the Court not only gives an evaluation of the existing dispute but also forms guidance to Argentina and Uruguay to protect the river from any other possible harm not covered by the topic of this particular case.

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[472] Shawkat Alam, Md Jahid Hossain Bhuiyan, and others. Routledge Handbook of International Environmental Law. URL: https://www.routledgehandbooks.com/doi/10.4324/9780203093474

[473] Pulp Mills on the River Uruguay (Argentina v. Uruguay). URL: https://www.icj-cij.org/public/files/case-related/135/15895.pdf

Besides, by saying that "it is particularly necessary to bear in mind the dependence of the Parties on the quality of the waters of the Uruguay River insofar as it constitutes for them a source of income and economic development"[474] the Court shows that environmental protection does not exist only in itself or for itself but rather acts as an element central to the economic functioning of our societies. Therefore, the International Court of Justice also stresses that the point of sustainable development is also to promote economic growth without adverse environmental consequences for citizens.

Moreover, Sandrine Maljean-Dubois, a prominent French scholar in environmental law, highly estimates the ideas of one of the ICJ`s judges[475]. Thus, Judge Weeramantry in its separate opinion[476] on the Gabčíkovo-Nagymaros Project (Slovakia v. Hungary) gives peculiar views on the notion of sustainable development. In this case, the Court has utilized and interpreted the notion of sustainable development for the first time in its history. The ICJ`s Vice-President Weeramantry rightly pointed out the relation, already seen in the Nuclear Tests II case, between international environmental and human rights laws ("The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself")[477].

According to Maljean-Dubois, the judge's ideas are enlightening because they specify that "the principle of sustainable development is part of modern international law, firstly by virtue

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[474] Ibid

[475] Olivier Lecucq, Sandrine Maljean-Dubois. Le rôle du juge dans le développement du droit à l'environnement. January 2008. URL: https://www.researchgate.net/publication/279264481_Le_role_du_juge_dans_le_developpement_du_droit_a_l'environnement#fullTextFileContent

[476] Separate opinion of the Vice-President Weeremantry in the Gabcikovo-Nagymaros Project Case. 25 September 1997 URL: https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf

[477] Ibid

of its inescapable logical necessity, but also because of its general acceptance by the international community".

Weeramantry also makes a crucial comment on the division for pursuing a sustainable development agenda. In his dissenting opinion, he writes that "the concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on the basis of worldwide acceptance." This phrase needs to be understood in a broader political context of international negotiations in the 1990s. The thing is that during that period, an idea of different climate commitments was the leading approach in environmental politics.

Thus, the Kyoto Protocol, signed several months after the release of the International Court of Justice`s opinion on the Slovakia v. Hungary case, was a clear indicator of the dominance of that approach. The Kyoto Protocol, a predecessor of the Paris Agreement, was built on a division of countries (Annex A & Annex B). Such a division directly impacted their climate commitments, as such targets were binding only for Annex B countries. Therefore, the point of Judge Weeramantry on the unified global view on sustainable development and shared responsibility was one of the ideas the legislators kept in mind when proposing the Paris Climate Agreement as a way forward from the Kyoto Protocol.

PART II. ENVIRONMENTAL COMPONENT IN UKRAINIAN-RUSSIAN CASE WITHIN THE ICJ

As stated in Part I, despite the hope surrounding the environmental agenda in legal circles in the 1990s, the special chamber for environmental cases within the International Court of Justice was not created. Therefore most environmental violations committed during the Russian aggression will be subject to the consideration of a common chamber of the Court.

The only exception may be possible if the Ukrainian government decides to file a separate lawsuit in the International Tribunal for the Law of the Sea, created under UNCLOS (1982

United Nations Convention on the Law of the Sea). Within such a claim, Ukraine will most likely be concerned with questions related to interventions into Ukrainian territorial waters and exclusive economic zones via blocking by Russian warships of Ukrainian ports. However, Kyiv may recall environmental violations such as the Russian bombing of Ukrainian coastal infrastructure, leading to toxic substance leaks and immense water pollution. Given that the International Tribunal for the Law of the Sea has already proved its capacity to play a decisive role in settling environmental disputes[478], such a possibility should not be neglected.

Within the ICJ's legal process, environmental claims will be considered altogether political, economic, and social issues of an existing Ukrainian appeal to the ICJ under the "Genocide Case." On the 26th of February started, a new case against Russia, apart from one submitted in 2017 concerning the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination. The new 2022 Case relates to the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.

Initially, such a "Genocide Case" emerged as a Ukrainian response to Russian allegations that Moscow started its "special military operations" as though to protect the people of Donetsk and Luhansk Oblast (namely, in the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic) from genocide, committed by the Ukrainian government.[479] In its initial application, Ukraine aimed to deny that genocide in Donbas ever occurred, stating that it submitted the application "to establish that

[478] Tomas Heider, "The Contribution of the International Tribunal for the Law of the Sea to the Protection of the Marine Environment", December 2o21. URL: https://brill.com/view/journals/kjic/9/2/article-p354_11.xml

[479] Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures 27 February 2022. URL: https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf

Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide".

However, afterward with the unfolding Russian aggression taking place, "Genocide Case" changed its meaning. With new days of aggression, numerous war crimes and possibly crimes against humanity, such as the use of cluster munitions or attacks on medical facilities committed by the Russian army in Ukraine during its invasion, become apparent. Consequently, the Ukrainian general line is now centered on the idea of proving that Russian war crimes had a deliberate system nature, aimed to exterminate the Ukrainian nation, and can be classified as a genocide in the meaning of the 1948 Genocide Prevention and Punishment Convention ("crime of crimes").

A. ENVIRONMENTAL CRIMES & ICJ GENOCIDE CASE

As for the environmental crimes, they will carry a sort of supplementary character to the crime of genocide and other war crimes. The thing is that the term "ecocide" is still not deemed universal in international legal doctrine; therefore, it cannot be regarded as a separate part from genocide. Even though the Ukrainian Penal Code in its 441st article defines ecocide as "Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster," on the global UN level, the uniform definition, and recognition of ecocide was never done.

There are signals that in the future, the UN may work on either a multilateral convention or declaration on ecocide, but up to date, such initiatives are only nascent. Thus, in 2021 a high-level expert group of advisors working with the International Criminal Court coined the international definition of ecocide as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." Even though there is merely an advisory opinion, it is still an essential milestone in the ecocide's recognition. Needless to say that according to Article 38

of the Statute of ICJ teachings of the most highly qualified publicists are considered subsidiary sources of international law.

However, the absence of ecocide's definition does not level the value of the eventual administration of justice Ukraine should seek in environmental matters.

Russia already violated a number of international legal provisions related to the environment, namely Article 55 of the Additional Protocol to the Geneva Conventions of 1949 prohibits the use of methods or means of warfare which are intended or may expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. The Rome Statute of the International Criminal Court also acknowledges the existence of "environmental war crimes", defining them as "intentional attacks causing widespread, long-term and severe damage to the natural environment."

Elliot Winter, international law scholar at Newcastle University, notes[480] that adopting a flexible approach to the interpretation of environmental cases, even following a narrow definition of the Rome Statute, may play a decisive role in administering justice and making Russia accountable for violations of environmental legislation. As was already specified in the first part of the article, in recent years, the International Court of Justice has developed an evolutionary and more flexible approach to hearing environmental cases, which will be just in hand to Ukraine.

The main thing Ukraine can receive as a recompense for Russian environmental crimes is reparations. Even though environmental compensations are rare in the UN and ICJ history, in itself they represent that the aggressor-country should also pay for damage of such kind. Namely, following the Iraqi invasion of the State of Kuwait, Sadaat Husein's government was found guilty of

[480] Elliot Winter, The Role of the Environmental War Crime in the Russian Invasion of Ukraine, JURIST – Academic Commentary, April 25, 2022, https://www.jurist.org/commentary/2022/04/elliot-winter-ukraine-conflict-environmental-war-crime

environmental and public health damage to the Iraqi people.

In Costa Rica v. Nicaragua case[481] the Court has held that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment" and that "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law".

A key question connected to the fact of reparations as well as their amount is the proven amount of harm caused by the actions of the Russian army. According to the Ukrainian Ministry of Ecology, Moscow is responsible for numerous disasters such as large-scale wild fares, explosions of ammonia storage facilities, and attacks on natural reserves funds caused by attacks of Russian missiles and artillery.

There are also indirect consequences such as a hazardous number of emissions of greenhouse gasses such as carbon dioxide or methane in the atmosphere, which may not have an immediate effect, but are dangerous for human health in the long run. In general, when speaking about disasters, one needs to understand that they represent not a unique point in time but always entail long-term consequences. As Scott Gabriel Knowles, one of the most prominent scholars in the realm of disaster studies, notes, all disasters are "slow'', as their effects take place in a time long after the culmination has happened[482]. Even though Russian aggression against Ukraine may be a united story of environmental crisis, in reality, it consists of numerous small local disasters, causing extreme harm to surrounding communities.

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[481] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I), pp. 26-27, para. 35

[482] Scott Gabriel Knowles, Learning from Disaster: the History of Technology and the Future of Disaster Research, October 2014. URL: https://www.jstor.org/stable/24468470

Therefore the legal position of Ukraine on the environmental dimension within the legal battle with Russia should be centered on showing direct as well as hidden and long-term damage of its actions during the invasion. This is the way for Kyiv not only to seek justice but also to get more financial compensation from Russia in the ICJ.

The amount of the compensation to Ukraine is related to the classification and the understanding of environmental crimes by the ICJ. It other words, if the Court traces a systematic pattern of environemntal crimes, they will be percieved and judged in a connection with the general arguments and evidences on genocide.

At the same time, it is hard to say, based on merely historical experiences of genocide proceedings, about the correlation between the amount of financial compensation for environmental damage and its connection to the genocide.

The post-1945 system of international law on genocide did not face an environmental component in a way mirrored in a way such as the Russian war against Ukraine. Whereas the crimes of genocides either in Rwanda, Yugoslavia, or Myanmar involved oppression of certain ethnic or religious groups within one country, the Russian-Ukrainian case is entirely different.

Here one country, with one leading ethnic group, during the war against another country, also with one leading ethnic group, commits environmental damage. If the case of Rwanda or Yugoslavia, the military-political leadership of selected countries was committing crimes, they were doing it on their territory and, therefore, could not sue other countries for any participation in it.

Nevertheless, considering the general legal logic applied in criminal law, it becomes evident that the level of intent plays the leading role in judging a particular punishment for the perpetrator. A direct intent of a crime means that a person was fully conscious of his actions, foresaw that his/her actions could lead to a specific outcome, and desired such an outcome to become a reality. Unlike crimes of negligence or ones with extraordinary circumstances such as irresistible impulse, direct intent is a prerequisite for more severe punishment.

Moreover, in criminal law, there is also such a category as aggravated circumstances. According to Black's Law Dictionary, the most widely used legal glossary in the United States, aggravation in law is "any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself."[483]

Thus the proven connection of environmental crimes with genocide, the most severe crime in international law, which can only be intentional in nature, means that the amount of punishment and, as a consequence, compensation in an environmental dimension will be higher. For the International Court of Justice, there is a difference if wheat fields were bombed because of inaccurate weapons or intentionally to create massive fires and, as a result, worsen the future harvest and the state's capacity to provide its citizens with basic food.

In this realm, the Ukrainian legal task is to prove that during all those cases, the intent of Russian soldiers was deliberately aimed at causing damages. This link may be proved in multiple ways, such as, e.g., showing that attacks on Ukrainian protected areas (national parks, wilderness areas, community conserved areas, nature reserves, etc) had no other aims other than to destroy the Ukrainian environment. Here Ukrainian legal team will show that a given area is located far away from any military facilities, and therefore the possible arguments from the Russian side that allegedly, these areas were hit by the mistake of the executor will not have any legal sense.

In fact, such systematic behavior that is dangerous to the environment may manifest not only in direct attacks on Ukrainian flora and fauna. The bombing of, e.g., ammonia plants, as once happened in Sumy on the 2nd March with the following leaks of chemicals in the atmosphere, may also be regarded as an environmental crime. From a military point of view, there is no

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483 Black, Henry Campbell, Black's Law Dictionary, 6th edition. (St. Paul, MN: West, 2021).

contribution of ammonia plants to the functioning of armed forces; therefore, the only aim of the attack was to provoke chemical leaks to spread panic among the local citizens.

Undoubtedly, any military attack causes environmental damage. Missiles do pollute the atmosphere during flight: they emit carbon monoxide, carbon dioxide, brown gases, water vapor, nitrogen, and more toxic substances. Residues of fuel, the rockets themselves, as well as compounds that did not react during the detonation contaminate the soil, surface, and groundwater. Even missiles liquidated by air-defense systems still are harmful to the environment. One can think about an incident in the Ternopil region when shell fragments damaged tanks with mineral fertilizers. As a result, the soil and water in the Ikva River were contaminated with ammonia.

However, as stressed earlier, for the purposes of setting a higher level of financial compensation, the factor of intent to cause damage specifically to the protected area or to locals with the attack on environmentally hazardous objects is a decisive one.

B. LESSONS TO TAKE FROM THE "DRC V. UGANDA" CASE

As mentioned earlier, in a modern view of international law on the crime of genocide, the case of the Russia-Ukraine war may be a not standard one; nevertheless, there was indeed a similar situation, helpful to Ukraine in the realm of environmental reparations. The dispute between the Democratic Republic of Congo (DRC) and Uganda in the ICJ, and the subsequent inability of the DRC to fully prove Uganda's responsibility for environmental crimes, should act as a guiding point for the Ukrainian legal ICJ team in presenting its arguments to the Court.

Even though Uganda was also one of the aggressors in the multinational war in the DRC in the late 1990s, possessing even an actual control of some of the DRC territories, its role in environmental crimes was not considered appropriately. Generally, the environmental dimension was a reflection of the work of the DRC's lawyers. The whole legal crew of the DRC could

have been much more efficient. DRC won the case against Uganda, receiving international legal testimony that Uganda committed the crime of aggression. However, Kinshasa received only 3 percent of the reparations it wanted to obtain (325 million USD against 11 billion USD claimed).

Nevertheless, this case carries essential details for the sake of the Ukrainian win in the environmental dimension of the case against the Russian Federation, rather than just reminding that Ukraine should delegate a team of top-quality lawyers and foreign experts to the proceedings of the ICJ's case.

"The Court recalls that Uganda is internationally responsible for failing to comply with its obligations as an occupying Power in Ituri in respect of all acts of looting, plundering or exploitation of natural resources in the occupied territory, which includes damage to wildlife, and that it owes reparation for such damage" – this is a quote of the ICJ's decision in the DRC against Uganda case[484], released weeks before a full-scale Russian aggression on Ukraine.

Consequently, a specific question arises, why did DRC fail to prove the environmental harm fully, and which lessons should Ukraine make? If one considers that the ICJ stated that Uganda's armed forces did significant damage, why did the Court not order Kampala to pay the full reparations asked by DRC? For example, out of almost 2,7 billion dollars, Congolese lawyers want to charge Uganda for direct and indirect wildlife losses in four national parks (Virunga National Park, Garamba National Park, Okapi Wildlife, and Maiko National Park), DRC received only 60 million dollars (2,2%).

In a nutshell, DRC did not fully overcome its burden of proof, meaning that the Court did not find their arguments on Uganda's environmental laws violations sufficient enough. Back in 2005, at

[484] Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda). The Court fixed the amounts of compensation due from the Republic of Uganda to the Democratic Republic of Congo. February 2022. URL: https://www.icj-cij.org/en/case/116

the early stages of the case[485] the Court had already formulated its criteria for the argument: "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavorable to the State represented by the person making them. The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The ICJ moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention".

Therefore, in dealing with the national parks damage claim, the Court, in assessing the report of the University of Kinshasa, stated that the university report was outdated as well as does not have as much of its legal significance as presented without other diversity of scientific publications on this particular topic.

It is essential to understand that the absence of adequate proof does not always preclude an award for that damage. The Court first coined such a position in Costa Rica v. Nicaragua Case and then further repeated it in this case. The Court also notes that in modern society, wildlife enjoys a lower level of social and technical monitoring; therefore, the level of information on it may be lower than one of human health or commercial goods. In other words, the International Court of Justice understands that the war entails grave environmental consequences per se and that the military actions inevitably lead to environmental perturbations (as an already mentioned example of a liquidated missile by the air defense system) but deems proper evidence necessary to match high compensations.

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[485] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 201, para. 61.

The Ukrainian aim in the realm of environmental law violations is not only to seek justice but also to aspire to get the highest punishment level for Russian crimes. In the environmental dimension, the only possible way for Kyiv to manifest severe punishment is to defend compensation amounts properly. That is why Ukraine needs to consider lessons of the DRC's legal time in the ICJ.

The principle takeaway would be to ensure a proper evidence collection and the creation of the matrix and methodologies to assess the damage in monetary terms. In making a claim on the environmental damage resulting from deforestation, which entailed damage done to the biodiversity and the habitats of animal species, DRC, according to the Court, "offers no evidence for the extent of this damage, nor does it offer a methodology for its validation." The Democratic Republic of Congo just made a claim with no precise number, giving a range from 5 to 14 million USD), based only on one scientific study. Therefore, the ICJ was "unable to determine the extent of the DRC's injury, even on an approximate basis, and therefore dismissed the claim for environmental damage resulting from deforestation."

Besides, the methodology should not only exist but should have a solid explanation of why it should be used compared to other available ways of calculating the compensation. Otherwise, the other party to the dispute may find its weak spots and convince the Court not to use it. This was precisely the case, as the ICJ rejected the approach of the DRC to calculate its damage for animal losses.

The Democratic Republic of Congo proposed to calculate it based on "the price fixed for each animal has been set on the basis of prices habitually applied in international markets." Uganda objected that the DRC's methodology did not have any reasonable grounds but included the price of unborn animals instead, even though the value of possible offsprings is already mirrored in the original price of an animal.

The important point for Ukraine to consider in this realm is that, despite the evident status of Russia as an aggressor in the environmental disputes, this does not automatically preclude that its arguments lose any weight. Undoubtedly, it will be impossible

for Moscow to distort reality so much to make the Court believe that no environmental crimes ever happened. Regardless, mainly because of this reason, Russia will try to criticize and doubt any Ukrainian concrete argument, such as one related to the methodology of calculations, to have to pay less.

The debate of whether Russia will execute the decision of the International Court of Justice is not the topic of this article. Article 94 of the UN Charter stipulates that "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Russia, a permanent member of the United Nations Security Council, in the light of Article 27 of the UN Charter, has the possibility to block any enforcement action of the ICJ's decision.

Nevertheless, in our opinion, such a possibility should not level or undermine the importance of ICJ proceedings in general and its environmental dimension in particular. Therefore, the Ukrainian ICJ legal team should prepare in advance, engaging many non-legal stakeholders, to be ready for any criticism or counterarguments from Russia or ICJ judges themselves.

In order to create such a synergy effect, it is vital to either create a single authority or designate a special advisor to be responsible for coordination work between international law experts, foreign embassies, various NGOs, both Ukrainian and foreign ones, and intergovernmental organizations such UN Environment Programme, European Environmental Agency or International Union for Conservation of Nature.

Such a cooperation officer may be created within the Ministry for Environmental Protection and Natural Resources, but, in our opinion, it would be better to place it within the Ministry of Foreign Affairs as the central governmental body in charge of the Ukrainian legal battle against Russia in international courts. For example, the head of Ukrainian delegation to represent the country in the ICJ's Genocide Case may have a special advisor on environmental matters.

Such an advisor will be a practical addition to the delegation's work to the ICJ. While being involved in designing the legal position of Ukraine and therefore knowing where Kyiv needs the most substantial evidence, s/he could better manage the communication with relevant stakeholders, paving the way for how to help. Such a cooperation plan will prevent the work on similar matters in situations when it would be better for the state if, e.g., think tanks work on different issues rather than concentrate attention on one particular problem.

The main objective of such cooperation should be centered on creating a solid evidence base for Russian environmental crimes to demonstrate to the ICJ. As stressed by the Court in the DRC v. Uganda case, the information submitted should be the most recent. This means that right now, Ukraine is in dire need of tangible and rigorous reports on the influence of Russian aggression on the environment.

In addressing foreign civil servants, the government, both Foreign Affairs and Environmental Protection Ministries, should emphasize the importance of their assistance in environmental crimes investigation. The DRC's ordeal teaches us that the opinion of international environmental stakeholders matters for the ICJ, and only studies of local research institutions may not be qualified as substantial evidence. Therefore, one should encourage think tanks and NGOs to seek international cooperation with foreign experts and research institutions. In the same vein, the government, e.g., via the mentioned environmental advisor, should address foreign embassies to create specific grants programs for research, covering investigations of environmental crimes.

One should understand that this process should not be too centralized and controlled. Whereas the idea is to facilitate communication and cooperation between stakeholders, there is a line not to be crossed when too much centralization may hinder the general progress. Therefore, environmental investigations should also be carried out at the regional level. As environmental crimes happen in every part of the country, each regional administration, including its environment protection departments, has the chance to contribute to the global process. Whereas it may indeed turn out

to be too costly for regional governments to finance such initiatives by themselves, they should consider the possibility of engaging local universities & NGOs on a pro bono basis.

Furthermore, throughout the country, many regional and even local communities have partner relations with municipalities abroad. Such partnership may entail either some partial financing from local foreign communities for environmental initiatives or the creation of some programs involving foreign environmental experts to participate in the evidence collection & further processing with regard to Russian environmental crimes.

Finally, on the global level, the Ministry of Interior and the Office of the General Prosecutor should consider the possibility of engaging more foreign help to work on the environmental dimension. Since a large-scale Russian invasion began, specialists from multiple foreign countries (e.g., France, the United States, Canada, and Germany) have been working with their Ukrainian counterparts on evidence collection of Russian war crimes. Therefore there is already a solid ground of cooperation that may be expanded, especially given that a special ecological prosecution service operates in Ukraine. Their help will support Kyiv in presenting and collecting evidence and also add credibility to national reports.

CONCLUSIONS

Historically, the activities of the ICJ regarding the environmental disputes reflected existing tendencies in the international political and legal system. Whereas the shift in the interpretational paradigm, allowing the Court to hear the environmental cases, was a step taken by the International Court of Justice's judges, the Court's position on the admissibility and reasonability behind such hearings was largely caused by the external system of international law and politics.

It was just after the Rio Conference in 1992 when the ICJ judges felt the tendency, pushing for more attention to ecological disputes and even announcing a special chamber in the ICJ structure. Even though the talks on the chamber have not been realized, the post-

Rio and even post-Stockholm shifts toward a more environment-centered legal agenda empowered the Court to become a significant decision-maker in global environmental law.

In parallel to international legal tendencies, the Court`s change of interpretation toolkit, as well as the understanding that environmental questions do matter globally, meaning that states should not deal with them on their own without consulting an international community, made the International Court of Justice capable of playing a decisive role in developing international environmental law.

In the post-Rio era, the Court's role as the environmental legislator manifested in multiple dimensions. The ICJ showed that environmental protection does not exist only for itself but rather acts as an element central to our societies' economic and political functioning, therefore stressing the link of environmental law to other branches of international law.

Throughout its institutional evolution, the ICJ became an essential stakeholder in administering international environmental law. Therefore, Ukraine should not ignore the opportunity to bring Russia to responsibility for environmental crimes in the Court. Whereas the environmental dimension will be presented as a part of broader proceedings on genocide, it gives Kyiv the chance to maximize the punishment for environmental crimes as well.

Even though reparations are the main element the Court may offer as a remedy, the aim to receive them in the maximum possible quantity is an essential task of Ukraine's delegation to the ICJ. To successfully win this legal battle with Russia, Ukraine should also prepare much in advance, taking into account lessons from DR Congo's ordeal to prove Uganda's environmental crimes. Cooperation with multiple national and international stakeholders (NGOs, think tanks, and international organizations) is a key to managing our burden of proof via presenting much evidence from credible sources worldwide.

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APPLICATION OF THE PRINCIPLE OF COMPENSATION FOR DAMAGES IN THE PRACTICE OF BODIES OF INTERNATIONAL CRIMINAL JUSTICE

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INTRODUCTION

The formation of international criminal law, which aims to punish those guilty of the most serious international crimes, is one of the main results of the progress of international law after the Second World War. However, the philosophy of this branch of international law was primarily focused on punishing criminals for a long time. Nevertheless, the concept of justice is broader than simple punishment and includes protection of the rights and interests of sufferers and victims of international crimes.

In this regard, the principle of compensation for damages occupies a leading place in the system of principles of international criminal law. Despite the fact that its formal consolidation in the norms of international acts and founding treaties of international criminal courts and tribunals took place relatively recently, such bodies as the International Criminal Court (hereinafter – the ICC) and the International Tribunal for the Former Yugoslavia (hereinafter – the ICTY) already have the practice of its application.

In this study, we will examine the current practice of these

bodies and formulate conclusions that may be useful for Ukraine in the course of post-conflict settlement. Doctrinal and practical approaches to understanding the principle of compensation for damages in international criminal law and the evolution of its consolidation in the norms of international law will be clarified, the norms of the founding acts of the ICC, ICTY and other international and internationalized tribunals, which regulate this principle, will be analyzed. In addition, the practice of the ICC and ICTY regarding the application of the principle of compensation for damages will be investigated. Finally, we will consider ways in which the practice of these bodies regarding reparations can be taken into account by Ukraine in further work to bring the perpetrators to justice and obtain reparations for the victims. Recommendations will be formulated regarding the further development of the principle of reparation in international criminal law and its application in the course of punishing those guilty of Russian aggression in Ukraine.

I.THE CONTENT OF THE PRINCIPLE OF COMPENSATION FOR DAMAGES IN INTERNATIONAL CRIMINAL LAW

Compensation for damages caused by a wrongful act is a general principle of law. Even in Roman law, it was recognized that in the event of an act (delict) that causes damage, an obligation to compensate for it arises[486]. This approach was later reflected in the legal maxim ubiqunqueest injuria, ibi damnum sequitur (from Latin, where there is an offense, there is compensation). F. O. Raimondo also cites another well-known principle of Roman law – nullus commodum capere de sua injuria propria (from Latin, no one can benefit from the damage caused by him), as the one that formed the basis of the principle of compensation for damages in modern law[487].

[486]Тищик Б. Й. Держава і право Стародавнього Риму: Навчальний посібник.Львів: ЛДУ, 1998. С.160.

[487]Raimondo F. O. General principles of law in the decisions of international criminal courts and tribunals. Leiden ; Boston : M. Nijhoff Pub., 2008. P. 27.

This principle does not belong to one branch of law and provides for compensation regardless of the type of offense: criminal offense, administrative or civil misdemeanors, breach of contractual obligations, etc. At the same time, despite the universal nature of the principle of compensation for damages, the set of norms that regulate it differ significantly depending on the subject of the relationship. In legal science, compensation for moral damage, compensation for damage to the environment, etc. are distinguished.

Compensation for damage as a general principle is an important component of modern international law. In 1927, the Permanent Chamber of International Justice in its decision in the "Chorzow Factory Case" (Germany v. Poland) noted that "it is a principle of international law that a breach of an assumed obligation entails an obligation to compensate for damages... compensation must, as far as possible, eliminate all the consequences of the wrongful act, and restore the state that would probably have existed if this deed was not committed..."[488].

At the same time, such an understanding of this principle, awareness of its role, as well as normative consolidation has come a long way. Although K. Ferstman rightly emphasized that "the right to reparation for victims of international crimes is a well-established though often unimplemented principle of international law"[489], its recognition as applicable to sufferers and victims of international crimes has come a long way.

Thus, in the same period when the Permanent Chamber made a decision in the "Chorzow Factory Case", the famous international

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[488]ChorzowFactoryCase (Germany vs. Poland) :Judgement of Permanent Court of July, 09th, 1927. URL :https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf (requested on 18.08.2022)

[489]Ferstman C. TheReparationRegimeoftheInternationalCriminalCourt: PracticalConsiderations. Leiden Journal of International Law. 2002.Vol. 15. P. 668.

lawyer D. Anzilotti stated that "... the behavior of the state, no matter how much it contradicts international law, can never give rise to the right of an individual for damages..."[490].Only tectonic changes in international law, in particular in the development of its criminal branch, in the XX century – at the beginning of the XXI century allowed to fully talk about its implementation in international legal relations.

The landmark international document in this context was the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly in 1985 and Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law adopted by the UN Commission on Human Rights in 2000. The later were the result of many years of work by famous lawyers – T. Van Boven, S. Bassiuni and L. Jouane, and they predicted the need for "adequate, effective and prompt reparation... proportional to the gravity of the violations and the harm suffere[491]. In fact, these documents contributed most to the recognition of the principle of reparations for victims of international crimes.

The events of the 1990s, when international criminal justice was actively developing, became important in this context. In particular, based on the results of the first years of the ICTY work, its president K. Jorda wrote in his letter to the UN Secretary-General that "in order to bring about reconciliation... and to ensure the restoration of peace, it is necessary that persons who were the victims of crimes... receive compensation for their injuries"[492].

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[490]Анцилотти Д. Курс международного права. М., 1961 Т. 1. С. 412-413.

[491] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the Resolution adopted by the General Assembly on 16 December 2005 №60/147. URL : https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf (requested on 18.08.2022)

[492] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-

A special place in international law is the practice of applying this principle in the course of compensation for damages caused by an armed conflict. In this case, the principle of compensation for damages, as a general principle of international law, is actively applied in relations regulated by the norms of international humanitarian law, the law of international responsibility and international criminal law. The norms of all three branches approach its application from different, but related positions.

Thus, the norms of international humanitarian law (hereinafter – IHL) regulate the conduct of military operations, establish guarantees for the protection of non-combatants, the civilian population, etc. during an armed conflict. Their violation serves as a legal basis for bringing the culprits to justice, including the form of compensation for damages to the victims.

Obviously, the list of such grounds is not exhausted only by violation of IHL norms. These can also be violations of norms on the protection of human rights in the case of crimes against individuals during an armed conflict, international environmental law – in the case of crimes against nature and the environment in connection with military actions, etc.

In the context of the law of international responsibility, compensation for damages is always present in the legal relationship of responsibility under international law, including those related to the consequences of an armed conflict. On the one hand, compensation for damages caused by an offense is one of the purposes of responsibility in international law[493]. On the other hand, compensation (in various forms) is one of the ways of realizing responsibility towards the guilty party.

This approach was established at the stage of formation of this field of international law. In particular, the UN International Law

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ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement(requested on 18.08.2022)

[493] Лукашук И.И. Право международной ответственности : монография. Москва: Волтерс Клувер, 2004. С. 201.

Commission in the Draft Articles on the Responsibility of States for Internationally Illegal Acts defined the content of international legal responsibility as "the consequences that this or that internationally illegal act may have in accordance with the norms of international law in various cases, for example, the consequences of an act in a plan for reparations and sanctions in response".[494]

Finally, international criminal law aims to prosecute physical persons (individuals) who are guilty of committing international crimes, including during armed conflicts. As M. Oberg rightly points out, "indictments against such persons can both provide compensation for victims, and serve as a legal basis for them to receive compensation in another way».[495]

A practical example of such an interdisciplinary application of the principle of compensation for damages is that the responsibility under international law in the form of compensation for damages caused by international crimes committed during an armed conflict should be born not only by the persons who committed them, but also by the states on whose behalf they acted. According to H. Verle, this is due to the fact that the concepts of international crimes and international illegal acts very often coincide. Therefore, serious violations of IHL norms due to such a "dual nature" of obligations give rise to both state responsibility and individual responsibility according to a criminal law[496].

Such intersectorality was one of the counter-arguments against giving international criminal justice bodies the power to award damages. K. Ferstman points out that during the development of the Rome Statute of the ICC, fears were expressed

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[494] Yearbook of the International Law Commission 1984. Vol. II, Pt. II. New York : United Nations, 1985. P. 100.

[495] Åberg M. The Reparations Regime of the International Criminal Court : Reparations or General Assistance? URL : https://www.diva-portal.org/smash/get/diva2:801293/ FULLTEXT01.pdf(requested at 18.08.2022)

[496] Верле Г. Принципы международного уголовного права : учебник ; пер. с англ. С. В. Саяпина. О. :Фенікс; М. : ТрансЛит, 2011. С. 55.

that the application of the principle of compensation for damages would give the Court powers over states as well: «was also concern that the introduction of reparations provisions would somehow invoke principles of State responsibility, when the Court had a clear focus on individual responsibility»[497]. In turn, K. Muttukumaru mentioned that «a significant number of delegations were not prepared to accept the notion of State responsibility to, or in respect of victims»[498].

Fortunately, these concerns did not prevent the principle of compensation in the Rome Statute, although not directly in the form of an opportunity to oblige the state to eliminate harmful consequences for the actions of its citizens or authorized persons by indemnification of losses. At the same time, even such a formula is quite significant – as C. Muttukumaru wrote «this refusal does not diminish any responsibilities assumed by States under other treaties and will not – self-evidently, prevent the Court from making its attitude known through its judgments in respect of State complicity in a crime»[499]. In our opinion, such an approach is also effective in applying the principle of indemnity.

Applying the principle of indemnity in the process of bringing to justice in the international criminal process can be both an independent goal and act as one of the elements. For instance, G. Werle notes that the compensation of damages can be both an addition to criminal prosecution and considered as an event, which is used instead of its, so-called "alternative way of dealing with past events", along with criminal prosecution or rejection of the past, the

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[497]Ferstman C. TheReparationRegimeoftheInternationalCriminalCourt: PracticalConsiderations. Leiden Journal of International Law. 2002.Vol. 15. P. 671.

[498]Muttukumaru C., Reparationsto Victims. *The International Criminal Court The Makingof the RomeStatute: Issues, Negotiations, Results.* in R.S. Lee (Ed.). TheHague :MartinusNijhoffPublishers, 1999. P. 264.

[499] Muttukumaru C., Reparations to Victims. *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results.* in R.S. Lee (Ed.). The Hague : Martinus Nijhoff Publishers, 1999. P. 267.

establishment of truth and application of sanctions[500].

In the modern international criminal process damage compensation is an addition to the process of criminal prosecution. To confirm this G. Werle notes that the International Criminal Court hearing on claiming damages is an independent stage of the process, which follows the indictment, and the Secretary of the Court has the authority to inform victims, even those who have not participated in the process before so that they can declare their own interests[501].

In addition, in line with the interindustry, the application of the principle of indemnity in international criminal law practice has its specificity in light of its beneficiaries. If, in the case of international responsibility, such is the most common case of states as a whole, then in the case of international criminal law, such are natural persons. This is important not only in the theoretical context but also in the choice of forms of compensation and its goals.

In practice, international criminal justice can provide both material and intangible forms of compensation. Famous German specialist in international criminal law G. Werle allocates material forms of compensation – indemnity, restitution, confiscation, and intangible – moral and judicial rehabilitation[502]. Another researcher, C. Ferstman, mentioning about compensation and restitution as material forms, rehabilitation, satisfaction, and guarantees of uniqueness as non-material forms of compensation[503]. This classification coincides with the one contained in the subject of the Draft articles on Responsibility of

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[500] Верле Г. Принципы международного уголовного права : учебник ; пер. с англ. С. В. Саяпина. О. :Фенікс; М. : ТрансЛит, 2011. С. 100.

[501] Верле Г. Принципы международного уголовного права : учебник ; пер. с англ. С. В. Саяпина. О. :Фенікс; М. : ТрансЛит, 2011. С. 125.

[502] Верле Г. Принципы международного уголовного права : учебник ; пер. с англ. С. В. Саяпина. О. :Фенікс; М. : ТрансЛит, 2011. С. 103.

[503] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 668.

States for Internationally Wrongful Acts (2001), which once again proves the interbranch nature of the application of this principle.

As mentioned above, the specific nature of the damage caused by international crimes determines the special importance of non-material forms of compensation. G. Werle noted on this occasion that "the development of various forms of moral and judicial rehabilitation is also important"[504]. A similar opinion was expressed by C. Ferstman: «Reparation is as much about the restoration of dignity and the acknowledgement of the harm suffered, as it is about monetary compensation or restitution»[505]. Therefore, the inability sometimes to provide the material compensation itself, which we will talk about below, should not devalue the importance of the relevant decisions of the bodies of international criminal justice as a whole.

For example, D. Shelton analyzes the practice of the UN International Court of Justice on interpretation and application of the principle of indemnity, in which this body refers to the already mentioned decision of the Permanent Chamber of International Justice "About the factory in Khozhuv". He concludes that the priority approach of the Court is to restore the situation that should have existed if the violation had not occurred, that is, in fact, restitution[506]. Pablo de Greiff notes that the same understanding exists in the European and Inter-American human rights protection systems, where compensation should provide for the restoration of the status quo ante[507].

However, in the case of international crimes, victims often

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[504] Верле Г. Принципы международного уголовного права : учебник ; пер. с англ. С. В. Саяпина. О. :Фенікс; М. : ТрансЛит, 2011. С 103

[505] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 668.

[506] Shelton D. Remedies in international human rights law. Oxford: Oxford University Press, 2005. P. 92.

[507] Shelton D. Remedies in international human rights law. Oxford: Oxford University Press, 2005. P. 92.

become individuals, it is very often impossible to ensure the realization of the principle of indemnity in the form of restitution. It is unattainable to return a person's life or to turn off rape or skating. J.D. Watkins speaks in this regard of the "fundamental paradox inherent in any discussion of reparations" because "it is impossible to return the victim of any serious human rights violation to the status quo ante"[508]. In this connection, as we will see below, other approaches to the forms of compensation of losses and its forms – both material and intangible – are applied in the practice of international criminal law.

The increased role of non-material forms is also determined by the fact that in international criminal law, in principle, discussions have been held whether the bodies of international criminal justice should consider the issue of compensation and apasculate it. Thus, the President of the International Criminal Tribunal for the former Yugoslavia in 1999-2002 Claude Jorda argued that granting the Tribunal broad powers of compensation «run counter to its principal objective of prosecuting those responsible for the crimes in the former Yugoslavia» and offered, instead, «consider that the question of compensation of the victims of those crimes should be brought to the attention of the Security Council in order that the Council, or some other organ to which it might refer the matter, might consider possible mechanisms for the payment of compensation, such as the creation of an international compensation commission»[509].

Later, considerable doubts were expressed in elaborating the Rome Statute of the International Criminal Court. C. Muttukumaru and C. Ferstman such doubts highlighted the question of whether the solution to the issue of compensation of losses will be compatible with

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[508] Watkins J. L. The Right to Reparations in International Human Rights law and the Case of Bahrain, Brooklyn Journal of International Law. 2009, Vol. 34. P. 572.

[509] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

the primary purpose of the International Criminal Court – bringing the guilty to justice, difficulties arising from the unity of approach to the form and volume of compensation, inability to fulfill the decision on compensation due to lack of property in the guilty and others[510].

In our opinion, most of these nuances are technical and effectively resolved in the practice of international criminal justice, which we will speak about below. It is worth considering the first one – how the principle of indemnity fits within the limits of bringing the guilty in international crimes to criminal responsibility under international law.

There are no contradictions here, if we recognize that it is justice for the victims of international crimes that is the global goal of international justice as a whole. Justice cannot be considered achieved only when the perpetrator is held accountable, but also when the harmful consequences for the victim have been removed. As Ferstman rightly asserts «Of course, the pain does not go away. But if you are a victim and receive financial support… then that's already a real bonus»[511].

Confirmation of this thesis is contained in the practice of the ICC, in particular in the decision on compensation in the case «The Prosecutor v. Thomas Lubanga Dyilo» it was stated that «the purpose of the reparation proceedings is to oblige those responsible for grave crimes to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts»[512].

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[510] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 670-671.; Muttukumaru C., Reparations to Victims. *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results.* in R.S. Lee (Ed.). The Hague : Martinus Nijhoff Publishers, 1999. Pp. 262-264.

[511] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 672

[512] The Prosecutor v. Thomas Lubanga Dyilo : Order for Reparations of 03 March 2015. URL : https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2015_02633.PDF (requested on 18.08.2022).

At the same time, as we will repeatedly draw attention to below, the property capacity of compensation is not a key factor – intangible forms of compensation play an equally important role in establishing justice using the tools of international criminal law. Therefore, the principle of indemnity for damages is an integral element of the system of principles on which modern international criminal justice is built.

II. CONSOLIDATION OF THE PRINCIPLE OF INDEMNITY IN THE CONSTITUTIONAL DOCUMENTS OF INTERNATIONAL CRIMINAL JUSTICE BODIES

Normative consolidation of the principle of indemnity in international criminal law has gone a long way, and its perception as necessary was formed only recently. For example, relevant provisions were not included in the founding documents of the Nuremberg and Tokyo tribunals and treaties that were adopted in the first decades after the Second World War.

In this regard, the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which contained provisions on «When genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations»[513]. Although these provisions were not included in the final text of the Convention, they proved that the issue of compensation for damages caused by international crimes is on the agenda of international law.

Subsequently, with the institutional development of international criminal justice, the relevant provisions on compensation for damages were enshrined in the founding documents of international criminal courts and tribunals, both created ad hoc and hybrid (internationalized)

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513 Draft Convention on the Crime of Genocide. URL : https://digitallibrary.un.org/record/611058 (requested on 18.08.2022).

in the 1990s-2000s. The importance of the issue of compensatory damages in their case was also discussed in UN decisions on this matter, for example, UN Security Council Resolution No. 827 (1993) of May 25, 1993, which initiated the movement towards the creation of the International Criminal Tribunal for the former Yugoslavia, provided that «the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law»[514].

However, in the future, when they were created as institutions, the principle of indemnity was reflected in their founding acts in a rather limited scope. C. Jorda, president of the International Criminal Tribunal for the former Yugoslavia, wrote in this connection about "the relative silence of the Statutes of the ad hoc Tribunals on compensation and participation issues". However, at the same time, the experts directly recognized that "victims of crimes within the Tribunal's jurisdiction have a legal right to seek compensation for their injuries"[515].

For example, the Statute of the International Criminal Tribunal for the former Yugoslavia did not provide this body with official powers to consider issues of reparation and award compensation to victims of international crimes. However, the founding documents provided for the right of the Tribunal to take measures to ensure the right of victims to compensation. Thus, the Rules of Procedure and Evidence of the ICTY contained Rule 106 "Compensation to Victims", which provided for:

- transmission to the competent authorities of the States

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[514] Resolution №827 of May 1993 adopted by the Security Council at its 3217th meeting, on 25 May 1993. URL : https://digitallibrary.un.org/record/166567/files/S_RES_827%281993%29-EN.pdf (requested on 18.08.2022)

[515] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

concerned the judgment finding the accused guilty of a crime which has caused injury to a victim.;

- pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.;

- judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury[516].

Similar provisions were previously included in the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (hereinafter – ICTR)[517] and Special Tribunal for Lebanon (hereinafter – STL)[518], Special Court for Sierra Leone (hereinafter – SCSL)[519]. In Rule 23 quinquies Rules of Procedure and Evidence of The Extraordinary Chambers in the Courts of Cambodia (hereinafter – ECCC), only the award of "collective and moral compensation" was allowed, excluding its award in monetary form[520].

Separately, although limited, the issue of restitution was regulated, but only in the case when it was about property that was illegally appropriated or taken from victims. Thus, Art. 24 of the Statute of the International Criminal Tribunal for the former

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[516] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia. URL : https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (requested on 18.08.2022)

[517] Rules of Procedure and Evidence of the International Criminal Tribunal for the Rwanda. URL : www.hrlibrary.umn.edu/africa/RWANDA1.htm (requested on 18.08.2022)

[518] Rules of Procedure and Evidence of the Special Tribunal for Lebanon, URL :https://www.stl-tsl.org/sites/default/files/documents/legal-documents/RPE/RPE-Rev11-Dec-2020-EN-online.pdf (requested on 18.08.2022)

[519] Rules of Procedure and Evidence of The Residual Special Court for Sierra Leone. URL : www.rscsl.org/Documents/RSCSL-Rules.pdf (requested on 18.08.2022)

[520] Rules of Procedure and Evidence of The Extraordinary Chambers in the Courts of Cambodia https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf (requested on 18.08.2022).

Yugoslavia and Art. 23 of the ICTR Statute contained the same wording «the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners»[521].

Therefore, the content of the principle of indemnity, which was enshrined in the founding documents of these bodies, was quite limited in nature. Nonetheless, even this understanding was quite important, because although the decisions of these bodies did not directly award compensation, they could serve as a basis for obtaining compensation in another way.

However, international lawyers were skeptical of such a format, noting that «there was no true precedent in international criminal tribunals to draw upon» before the adoption of the Rome Statute in 1998[522]. And some researchers, in particular V. Morris and M. Scharf, in principle asserted that the ICTY was not empowered to award compensation (the similarity of the provisions allows this conclusion to be extended to the ICTR as well)[523].

It should be agreed that, in fact, significant progress in international criminal law practice in this area took place only with the creation of the International Criminal Court and the development and adoption of its founding act. However, the path to enshrining this principle in this case and granting the ICC the right to award reparations was not easy either. C. Ferstman notes that during the

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[521] Statute of the International Criminal Tribunal for the former Yugoslavia. URL : https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (requested on 18.08.2022); Statute of the International Criminal Tribunal for Rwanda. URL : https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons (requested on 18.08.2022).

[522] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 670.

[523] Morris V., Scharf M. Get a Copy Find a copy in the library An insider's guide to the international criminal tribunal for the former Yugoslavia. Irvington-on-Hudson (N.Y.) : Transnational publ., 1995. Pp. 167, 286-287.

development of the Rome Statute, the idea of enshrining provisions on reparations in it met with strong resistance, and the draft of this document provided only that the Court may assign fines to be paid to a special fund under the UN Secretary-General in the interests of victims[524]. We have already discussed some of the reasons for such resistance above.

The Rome Statute of the International Criminal Court contains Art. 75 "Compensation of damages to victims", which provides that "the court shall establish principles regarding compensation of damages to or for victims, including restitution, compensation and rehabilitation"[525]. Although there is no direct reference to the principle of compensation for damages as a general principle of international law, this article also states that the ICC, when making relevant decisions, "declares the principles on the basis of which it acts" and, obviously, in this case it will also be about general principles of law, recognized by civilized nations as a source of international law.

On this basis, the ICC can make a decision to award compensation to the convicts for the damage caused to the victim. In practice, this can take the form of a fine, confiscation of property and profits received as a result of committing a crime[526]. Experts, in particular K. Ferstman, emphasize qualitative changes in approaches to reparations and the potential impact of this consolidation on international justice. In her opinion, "this is a significant departure from previous international criminal tribunals, and one which is likely to have a major impact on the course of justice before the ICC"[527].

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[524] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 670.

[525] Rome Statute of the International Criminal Court. URL : https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (18.08.2022)

[526] Ibid.

[527] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 668.

As we can see, the analysis of the above provisions of the founding documents of both international and internationalized criminal bodies indicates two main approaches to establishing the principle of compensation for damages. In the first case, which has so far been reflected only in the Rome Statute of the ICC, the body of international criminal justice is empowered directly to award reparations. In the case of the ICTY, MTKR and internationalized tribunals (STL, SSSL, NPSK, etc.), these bodies do not establish the fact of the appropriateness of compensation or its amount, but the decisions of these bodies can serve as a basis for compensation in another way, in particular at the national level.

III. PRACTICAL APPROACHES TO THE APPLICATION OF THE PRINCIPLE OF COMPENSATION OF DAMAGES BY BODIES OF INTERNATIONAL CRIMINAL JUSTICE

The question of the practical application of the principle of compensation for damages in international criminal law is quite complex. During the last decades, a significant law-making and law-enforcement practice has appeared, nevertheless, many questions remain unanswered. As noted by the experts in the report that the President of the ICTY K. Jord sent to the UN Secretary-General: "The question then is not so much is there a right to compensation but how can that right be implemented" [528].

As the practice of international criminal justice proves, there is no single approach to the issue of applying the principle of compensation for damages in the issue of paying reparations as a result of armed conflicts. The examples of the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) demonstrate two approaches that are used to solve this issue in the practice of international justice bodies.

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[528] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

Therefore, the decisions of the tribunal served as legal grounds for receiving compensation at the national level for victims of the actions of specific international criminals. At the same time, it was not specified whether such compensation should be carried out at the expense of the property that belonged to the criminals, or whether it should be carried out by the state in another way.

This approach is not perfect, primarily due to the fact that it places victims of the conflict in dependence on national legal systems, very often precisely those that are under the control of the state whose representatives committed international crimes. Besides the obvious risk of bias, there are other problems inherent in the judicial system. For example, K. Del Ponte, who was a prosecutor of both the ICTR and the ICTY, believed that "a civil action taken in a country like Rwanda or anywhere else: it takes a long time and costs a lot of money. Changing things on this front is a tricky business, since it requires changing the legal statutes»[529].

In the end, the imperfection of these approaches was also recognized by the leadership of both international tribunals and bodies, in particular the ICTY and MTR. In particular, the head of the MTR, N. Pillai, spoke in favor of the need to develop appropriate compensation mechanisms. A similar position was supported by the President of the ICTY, K. Jord, who emphasized the inexpediency of making changes to the Tribunal's powers, pointing to the lack of sources for financing the payment of compensation, as well as the fact that this would lead to the extension of the terms of consideration of cases[530].

The ICC uses a different approach – a direct award of compensation. The Rome Statute in the already mentioned Art. 75

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[529] Compensating victims with guilty money, Interview with Carla del Ponte, The Hague, 9 June 2000. Copyright Diplomatie Judiciaire, appearing at http://www.diplomatiejudiciaire.com/ UK/Tpiruk/Prosecutor13.htm.

[530] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

gives the court the right to award compensation and apply to the states that have joined the Statute for a decision at the national level (recovery from the property of the victims) or through payments from the Trust Fund for Victims (Trust Fund for Victims, hereinafter – the Trust Fund)[531]. The award of compensation for damages occurs through the adoption of a court "Decision on compensation" (Reparations Order).

Procedural issues are also partially resolved in Rule 97 of the ICC Rules of Procedure and Evidence. It provides:

- the possibility of awarding compensation on an individualized basis or, where it deems it appropriate, on a collective basis or both;

- and appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations[532].

In addition to decisions, the issue of compensation is the subject of the Court's work at all stages of the proceedings. For example, even at the stage of pre-trial proceedings, according to Art. 57(3)(e). The department of preliminary proceedings can "to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims"[533]. In accordance with Rule 99 of the Rules of Procedure and Evidence of the ICC, this is done at the request of the victims or their legal representatives[534].

The inclusion of this norm in the content of the Rome Statute

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[531] Rome Statute of the International Criminal Court. URL: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (18.08.2022)

[532] Rules of Procedure and Evidence of the International Criminal Court. URL : https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf (requested on 18.08.2022)

[533] Rome Statute of the International Criminal Court. URL : https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (18.08.2022)

[534] Rules of Procedure and Evidence of the International Criminal Court. URL : https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf (requested on 18.08.2022)

also encountered some opposition from the states-parties of the statute. D. Donna-Katten mentioned that the delegates are discussing preventive measures provided for in Art. 57 of the Statute and Rules of procedure, through the prism of the limits of interpretation of the presumption of innocence and the standards of protection of property rights in national legal systems[535]. However, in the end, the relevant provisions were reflected in the content of the founding act of the ISS.

When considering the issue of compensation for damages, the ICC works according to the principle of competition and tries to ensure participation in the consideration of the issue of compensation. According to Art. 75 (3) "the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States"[536]. This was also confirmed in the decision of the ICC regarding reparations, particularly in the case of «Prosecutor against Thomas Lubangi Dilo» , where it was held that «the Chamber must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other»[537].

The provisions of the Rules of Procedure and Evidence regarding the possibility of awarding collective compensation became interesting and important, which became an innovation of international criminal law. In this regard, K. Ferstman noted the revolutionary nature of this provision: «The possibility for the Court to award collective reparations is likely to have significant effect in shaping and developing new jurisprudence on creative

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[535] Donat-Cattin D. Article 75. Commentary on the Rome Statute on the International Criminal Court : observers' notes, article by article / Triffterer O. (edt.). Baden-Baden : Nomos, 1999. P. 966.

[536] Rome Statute of the International Criminal Court. URL : https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (18.08.2022)

[537] The Prosecutor v. Thomas Lubanga Dyilo : Order for Reparations of 03 March 2015. URL : https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2015_02633.PDF (requested on 18.08.2022).

means and mechanisms for reparations», although she noted possible difficulties associated with financing the implementation of decisions on compensation[538].

Subsequently, the International criminal court opened up the issue of collective reparations in its decisions, in particular in the case "Prosecutor against Germaine Katanga". There the Court stated that «group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court», namely compensation «benefit a group, including an ethnic, racial, social, political or religious group which predated the crime»[539].

Obviously, the amount of legal regulation in this case is insufficient, which is also noted in the international legal doctrine. According to K. Ferstman, «article 75 of the [Rome] Statute... is of only limited guidance... Rules of Procedure and Evidence are equally broad»[540]. However, compared to the above international criminal provisions of the statutes of international ad hoc criminal tribunals and internationalized tribunals, its content is a tectonic progress.

In addition, the previous experience was also taken into account, in particular the work of the International Criminal Tribunal for the former Yugoslavia and MTR. Yes, the creation of a Trust Fund can be considered one of these considerations. Even the President of the MTR N. Pillay, pointing out the shortcomings of the compensation mechanism within the framework of the Tribunal, offered «the establishment of a trust fund for victims, to be run by

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[538] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 675,

[539] The Prosecutor v. Germain Katanga : Order for Reparations of 24 March 2017. URL : https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_05121.PDF (requested on 18.08.2022).

[540] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 669-670,

the United Nations or another governmental body»[541].

During the entire period of activity of the International criminal court, four decisions on compensation were adopted, the last of which was in the case "Prosecutor against Bosco Ntaganda". By decision in this case dated March 8, 2021, the International criminal court awarded compensation in the amount of 30 million dollars to the victims of Ntaganda's actions.[542].

Compensation for damages by persons found guilty of war crimes faces the problem of whether or not they have the necessary funds. Persons convicted of such crimes often do not have sufficient assets to cover the damages to victims.

For example, the already mentioned B. Ntaganda, who was the field commander of the "National Congress of People's Defense" group, officially owned insignificant property, so the ICC recognized him as "materially unable" to fulfill the compensation decision. Therefore, the court decided to continue the search for his assets, as well as prepare a compensation plan and make compensation payments from the funds of the Trust Fund[543].

The operation of the Trust Fund provides a certain guarantee of reimbursement, yet it has limited resources. The Rome Statute in Art. 79 provides that the fund is formed both from voluntary contributions and from funds collected by the ICC as fines or compensations. Therefore, payment of compensation for damages in full or in a reasonable time may run into serious problems.

The practice of other bodies of international criminal justice proves the existence of these challenges. For example, in the case of the MTR, experts noted that as of 2001, "its practically impossible"

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[541] Letter of 14 December 2000 of the UN Secretary-General, addressed to the President of the Security Council, UN Doc. S/2000/1198 (15 December 2000).

[542] The Prosecutor v. Bosco Ntaganda : Reparations Order of 08 March 2021. URL : https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01889.PDF (requested on 18.08.2022).

[543] Ibid.

to pay compensation to 4,000 Rwandans who were awarded compensation in the amount of about 100 million dollars during 1997-2001[544].

The International Criminal Tribunal for the former Yugoslavia had similar problems. The issue of compensation faced reluctance and resistance from Serbia, the legal successor of the former Yugoslavia (Union Republic of Yugoslavia until 2003, Republic of Serbia and Montenegro until 2006). Serbia's leaders argued that full-scale restitution and compensation could take too much time, money and cause outbursts of discontent. After all, such "sabotage" at the national level was foreseen at the very first stages of the ICTY's activities. Thus, in the report of the group of experts, which the President of the ICTY, K. Jorda, sent to the UN Secretary-General in 2011, it was suggested that when transferring the decisions of the Tribunal for implementation at the national level, "this approach appears unlikely to produce substantial results in the near future" [545].

Other problems arose in the context of reparations for victims, in particular with establishing the valid citizenship of persons found guilty by the tribunal and determining the state that should make reparations for their actions, in the event that reparations were requested to be imposed on it. These challenges are confirmed by the practice of international legal relations.

In particular, in the decision of the International Court of Justice of the United Nations in the case "On the Application of the Convention on the Prevention of the Crime of Genocide" (Bosnia and Herzegovina v. Yugoslavia) dated July 11, 1996, the Court ruled

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[544] International Criminal Tribunal for Rwands : Justice Delayed. International Crisis Group Africa Report N° 30. URL : https://d2071andvip0wj.cloudfront.net/30-international-criminal-tribunal-for-rwanda-justice-delayed.pdf (18.08.2022)

[545] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

that the extermination of a certain group of persons will entail the criminal prosecution of the guilty persons, as well and the obligation of the state to pay them compensation.[546]. Subsequently, the Court confirmed this concept of "dual responsibility" of individuals and states for serious violations of international law in the decision in the case "On the Application of the Convention on the Prevention of the Crime of Genocide" (Bosnia and Herzegovina v. Serbia) of February 26, 2007 [547].

At the same time, the application of the principle of damages in this way is not automatic. Thus, in the same decision of the IC UN on February 26, 2007, Bosnia and Herzegovina's demands for compensation were rejected due to the fact that it was not proven that the crime of genocide was committed by the authorities of Yugoslavia (Serbia and Montenegro) or at the direction of its government.[548].

In addition to "dual liability", existing approaches to the application of the principle of compensation for damages face several other challenges, especially in terms of their implementation. This is true both for decisions of international ad hoc tribunals and internationalized tribunals, and for decisions on the compensation of the ICC, in the event that compensation will be carried out not at the expense of the Trust Fund, but at the national level. K. Ferstman singles out three main problems that remain open in this case:

- how national jurisdictions will enforce the reparations orders of the ICC;
- it is not clear how national courts will deal with competing claims for assets and whether will they prioritize orders emanating from the ICC;
- the extent to which the ICC will inquire into the adequacy or

[546] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, 1. C. J. Reports 1996, para 13.
[547] Ibid., para 172.
[548] Ibid., para 386.

effectiveness of domestic reparations regimes, where they exist[549].

It should also be borne in mind that the Trust Fund mechanism is not a one-size-fits-all solution. The key problem that experts, in particular K. Ferstman, drew attention to at the very beginning of the ICC activity is that the Foundation «It is clear, however, that the Fund will be under-resourced… and the demands for funds will be far greater than what could feasibly be supplied». To address the challenges of funding restitution decisions at the national level, some states, such as Canada or the United Kingdom, create similar funds at the national level [550].

These challenges are especially relevant in the case of armed conflicts, in particular in cases where the guilty party to the conflict or the persons found guilty refuse to admit guilt and make restitution voluntarily. Of course, in the practice of international legal relations there are cases when the guilty party agreed to voluntarily make restitution, for example in the case of Iraq after its invasion of Kuwait.

However, situations of refusal to implement such decisions by the guilty party are more common, which blocks the possibility of implementing such decisions at the national level. Ukraine will very likely face the same challenges: the Russian Federation will most likely continue to cynically deny its guilt, as well as the guilt of those who acted on its behalf and under its control. This makes the possibility of compensating damages based on the decisions of the International Court of Justice or other bodies in Russia almost impossible in the short and medium term.

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[549] Ferstman C. The Reparation Regime of the International Criminal Court: Practical Considerations. Leiden Journal of International Law. 2002. Vol. 15. P. 670,

[550] Ibid., P. 685,

IV. LESSONS REGARDING COMPENSATION OF WAR DAMAGE TO UKRAINE CAUSED BY RUSSIAN AGGRESSION

The experience of awarding compensation to victims of international crimes, which has the ICC, ICTY, MTR, etc. can be valuable for Ukraine, in particular, to prevent challenges arising from the implementation of the decisions of these bodies of international justice. At present, it is unlikely that high-ranking officials and military personnel of the Russian Federation, who even officially own assets sufficient for compensation, will be convicted of international crimes committed in the course of Russian aggression. It is also very doubtful that Russia will contribute to the implementation of these decisions.

The issue of the reality of financing reparations decisions should be one of the key indicators when deciding whether to empower a special tribunal for the crime of aggression, the creation of which is currently being debated, or a separate mechanism for reparations. As the experts rightly noted in the report sent by the President of the ICTY K. Jorda to the UN Secretary-General, «a system that purported to award compensation but failed to ensure that victims would be compensated would not be acceptable»[551].

Therefore, in the Ukrainian government's strategies for the development and implementation of the war damage compensation mechanism, it is necessary to include proposals on ways to ensure material compensation for damages awarded by international criminal justice bodies. One of these methods may be the transfer of part of the frozen Russian assets to the Trust Fund at the International Criminal Court specifically to compensate the victims of Russian international crimes in Ukraine.

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[551] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council. URL : https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement (requested on 18.08.2022)

The same approach – indemnification loss at the expense of the frozen assets of the Russian Federation in Ukraine – should be applied in case of the creation of a special international tribunal regarding the crime of aggression of the Russian Federation against Ukraine. If he will have the power to punish in the form of compensation, execution such decisions should be entrusted to a special fund under this body, following the example of the ICC Trust Fund.

In addition, even if the issue of bringing the perpetrators to justice and compensating the victims of the Russian aggression against Ukraine will be delimited, this does not mean that the relevant powers of the International Criminal Court or other bodies will not be relevant for compensation. These decisions will also serve as a legal basis for obtaining compensation within the framework of other created compensation mechanisms if the fact of the crime and the right to compensation is proven. Among such mechanisms may be the creation of an international commission in the case of compensation for damages to Ukraine, and the authority of the decisions of such a body should be indisputable.

After all, experts who analyzed the practice of the ICTY in this direction also spoke about demarcation as an effective means of providing compensation to victims of international crimes. They expressed the opinion that a much more appropriate approach would be the establishment of an international commission for the review of claims: «a better approach would be for an international claims commission to be established… in principle a commission provides a much fairer and expeditious method of providing a measure of restorative justice to the victims of the wars»[552].

Taking into account the experience of the International Criminal Court, ICTY etc. enables Ukraine to warn of other problems that may arise in the course of compensation for damages, in particular: investigation and implementation of justice in Ukraine regarding international crimes, the problem of assigning

[552] Ibid.

crimes committed by members of terrorist organizations L/DNR to the Russian Federation, etc. As far as is known from public sources, the relevant working groups created by the President and the Cabinet of Ministers of Ukraine are actively studying international experience, including those of these bodies, which gives hope that the mentioned approaches will be taken into account in the future.

CONCLUSIONS

The principle of compensation for damages, although the process of forming its content in international criminal law continues, occupies a prominent place in the system of principles of this field of international law. The practice of the bodies of international justice shows that compensation is an inseparable element of establishing justice for the victims of international crimes, next to the punishment of those guilty of their commission. And in this context, the role of not only material, but also non-material forms of compensation is important.

The recognition of this principle in international criminal law did not happen immediately, but was the result of a long process. If the founding acts of the Tokyo and Nuremberg tribunals did not contain provisions on compensation at all, and in the founding acts of the tribunals regarding Yugoslavia, Rwanda, etc. it was only partially enshrined, then the Rome Statute of the International Criminal Court enshrined the relevant powers, which became, in fact, the final recognition of this principle.

The practice of the International Criminal Court, ICTY, International Association of Workers indicates two main approaches that these bodies use to compensate victims of international crimes. In the first case, the MTCS and IAW did not award compensation directly, and they decided to serve as a basis for awarding compensation at the national level. In turn, the ICC can award compensation and determine its amount directly.

A key issue, in this case, is the enforcement of damages awards. It is also relevant for Ukraine when convicting those guilty of international crimes committed in the course of Russian aggression

and providing compensation to their victims. Taking into account the experience and practice of the International Criminal Court, ICTY, International Association of Workers will allow Ukraine to more effectively punish the guilty and restore the violated rights of international crimes victims, including in terms of compensation for damages. This is also important because, along with the ICC, it is planned to create separate international legal mechanisms for sentencing and awarding damages.

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JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT DURING THE WAR OF THE RUSSIAN FEDERATION AGAINST UKRAINE

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INTRODUCTION

The current stage of the development of international justice is associated with the International Criminal Court (hereinafter referred to as the ICC), which is the first permanent international body that prosecutes not a state, but a specific natural person, a specific individual. The ICC, whose jurisdiction is established by the Rome Statute, is determined by an international court created on a contractual basis to end impunity for numerous serious crimes committed in the 21st century. The main task of the Rome Statute of the ICC is to ensure the legal basis for prosecuting individuals, regardless of their official position, who are guilty of committing the most serious international crimes. The ICC can apply general principles of law, as well as principles and rules of law, which have been interpreted in its previous decisions. Namely, as we can see, the "Elements of crimes" of genocide, crimes against humanity and war crimes, over which the ICC has jurisdiction, are singled out as a separate source of law applied by the ICC. According to Art. 9 of the Rome Statute "Elements of crimes" should assist the Court in the interpretation and application of Articles 6, 7, 8 of the Statute of the ICC, which relate to the specified crimes.[553]

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I. THE MAIN TASK OF THE ROME STATUTE OF THE ICC

The Rome Statute defines all the crimes prosecuted by the ICC, for example, genocide occurs when acts are "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group". This very definition of genocide is based on the definition found in the Convention on the Prevention of the Crime of Genocide[554] adopted by the United Nations in 1948 and defines the punishment for it. Thus, to Art. 5 of the Rome Statute, the court exercises jurisdiction over such crimes as genocide, crimes against humanity, war crimes, and the crime of aggression.[555] Consequently, the jurisdiction of the ICC was defined by the Rome Statute of 1998, which entered into force on July 1, 2002, and it extends to states (within their territory and their citizens) that have ratified the Rome Statute, as well as to states that have not ratified the Statute, but made statements about recognizing the jurisdiction of the ICC in relation to a particular crime in accordance with Art. 12 of the Statute.

According to the German scientist G. Wehrle, "today, the Statute of the ICC is the central document of international criminal law. It laid the legal foundation of the ICC and established a new type of procedural law for it. Also, this statute became an important stage in the development of substantive international criminal law. In Art. 5 four "key" crimes of international criminal law are shown – the "classic" Nuremberg definitions, as well as the "crime of genocide".[556]He claims that "the most innovative impact of the Statute of the ICC is on the general principles of international criminal law. While the documents that preceded the Statute contained only individual provisions, the ICC Statute became the first document to contain a system of rules relating

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[555] Rome Statute of the International Criminal Court [Електроннийресурс]. – Режимдоступу: http://www. webcitation. org/66vwVRVSf.

[556] Верле Г. Принципы международного уголовного права: учебник / пер. с англ. С.В. Саяпина. О.: Фенікс; М.: ТрансЛит, 2011. С. 33.

to the "general principles" of international criminal law".[557]But at the same time, the Statute of the ICC is considered to be the most complete source of international criminal law, the preamble of which confirms the principles listed in the UN Charter. Article 5 (1) (d) provides that the ICC has jurisdiction over all serious international crimes, including the crime of aggression. The Rome Statute of the ICC is aimed at strengthening the rule of law in international relations, requiring individuals who have violated their obligations towards the international community to be brought before an independent international judicial institution and bear responsibility for their actions.

As of September 2019, 155 states have signed the Rome Statute, but 122 states have ratified it[558]. Ukraine did not ratify the Rome Statute, but it recognized the court's jurisdiction and bombarded it with reports about crimes confirmed and committed on our territory by Russia. Ukraine still hesitates to ratify the Rome Statute. However, we believe that it is ratification that will allow our country to significantly speed up the work procedures of the ICC.

It is worth agreeing with the opinion of Professor V. Gutnyk, who notes that the motives for the creation of the ICC are outlined in the preamble of the Rome Statute of the ICC. In particular, in the first paragraph of the preamble, attention is drawn to the fact that the member states of this Statute are aware that all peoples are united by common ties and that the interweaving of their cultures forms a common heritage that can be destroyed at any moment. Further, the preamble states that over the past century, millions of children, women, and men have become victims of unimaginable crimes that have deeply shaken humanity, and such heinous crimes threaten the general peace, security and well-being, the crimes committed must not go unpunished, which in turn will contribute

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[557]Там само – С. 33–34.

[558] Rome Statute of the International Criminal Court [Електронний ресурс]. – Режим доступу: https://web.archive.org/web/20160422075501/https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

to preventing similar crimes from being committed in the future[559].Based on this preamble, we can say that the creation of the ICC was preceded by the prevention of new international crimes.

In 2014, the armed conflict in Donetsk and Luhansk regions, among many other problems, presented the Ukrainian legal system with difficult tasks, thesolution of which fell to domestic courts. The fulfilment of obligations that Ukraine has both to its citizens and to the international community as a whole depend on the readiness of judges to correctly understand the application of the provisions of international humanitarian law to the armed conflict in Ukraine, the interpretation of the relevant norms of international law and national legislation and their direct application[560]. So, since 2014, we can legitimately talk about Russia's aggression against Ukraine, which resulted in the aggressive rejection of the Autonomous Republic of Crimea and the city of Sevastopol from Ukraine, as well as the military occupation of certain areas of the Donetsk and Luhansk regions. These actions are a gross violation not only of the norms of national legislation, but also of the principles of international law because they encroach on peaceful relations between states and violate international security.

And on the night of February 24, 2022, V. Putin in his speech "justified" the attack on our state, calling Ukraine "the historical territory of Russia." And he named "denazification" as one of the reasons for the war. In fact, as evidenced by the statements of high-ranking officials of the Russian Federation, we are talking about the expansion of Russian borders and the annexation of part of the

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[559]Гутник В. Міжнародне кримінальне правосуддя: прогрес, регрес чи рух по колу?; Міжнародне право у світі динамічних змін: контури майбутнього міжнародного правопорядку: кол. монографія / наук. ред. В. Репецький, І. Земан, В. Гутник: Львів-Дрогобич, Коло, 2021. С. 301

[560]Гнатовський М.М. Повага до прав людини в умовах збройного конфлікту в Україні. URL: https://newjustice.org.ua/wp-content/uploads/2017/09/Report_Respectfor-HR-in-Conflict_Gnatovsky_UKR.pdf (дата звернення 12.10.2020).

territory of Ukraine. The politicians' public speeches come down to one thing: Russia is reclaiming its own as a restoration of historical justice. Moreover, in the understanding of Putin and the leadership of the Russian Federation, a "Nazi" is someone who identifies himself as a Ukrainian, and therefore "denazification" actually aims to destroy the Ukrainian nation, to kill those who do not agree with the Kremlin's imperial policy. On the eve of a full-scale invasion, the Russian president declared that modern Ukraine was "artificially" created during Soviet times. Thus, early in the morning of February 24, 2022, the head of the aggressor country decided to conduct a "special military operation" on the territory of Ukraine. After that, Russian troops began shelling Kyiv, Kharkiv, Odesa, Mariupol, Dnipro and many other cities. Russian President V. Putin also emphasized that Ukraine was "completely created by Russia," that "there is no Ukraine." This is nothing but a declarationfor the complete destruction of our nation and state. Putin's "denazification" means the physical liquidation of all those who do not recognize Ukraine as part of Russia. And the so-called "demilitarization" involves the destruction not only of the Ukrainian army, but also of the Ukrainian state and all its institutions in general. Together with Russia, Belarus is actually waging a war against Ukraine: missile strikes are carried out on the territory of Ukraine from the border areas, military aircraft sorties are carried out to launch missile and bomb strikes on the territory of Ukraine, and troops are being redeployed and supported.

The Russians are deliberately wiping Ukrainian cities, factories, and infrastructure from the face of the earth. They deliberately aim at hospitals, maternity homes, schools, bomb shelters. Doctors, journalists and rescue workers are being shot at. They deliberately cut off the cities from heating, electricity, water, food, medicine. They shoot civilians trying to save themselves, condemn people to death by starvation. They drop bombs on nuclear plants and chemical plants to cause a man-made disaster. Agricultural machinery is taken and destroyed. Warehouses with food and fuel are being destroyed throughout the country to deprive Ukrainians of their livelihood. The

occupiers arrest, torture, and shoot active citizens, representatives of the intelligence, and priests.

II. JURISDICTIN OF THE ICC OVER THE CRIME OF GENOCIDE

So, to begin with, we will focus on the crime of genocide, since the Convention on the Prevention and Punishment of the Crime of Genocide[561]defines as genocide any of the five acts aimed at the total or partial destruction of a national, racial or religious group, namely: killing members of this group; – inflicting severe physical or mental harm on them;- creation of living conditions designed for its complete or partial destruction;- actions designed to prevent the birth of children in the group environment; – forcible transfer of children of this group to another group. All this is now being done by Russia against the Ukrainian people[562].

The key element in the recognition of genocide is to prove the intention to destroy (totally or partially) a nation, ethnic group, etc. The element of intent to destroy the group is the collective nature of the victim – the destruction of an entire community due to hatred for it. It is important that the crime of genocide cannot be committed by accident.

Z. Tropin, Associate Professor of the Department of International Law at the Institute of International Relations of the Taras Shevchenko National University of Kyiv, points out the presence of elements of the crime of genocide: "The terrible events in Bucha, Irpin and Hostomel (and in Ukraine in general) should be considered and remembered in relation to the purpose of the so-called "special operation » of the RF. The leadership of the

[561]Конвенція про запобігання злочину геноциду та покарання за нього [Електронний ресурс]. – Режим доступу: https://zakon.rada.gov.ua/laws/show/995_155#Text

[562]Звернення Президента України В. Зеленського, 24 лютого 2022 року [Електронний ресурс]. – Режим доступу: https://www.youtube.com/watch?v=AMjfwA4GHoo

aggressor directly noted that this is the so-called "denazification". Considering what has been done, this is a direct call for, planning and directingthe genocide in Ukraine. The logic is simple: we can consider that the events in Bucha, Irpin and Hostomel, plus the purpose of the so-called "special operation" ("denazification"), is the composition of the crime of genocide"[563].

In April, the parliamentarians of Estonia, Latvia and Canada were the first to recognize Russia's actions in Ukraine as genocide. On May 10, the Seimas of Lithuania unanimously recognized Russia as a terrorist state, and on May 11, the Senate of the Czech Republic adopted a resolution recognizing the crimes of the Russian army in Ukraine as genocide of the Ukrainian people.

On April 14, the Verkhovna Rada approved the resolution "On the Commitment of Genocide by the Russian Federation in Ukraine"[564], thus declaring the actions of Russian troops on Ukrainian territory to be genocide. If we talk about what Russia is doing, it is necessary to distinguish genocide from war crimes. It is obvious that genocide is also a war crime, although it may not necessarily happen in times of war. But what is really important? Genocide has the character of extermination of culture. When we talk about the destruction of national identity, then this is an act of genocide. But the most important and most difficult thing in determining the qualification of the crime as an act of genocide is the sufficiency and admissibility of the evidence testifying to the intent to destroy. International justice sets a high threshold for proving this crime. But at least the ICC has jurisdiction to

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[563]Геноцид українців внаслідок російської збройної агресії: від політичних заяв до юридичного визнання [Електронний ресурс]. – Режим доступу: https://yur-gazeta.com/publications/practice/inshe/genocid-ukrayinciv-vnaslidok-rosiyskoyi-zbroynoyi-agresiyi-vid-politichnih-zayav-do-yuridichnogo-viz.html

[564]Про Заяву Верховної Ради України «Про вчинення Російською Федерацією геноциду в Україні» [Електронний ресурс]. – Режим доступу: https://zakon.rada.gov.ua/laws/show/2188-20#Text

investigate this category of crimes.

Therefore, we can conclude that the Russian war is not only a war of aggression, but also a genocidal campaign aimed at the destruction of Ukrainians as a national group; there is also an incitement of hatred towards Ukrainians by Russian state media and officials, which led to genocide in the course of aggression against Ukraine. The goal of Russian military aggression in Ukraine is the systematic and consistent destruction of the Ukrainian people, their identity and deprivation of their right to self-determination and independent development.

III. CRIME AGAINST HUMANITY, A CRIME UNDER THE JURISDICTION OF THE ICC

The next type of crime that falls under the jurisdiction of the ICC and takes place on the territory of Ukraine is a crime against humanity that is "committed as part of a widespread or systematic attack directed against any civilian population". Crimes against humanity, or crimes against the peace and security of humanity, as they are defined in the Rome Statute of the ICC, are part of a large-scale or systematic practice of committing intentional grave 260 crimes against society (otherwise – acts of inhuman behaviour), such as: murder, enslavement, deportation or forcible transfer of population, illegal imprisonment or other cruel deprivation of physical freedom, torture, rape, sexual crimes (sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other forms of sexual violence), persecution of any identifiable group or community on political, racial, national, ethnic, cultural, religious, gender or other grounds recognized as impermissible under international law.[565]In particular, crimes against humanity threaten not only a specific person, but also the environment and the entire human community, because they violate the rules of

[565] Rome Statute of the International Criminal Court [Електроннийресурс]. – Режимдоступу: http://www. webcitation. org/66vwVRVSf.

coexistence. The heinousness of these crimes lies in the fact that they are committed intentionally as "part of a large-scale or systematic attack" directed against any civilian population, in accordance with or in support of a government or organizational policy to carry out such an attack.

As the British Queen's Counsel G. Robertson rightly noted, “crimes against humanity are distinguished both in terms of their immorality and the need for special deterrent measures by the simple fact that it is an act of brutality sanctioned by the state – or at least by an organization that carries out or asserts political power”.[566]

It is worth agreeing with S.O. Torosh's statement that in Ukrainian society, the term "crimes against humanity" is sometimes used to describe this type of crime. However, this is a wrong name, because in the Ukrainian language the word "humanity" characterizes positive human qualities that are inherent in every person, as well as kindness, modesty and decency. Therefore, as a rule, such an attitude manifests itself in the desire to help, love for one's neighbour, respect for him. And mankind is all people on earth, that is, the human community and its coexistence. Therefore, the term "crimes against humanity" should be understood as a separate type of offense.[567]

Crimes against humanity are crimes that harm a person – health, well-being, honour. They are criminal and punishable by law. These are murder, incitement to suicide, beatings, torture, failure to provide assistance to a person in danger, illegal deprivation of liberty, hostage-taking, human trafficking, child exploitation, rape, corruption of minors.

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[566]Джеффрі Робертсон Злочини проти людства: боротьба за правосуддя в усьому світі / Пер. з англ Г.Є. Краснокутського; Наук. ред. О.М. Баймуратов – О.: ОА БАХВА, 2006 – С. 362

[567]Торош С. О. Нормативно-правовий механізм врегулювання злочинів проти людства: історико-правовий аспект / С. О. Торош // Вісник Національного університету «Львівська політехніка». Серія : Юридичні науки. - 2015. - № 827. - С. 258-264.

Therefore, crimes against humanity (mankind) are not a threat to a specific person, but to the human community, the environment, they violate the rules of human coexistence. They are punished not only by the laws of a certain country, but also by international legislation. These are war propaganda, planning and waging war, use of weapons of mass destruction, piracy, desecration of the grave, cruelty to animals, environmental pollution, creation of a criminal organization, banditry, terrorist act.

Crimes against humanity and crimes against mankind are interrelated. Crimes against mankind are simultaneously crimes against humanity, but not all crimes against humanity are simultaneously crimes against all mankind. It is also worth saying that crimes against mankind are theoretically and practically not justified within the framework of the legislation of Ukraine. The Criminal Code of Ukraine has chapter No. XX – crimes against peace, human security and international legal order.[568]

Currently, our state is beginning a difficult and, obviously, long process of investigation and dissemination of true information about what crimes against humanity are actually being committed by militants of the Russian Federation and mercenaries against people – women, children and the civilian population of Ukraine. This information is reported to the Security Service of Ukraine 24 hours a day by eyewitnesses of crimes to the SSU hotline. These testimonies are fully confirmed by the objective data of satellite images, intercepted telephone conversations of militants, SSU counterintelligence materials, confessions of criminals detained and arrested by the decisions of Ukrainian courts. Counterintelligence data indicate that terrorists have introduced inhumane procedures in the territories temporarily controlled by them, which do not correspond to any principles of international law and humanity.

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[568]Кримінальний кодекс України : чинне законодавство зі змінами та допов. станом на 5 серпня 2012 року: (офіц. текст). – К.: ПАЛИВОДА А.В., 2012. – 216 с. – (Кодекси України)

The explosion in the prison in Donetsk region, where about 53 of our prisoners of war of the "Azov" unit died, as Russia claims it, was carried out by the Armed Forces of Ukraine. They do not understand that there are indications of local people and means of objective control that will allow to establish exactly where and how the fire was coming! Perhaps this crime against humanity will give the American government the determination to recognise Russia as a state sponsor of terrorism, and the international justice system – to "catch up" and convict the perpetrators. By and large, we are dealing with another manifestation of "Katynia" – the mass murder of Polish prisoners of war during the Second World War. We believe that today every world leader should understand that the whole world is dealing with Russia – a terrorist state that deliberately and systematically undermines the foundations of civilization as such.

IV. THE ICC'S JURISDICTION OVER WAR CRIMES

Article 8 of the Rome Statute defines war crimes over which the ICC must have jurisdiction if they are committed as part of a plan or policy or as part of a large-scale commission of such crimes. It is these war crimes that are divided into two categories that reflect the historical nature of the subject, namely crimes that may be committed during an armed conflict of an international nature, and crimes that take place during an intra-state armed conflict or of a non-international nature.

Therefore, war crimes are international crimes that grossly violate the laws and customs of warfare. These include premeditated murder; use of poison or poisoned weapons; a deliberate targeted attack on a civilian population that does not directly participate in hostilities; shelling or attack on civilian objects that are not military targets, in particular on civilian settlements, residential premises, cultural values; illegal destruction or appropriation of property, not justified by military necessity; intentionally committing actions that subject the civilian population to starvation as a method of waging war, intentionally creating obstacles to aid; recruitment of children under the age of

fifteen into the armed forces or their use to participate in armed actions; taking hostages; rape etc.

To begin with, it is worth dwelling on the issue of distinguishing military and war crimes. Despite some linguistic consonance of the two words, in the legal sphere they have completely different meanings, and the very concept of "War crime" is a concept purely in the sphere of international law (international humanitarian law) and, accordingly, has a more global and all-encompassing scope, that is, it does not refer to a specific country or groups of countries, but concerns the interests of the whole world. A war crime under the norms of international law is a deliberate violation of the generally accepted customs and rules of war, that is, a violation of the so-called "Laws of War." In other words, this is a violation of the normative prescriptions of international acts that detail the above concepts. The first international legal act in this field was the first Geneva Convention "On the Amelioration of the Fate of the Wounded and Sick in Active Armies"[569], which was signed in 1864 by representatives of 16 European countries. This Convention gave the impetus for the development of all international humanitarian law, and the regulation of the rules of hostilities and, accordingly, the consolidation of the concepts of "Laws of War" and "War Crimes". The Second World War made its adjustments to the system of international law. It became clear that it was necessary not only to establish a list of prohibited actions (which fall under the concepts of "War crime" and "Crimes against peace"), but also to establish mechanisms for bringing the guilty to international criminal responsibility. As a result, Article 6 of the Statute of the International Military Tribunal (the Statute of the Nuremberg Tribunal) listed specific actions that fall within the scope of a war crime, namely, killing, torture or taking into slavery or for other purposes of the

[569]Конвенція про поліпшення долі поранених і хворих у діючих арміях [Електронний ресурс]. – Режим доступу: https://zakon.rada.gov.ua/laws/show/995_151#Text

civilian population of the occupied territory; killing or torturing prisoners of war or persons at sea; killing hostages; robbery of state or private property and others. After that, in 1949, a new set of Geneva Conventions was signed, which entered into force in 1950, and in their provisions the already mentioned criminal offenses were duplicated as "War Crimes". The Rome Statute of the International Criminal Court is the most relevant international act in matters of listing "War Crimes". The relevance of this act lies in the fact that it was able not only to consolidate within itself all the components of "War crimes" that were scattered among many international sources of international humanitarian law, but also to provide an interpretation to each of them, so that there are no different interpretations of these concepts. One of the key points that separates "War Crimes" from other criminal acts is that the existence of an armed conflict is a mandatory condition for their commission.

According to the norms of the Rome Statute, "War crimes" can be committed both during an international armed conflict, that is, between two or more countries, and during an armed conflict that takes place within one state, but without external foreign intervention[570].

That is, if we summarize the information about "War crimes", we can say that they are illegal actions (usually deliberate) that violate the rules, principles and laws of warfare established by mankind, which find their practical consolidation in international legal acts. If we move on to the concept of "Military crime", we can start with the fact that this issue in each country is regulated exclusively by national criminal legislation, because it does not have an international aspect. According to its meaning, the concept of "Military crime" has a purely domestic meaning, that is, these are illegal actions against the accepted (established) order of military service in the state, and all other related concepts in a specific

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570 Rome Statute of the International Criminal Court [Електронний ресурс].–Режим доступу: http://www. webcitation. org/66vwVRVSf.

country. In Ukraine, all components of "Military crimes" are directly provided for in the only source of national criminal law – the Criminal Code,[571], namely in Chapter XIX entitled" Criminal offenses against the established order of military service (Military criminal offenses)". Part 1, p.401 gives the definition of a military crime, which refers to the criminal offenses provided in this chapter against the procedure for carrying out or completing military service established by law, committed by military personnel, as well as conscripts and reservists during military service. The object of these crimes is the procedure for carrying out or completing military service established by the legislation of Ukraine, which is enshrined in the Constitution, military statutes and separate laws. Servicemen of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military formations formed in accordance with the laws of Ukraine, the State Special Service of Transport, the State Service of Special Communications and Information Protection of Ukraine are responsible for the relevant assets of this chapter, as well as other persons defined by law.

That is, according to the legislation of Ukraine, "Military crimes" are only those illegal actions that are directly provided in the Criminal Code, in articles 402-435. An interesting point is the fact that some components of "Military crimes" provided by the Criminal Code have all the characteristics of "War crimes", it means the components of crimes according to the articles 432-434 (looting, violence against the population in areas of hostilities, ill-treatment of prisoners and illegal use of the symbols of the Red Cross, Red Crescent). In my opinion, this issue of legal inconsistency in national legislation needs regulation and legal analysis. In some countries of the world, military-criminal law has some

[571]Кримінальний кодекс України : чинне законодавство зі змінами та допов. станом на 5 серпня 2012 року: (офіц. текст). – К.: ПАЛИВОДА А.В., 2012. – 216 с. – (Кодекси України)

independence, and accordingly has its own sources, which are separated from general normative-criminal law sources, and "Military crimes" will be provided by them. For example, in the USA, the composition of "Military crimes" is provided for in the "Uniform Code of Military Justice" (which has been in effect since 1951), in England – in the "Army Act", in Germany in the Law "On War Crimes". That is, if we summarize everything that was mentioned, we can say that the concepts of "War" and "Military crime" are two different terms, the only common point is that they both represent criminal activity. On the other hand, "War crimes" refer to the violation of general, international legal prescriptions regarding the rules and laws of warfare, while the concept of "Military crime" has a purely domestic character, and has an exclusively local format, which manifests itself in violations of the rules of service in a specific army a specific country in the world.

According to the ICC Statute, "war crimes" mean serious violations of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in armed conflict "when committed as part of a plan or policy or on a large scale." Such prohibited actions include: murder; mutilation, ill-treatment and torture; taking hostages; deliberate targeting of attacks on the civilian population; deliberate attacks on buildings associated with religion, education, art, science or charity, historical monuments or hospitals; looting; rape, sexual slavery, forced pregnancy or any other form of sexual violence; conscription or enrollment of children under 15 in armed forces or groups or using them for active participation in warfare. These principles state that when a combatant consciously uses tactics that will cause disproportionate harm to civilians or the environment, it is a war crime.

Benjamin Ferentz, who served as a prosecutor against Nazi war criminals at the Nuremberg trials, said that the imprisonment of Russian President Vladimir Putin is "very realistic ... emphasizing that he wants to see Putin behind bars as soon as possible." But it seems unlikely that war crimes investigations by international authorities will deter the crimes currently being committed in

Ukraine, whether out of fear of prosecution or in response to national or international opinion. Russia has only half denied the allegations of war crimes, sometimes blaming Ukrainian nationalists for the deaths of civilians. Apparently, Russia deliberately targeted civilians during evacuation along agreed humanitarian corridors.

Russia, which is not a party of the ICC statute, is likely to deny that it (the Court) has any legitimate jurisdiction. The impact of war crimes allegations on public opinion and domestic political pressure on the Russian regime will be suppressed by government censorship, which ensures that information about these allegations remains unknown. Western news sources are blocked. Although more and more Russians disapprove of the war, they risk being severely punished for speaking out, and support for the war guided by media propaganda is also strong. Lawmakers have amended the Criminal Code to make spreading of "fake" information a crime that has to be punished by a fine or up to 15 years of prison sentence, in fact it is banning of independent journalism.

International law provides not only individual, but also team responsibility for war crimes. Therefore, the commander of a military unit is responsible for the violation of the norms of international humanitarian law done by his subordinates in those cases when he had information about the possibility of committing offenses by them, but did not make efforts to stop or prevent them. Thus, responsibility for the commission of war crimes also to be heldby the highest military leadership, up to the Supreme Commander-in-Chief. In the Criminal Code of Ukraine[572] there is article 438, which provides for "Violation of the laws and customs of war" – cruel treatment of war prisoners or the civilian population, expulsion of the civilian population for forced labor, looting of national values in the occupied territory, use of means of

[572] Кримінальний кодекс України : чинне законодавство зі змінами та допов. станом на 5 серпня 2012 року: (офіц. текст). – К.: ПАЛИВОДА А.В., 2012. – 216 с. – (Кодекси України)

warfare prohibited by international law, other violations of the laws and customs of war provided by international treaties, the binding consent of which has been given by the Verkhovna Rada of Ukraine, as well as giving an order to commit such actions. Note that the law itself does not mention which of the parties to the conflict violates the laws and customs of war. That is, if, relatively speaking, the looting, violence and killing of civilians in the territories where hostilities were ongoing, were not committed by the Russian occupiers, but by the Ukrainian military, their actions would be interpreted as a war crime in the same way.

V. THE CRIME OF AGGRESSION

The crime of aggression is a separate crime, different in nature from war crimes, crimes against humanity and genocide. The crime of aggression includes the planning, preparation, initiation or implementation of an act of aggression, which by virtue of its nature, seriousness and scale is a gross violation of the UN Charter, by a person who is actually in charge, leads or controls the political or military actions of the state. Thus, not just ordinary executors of military orders, but the higher military-political leadership of the state can be held responsible for the crime of aggression. In addition, the crime of aggression can cover a wide range of foreign-policy, financial, trade and other decisions and actions that the leadership of the aggressor state takes long before the actual warfare begin.

According to Article 3 "Definition of Aggression", the crime of aggression can be committed in the form of: – an invasion or attack of a military state on the territory of another state or any military occupation, however temporary in nature, resulting from such an invasion or attack, or any forced annexation of the territory of another state or its part; – bombing of other subjects of the state by state's armed forces or the use by the state of any weapons against the territory of another state; – blockade of the ports or coasts of the state by the military forces of another state; – an attack by the state's military forces on land, sea or air forces, or sea and aircraft of another state; – the use of the armed forces of one state located in another state

in agreement with the host state, in violation of the conditions provided in the treaty, or any extension of their (armed forces) stay in the territory upon termination of the treaty; – the action of a state that allows its territory, which it placed at the disposal of another state, to be used by this other state to carry out an act of aggression against a third state; – the expulsion by the state or on behalf of the state of military groups, groups, irregular forces or mercenaries who carry out acts of the use of military force against another state, which are of such a serious nature that it is equivalent to the acts listed above, or its significant participation[573].

Military tribunals in Nuremberg and Tokyo after World War II became precedents for punishment for acts of aggression in international relations. Article 6 (a) of the Nuremberg Tribunal Statute declares that a crime against peace is "to plan, prepare, initiate or wage a war of aggression or a war in violation of international treaties, agreements or assurances, or to participate in a general plan or conspiracy to carry out any of the above acts"[574].

It is worth mentioning that all the authors unequivocally state that aggression is the most dangerous international crime, and in general we absolutely agree. Klaus Kress, a professor of criminal law and international public law at the University of Cologne, in his work "On the Implementation of the ICC's Jurisdiction over the Crime of Aggression" emphasizes that the instructive definition of the crime of aggression is narrow – as narrow as the definition of the crime should be according to international law, and the jurisdictional threshold for a court to have jurisdiction over this offense is high – more than desirable.

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[573] Резолюція Генеральної Асамблеї Організації Об'єднаних Націй 3314 (XXIX) (Визначення агресії) [Електронний ресурс].– Режим доступу: https://documents-ddsny.un.org/doc/RESOLUTION/GEN/NR0/739/16/img/ NR073916.pdf?OpenElement

[574] Важна К. А. Концепція кримінальної відповідальності держави: дис. … кандидата юрид. наук: 12.00.11 / Важна Катерина Анатоліївна. – К., 2013. – С. 123

The ICC is also empowered to prosecute the "crime of aggression," a clear violation of the United Nations Charter. But for the commission of aggression (as well as other international crimes), the ICC can make decisions only in relation to individual people, and cannot accept sanctions against the criminal aggressor-state as a whole[575]. That should happen in our case!

The jurisdiction of the ICC regarding the crime of aggression differs in a number of specific ways from the jurisdiction of other crimes provided by the Rome Statute. Yes, according to Art. ct. 15 bis and 15 ter a special procedure by which the Prosecutor of the ICC can initiate an investigation into the commission of the crime of aggression is established. And the most serious thing is related to the following: if the case was submitted to the Prosecutor of the ICC by the Security Council of the UN, then he/she starts an investigation in the same way as in cases of the occurrence of other crimes under the jurisdiction of the ICC. However, as an exception to such a situation, in order to initiate the investigation proprio motu (lat. «on personal initiative») or an investigation on the direct transfer of rights to the Court by a state itself, the prosecutor has to be sure of existence of proper conditions: firstly, whether the decision of the UN Security Council regarding the implementation of the act of aggression has been passed (in accordance with the provisions of Article 39 of the Charter of the UN), and if not, the Prosecutor must wait for the expiration of the six-month period[576]; secondly, whether the question of the implementation of

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[575] Rome Statute of the International Criminal Court, 17 july 1998 [Electronic resource] // The official site of the International Criminal Court. – Access mode : http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7- 9CDC7CF02886/283503/RomeStatutEng1.pdf У пункті 1 статті 8 bis Статуту вказується, що для цілей Статуту «злочин агресії» означає «планування, підготовку, ініціювання або здійснення особою, яка здатна фактично реалізовувати керівництво чи контроль за політичними або воєнними діями держави, акта агресії»

[576] Устав Организации Объединённых Наций, Сан-Франциско, 24 октября 1945 г.: [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_010

the act of aggression concerns the participating states of the Rome Statute, which did not make a reservation regarding the non-recognition of the Court's jurisdiction over the crime of aggression; thirdly, whether the Pre-Trial Chamber of the Court sanctioned the initiation of such an investigation.

As I. V. Kasyniuk rightly points out, the most controversial point related to the jurisdiction of the ICC regarding the crime of aggression was the question of the participation of the UN Security Council. The authority of the Security Council to transfer cases of individual criminal responsibility to the ICC "is a guarantee that high-ranking statesmen will not be able to escape responsibility for the crimes they committed against their people, even if their state does not ratify the Statute of the ICC."[577]

Currently, there are two most serious limitations in establishing the jurisdiction of the ICC over the crime of aggression at the request of the state, namely: – the court cannot exercise its jurisdiction over the crime of aggression committed by citizens of a state that is not a party to the Rome Statute, or committed on the territory of such a state (para. 5 of Article 15-bis); – the court does not have jurisdiction over the crime of aggression, despite the fact that the crime was committed by citizens of a state that is a party to the Rome Statute, but this state itself has declared its non-recognition of such jurisdiction (clause 4 of article 15-bis). Therefore, it is worth saying that the International Criminal Court will not be able to bring to justice for the crime of aggression neither the leadership of the aggressor state, nor the executors of the orders, nor the Russian military![578]

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[577] Касинюк І. В. Сучасні проблеми міжнародно-правового регулювання кримінальної відповідальності за злочин агресії / І. В. Касинюк // Науковий вісник Ужгородського національного університету: Серія «Право». – Т. 2. – Вип. 38. – С. 151–152.

[578] Плахотнюк Н.В., Іржова М.А. Юрисдикція Міжнародного кримінального суду щодо злочину агресії / Н.В. Плахотнюк, М.А. Іржова // Часопис Київського університету права, 2020/3 – С. 376

We can hope that the publication of the appeal of the Verkhovna Rada of Ukraine (hereinafter – VRU) to the parliaments of foreign countries and international organizations regarding the condemnation of the escalation of Russia's armed aggression against Ukraine was the impetus for studying the issue of the procedural possibility of bringing Russia's political elite to criminal responsibility for the crime of aggression against Ukraine[579]. In this very appeal the VRU calls on the parliaments of foreign countries and international organizations to condemn Russia for violating the ceasefire regime provided for by the Minsk agreements, as well as to take all possible measures that will contribute to the cessation of attacks by Russian armed forces ... and also recommends that the Prosecutor General's Office send materials and documents to the International Criminal Court, indicating the violation of international humanitarian law during the escalation of Russia's armed aggression against Ukraine within the framework of the proceedings carried out by the International Criminal Court in accordance with the Decree of the Verkhovna Rada of Ukraine dated February 4, 2015 "On the Statement of the Verkhovna Rada of Ukraine "On Ukraine's recognition of the jurisdiction of the International Criminal Court over the commission of crimes against humanity and war crimes by high-ranking officials of the Russian Federation and leaders of terrorist organizations "DPR" and "LPR", which led to a particularly mass murder of Ukrainian citizens."

Therefore, the ICC has jurisdiction to investigate any acts of genocide, war crimes and crimes against humanity committed on the territory of Ukraine. However, the ICC does not have jurisdiction over the crime of aggression if the act of aggression is committed by a state that is not a party to the Statute of this Court, except when the UN

[579] Про Звернення Верховної Ради України до парламентів іноземних держав та міжнародних організацій щодо засудження ескалації збройної агресії Російської Федерації проти України: Постанова ВРУ від 07.02.2017 р. // Офіційний веб-сайт Верховної Ради України [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/1837-19

Security Council refers a particular case to the ICC. Since Russia has not ratified the said Statute and will exercise its right of veto in the UN Security Council, the ICC cannot currently investigate the crime of aggression against Ukraine. The ICC will be able to bring individuals to justice for crimes that fall under the jurisdiction of the Court, if there is evidence of the connection of such individuals with specific actions and political decisions. However, in certain cases it may be easier to establish responsibility for waging an aggressive war that is a clear and gross violation of the UN Charter. Therefore, to supplement the jurisdiction of the International Criminal Court, the International Court of Justice and the European Court of Human Rights, we propose to establish a separate tribunal with appropriate jurisdiction over the crime of aggression, which cannot be dealt by the above three courts. A special tribunal on the crime of aggression against Ukraine can be formed quite quickly. During World War II, countries met in London in 1942 to pass a resolution on German war crimes, which eventually led to the creation of the International Military Tribunal and the Nuremberg Trials. We should create a special tribunal to help repel President Putin's despicable attempts to destroy peace in Europe. Acting in solidarity with Ukraine and its people, we demonstrate the seriousness of our intentions to not allow any tolerance for the crime of aggression and to leave no stone unturned to put an end to the terrible events we are currently witnessing. Thus, for the purpose of justice, we ensure bringing to personal criminal responsibility those who led to such terrible events. The Special Tribunal should be formed on the same principles that guided the Allies in 1942, and investigate acts of violence by Russia in Ukraine and establish whether they constitute a crime of aggression. Countries should transfer jurisdiction to the said Special Tribunal in accordance with their national criminal codes and international law and agree that the Special Tribunal has the authority to investigate both the perpetrators of the crime of aggression and those who financially or otherwise contributed to the

commission of that crime[580].

On February 28, 2022, the ICC Prosecutor announced that he would seek authorization to open an investigation into the situation in Ukraine based on the previous findings of the Prosecutor's office of the ICC, arising from his preliminary investigation and covering any new suspected crimes falling within the jurisdiction of the Court. Along with the ICC investigation, the process of creating a Special ad-hoc tribunal was launched to investigate the crime of aggression (since this crime cannot be investigated within the ICC due to existing restrictions). On March 5, 2022, specialists in the field of international law announced the Declaration on the establishment of such a tribunal based on the principles of the Nuremberg Tribunal after the Second World War.

On March 16, 2022, after an accelerated procedure, the International Court of Justice adopted temporary measures in the case of Ukraine versus Russia. In initiating the case, Ukraine argued that Russia wrongly claimed genocide in Ukraine to justify its invasion. Meanwhile, the Russian Federation rejected the Court's jurisdiction. Given the lack of evidence against the aggressor state's accusations of genocide and the principle that any action to prevent genocide must be carried out in good faith and in accordance with international law, the Court called on Russia to immediately suspend military operations. As Yu. Orlov points out, the problem is that the Ukrainian legislation on criminal liability does not provide the possibility and does not establish the criteria by which the criminality of an act committed on the territory of Ukraine would be determined not by the Criminal Code of Ukraine, but by other normative legal acts, in particular, The Rome Statute of the ISS. Such a conclusion can be drawn based on the content

[580] Заява про створення спеціального трибуналу для покарання за злочин агресії проти України [Електронний ресурс]. – Режим доступу: https://uba.ua/documents/Statement%20for%20Tribunal.pdf

of Part 1 of Art. 6 of the Criminal Code of Ukraine[581].

According to the prosecutor of the International Criminal Court Karim Khan, the largest group of court employees has arrived in Ukraine since the establishment of his office. ICC representatives in Ukraine will collect evidence of war crimes and crimes against humanity, as well as cooperate with Ukrainian investigators to establish the circumstances and details of what happened. The ISS will also be assisted by colleagues from the Netherlands. As the prosecutor of the court emphasizes: "It is important that the work of all parties, aimed at establishing responsibility for the events in Ukraine, takes place with proper coordination and communication. In the process, we will significantly increase the impact of our joint work to establish the truth."[582] He also noted that 21 countries (in particular the USA) have already expressed their desire to support the work of the Prosecutor's Office of the International Criminal Court in the investigation of war crimes in Ukraine, and 20 countries have pledged to provide the necessary funding. In March, the prosecutor of the International Criminal Court personally arrived in Ukraine to collect evidence of war crimes committed by the Russian Federation. In April, Karim Khan said that he plans to visit Ukrainian territory again.

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[582] Міжнародний кримінальний суд направив 42 представників в Україну для розслідування воєнних злочинів [Електронний ресурс]. – Режим доступу: https://suspilne.media/240480-miznarodnij-kriminalnij-sud-napraviv-42-predstavnikiv-v-ukrainu-dla-rozsliduvanna-voennih-zlociniv/

CONCLUSIONS

Therefore, the legal basis for the functioning of the ISS is the Rome Statute, which was adopted on July 17, 1998. Today, 123 countries of the world are members of the ISS. The Rome Statute does not provide for any statute of limitations for crimes within its jurisdiction. Thus, in order to increase the effectiveness of the work of the International Criminal Court, in our opinion, it should first of all cooperate with powerful, developed countries of the world, use the support of international institutions, and possibly expand the range of crimes for which individuals could be brought to international criminal responsibility in the future. The jurisdiction of the ICC in Ukraine covers genocide, crimes against humanity and war crimes, and it is worth mentioning the crime of aggression. Liability for these crimes is not limited to those who commit these acts, as well as those who order, facilitate or otherwise is complicit in the crimes. This includes accountability based on command responsibility, whereby military and civilian officials, up to the highest echelons of command, can be held criminally liable for crimes committed by their subordinates; when they knew or should have known that such crimes were being committed but failed to take reasonable steps to stop them. Therefore, the International Criminal Court in The Hague can indict Putin and other Russian officials or the military command, but it cannot issue a verdict in absentia, accordingly, it cannot issue a warrant for their detention. Russia signed the Rome Statute on September 13, 2000, but is not currently subject to the jurisdiction of the ICC, as on November 16, 2016, President Vladimir Putin signed an executive order refusing Russia to participate in the Rome Statute. Therefore, in order to bring the Russian dictator to justice, he must be arrested and brought to court. It should be realized that this is unlikely to happen during the term of office of V. Putin as the President of the Russian Federation. In fact, V. Putin may end up on the dock of the ICC after his removal from power, or if the next Russian leadership decides to extradite him.

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PART V

EUROPEAN LAW: THE VECTOR OF UKRAINE'S CIVILIZATIONAL CHOICE

THE IMPACT OF EUROPEAN INTEGRATION ON THE LEGAL NATURE OF THE SYSTEM OF STATE CONTROL (SURVEILLANCE) IN THE FIELD OF EXECUTING THE BUDGETS IN TERMS OF REVENUES

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INTRODUCTION

Currently, Ukraine is passing through a complicated historical period, struggling to turn into a European-level state, consolidate democratic basics in the society, and reform its legal system within the framework of European integration. The essential element of such reform is the formation of the system of legal and state institutions that should drastically change / Europeanize the system of state control in the field of public finance, in particular – in the field of executing the budgets in terms of revenues. The implementation of state control and surveillance may definitely ensure the effective work in the field of executing the budgets in terms of revenues since it will provide the proper functioning of the budget system, timely crediting of funds to the budget, and compliance with the law in this field. Therefore, the activities of the bodies of executive power and local self-government regarding the measures of state control and surveillance in the field of executing the budgets in terms of revenues constitute a clearly defined at the legislative level system of institutional and legal entities, which complete the functional toolkit of the subjects of the budget process.

That is why the present-day process of reforming state control (surveillance) in the field of executing the budgets in terms of revenues has been stipulated by the formation of an open administrative-supervisory system, where the principles, tools, forms, and methods of central, territorial, and local administration

are constantly harmonized, whereas the institution of state control (surveillance) in the field of budget execution acquires its own development as a peremptory norm of general policy within the framework of the European Union. The process of Ukraine's integration into the community of European states as an equal, democratic, social, law-based state requires a distinct legal definition of the essence, place, role, and functions of state control and surveillance in the system of budget execution.

Both the system of the bodies of public administration and the legislation itself (the latter regulating state control and surveillance in the field of executing the budgets in terms of revenues) are subject to systematic changes that result from the ongoing European reforms. Consequently, a lot of theoretical and analytical sources in the field under studies have lost their scientific significance. The research of the system of state control (surveillance) in the field of executing the budgets in terms of revenues is of primary importance due to numerous theoretical and practical issues it generates. Such research may help outline the major problems arising in the course of executing the budgets in terms of revenues, as well as will allow to determine the basic ways to solve them in the framework of European integration.

It is necessary to emphasize that representatives of various sciences have been engaged in investigating the issue of control and surveillance in the field of executing the budgets in terms of revenues. However, the most relevant works have been written by the scholars specializing in financial and administrative law, which is quite natural as the legal relations of control and surveillance are closely associated with the concepts of executive-administrative and organizational activities. In addition, they are of state-authority nature, for the bodies of control and surveillance are empowered by the state in the field of executing the budgets in terms of revenues.

Such scientists as L. Voronova, O. Hetmanets, M. Kucheriavenko, T. Latkovska, A. Monaienko, O. Orliuk, N. Pryshva, L. Savchenko, O. Soldatenko, V. Chernadchuk, R. Iatskin and many others have investigated in their works the issue of state control and surveillance in

the field of budget. Every one of them has managed to reveal various aspects of the issue to a certain extent. Nevertheless, we believe that more detailed attention should be attached to the analysis of the impact European integration had on the legal nature of the system of state control and surveillance at a narrower sub-stage of budget execution – the execution of the budgets in terms of revenues. The latter combines a complex spectrum of legal relations, as well as is the primary basis for the further use of budget funds and implementation of budget policy. In view of the above, we can affirm the significance of the selected direction of research, which will become the basis for further development of this issue in a narrower section. Besides, this study will allow to perceive the structure and essence of the system of state control and surveillance in the field of executing the budgets in terms of revenues in a new way since the impact of European integration on this area of legal relations is closely related to new humanitarian challenges in terms of balancing the accumulation and usage of public finance. An active discussion on the forms, methods, types, and directions of state control (surveillance) in the field of executing the budgets in terms of revenues is a vivid example of why it is so crucial to develop a unified system of state financial control and introduce the respective amendments into the Budget Code of Ukraine, as well as other normative-legal acts that ensure the regulation of this sort of legal relations. This will provide the opportunity to enshrine legislatively the sequence of implementing such a control (surveillance), as well as to determine the competence and powers of the bodies that provide the effectiveness of both accumulation and usage of public finance. Today, the legislation of foreign states, especially EU members, has a tendency towards unification. Therefore, in October 1977, at the INTOSAI Congress in the city of Lima, there was adopted the Lima Declaration.[583] Its purpose was to determine the universal principles that might be acceptable for all countries, regardless of the

[583] Лімська декларація керівних принципів аудиту державних фінансів. Керівні принципи аудиту державних фінансів. Лімська декларація : Декларація Орг. Об'єдн. Націй від 11.09.1997 р. URL: https://zakon.rada.gov.ua/laws/show/998_090#Text

form of their state system and state government, without violating the traditions of higher financial control, which were formed in individual states for a long time. Even though from the point of view of international law, the Lima Declaration is not mandatory to apply, it proclaims the primary provisions for the development of state control in democratic countries,[584] in particular: the peculiarities of organizing control as an element of management; the scope of application of control; the principles of building a financial control system, the principles of independence and accountability of higher control bodies, their powers, etc.[585]

I. THE CATEGORY OF "SYSTEMATICITY" AS A CORRELATION OF CONTROL AND SURVEILLANCE IN THE FIELD OF EXECUTING THE BUDGETS IN TERMS OF REVENUES

The systemic approach, used in the process of learning certain socio-legal phenomena (including control and surveillance), suggests the differentiation of the system elements in accordance with the signs of relative autonomy and structural-logical connection with each other, which ensures the unity and purposefulness of the entire system. The above elements within the system may comprise the subjects of surveillance; the subjects, the object, and the content of surveillance; the forms of surveillance, etc. The listed elements are selected according to various criteria. For instance, in the case of applying the subject criterion for differentiating the system elements, it is advisable to point out the system of the subjects of surveillance. In

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584 Дмитренко Г.В. Організація і здійснення державного контролю в Україні (фінансово– економічні аспекти). [Текст] : автореф. дис. ... д-ра наук з держ. упр. : 25.00.02; Нац. акад. держ. упр. при Президентові України. - К., 2011. - 36 с.

585 Піхоцький В. Зарубіжний досвід організації державного фінансового контролю та можливість його використання в Україні. *Економіст*. 2016. №1. С.31 URL: http://nbuv.gov.ua/UJRN/econ_2016_1_9.

the case of applying the structural approach as a criterion for differentiating the elements of the respective system, it is essential to outline the structure of the surveillance system, which contains the subjects, the object, and the content of surveillance – the principles, the functions, the forms, and the methods of surveillance. When selecting the criterion that identifies the external manifestation of activity regarding the implementation of surveillance, it is logical to indicate the system of surveillance forms. Each of the above approaches makes it possible to regard surveillance as a system of interconnected material and procedural basics, as well as to take into account its managerial, purposeful nature. At the same time, each of the proposed approaches to the study of the surveillance system contains techniques and methods of scientific knowledge, and their content undergoes certain transformations. When differentiating material and procedural basics of surveillance activities, it is possible to dwell on the system of its forms or the system of its procedures. A due regard to managerial, purposeful nature of surveillance as the basis for differentiating the appropriate system allows to specify the surveillance system in terms of its structure (the subjects, the object, and the content of surveillance). It is worth mentioning the system of the subjects of surveillance only provided both approaches (managerial and procedural) are applied.

State control and surveillance in the field of executing the budgets in terms of revenues is administered by the bodies of state power. The scientific knowledge of its essence has to rely on the methodology that allows to analyze the subject of research studies with the use of means, techniques, and methods of cognitive activity, which correspond to the essence and peculiarities of the phenomenon or process under analysis. From the point of view of the theory of knowledge, both the systemic approach and dialectics make it possible to form a conceptual apparatus. It is interesting that systematicity in the course of the formation of such an apparatus is manifested in the definition of those phenomena and processes that objectively require appropriate designation and reproduction in concepts (in theory) and definitions (in current legislation), while dialectics directly affects the content

characteristics of a phenomenon or process, which is manifested in signs, goals, and other elements that reproduce the process of cognition and are reflected in a certain concept or definition.[586] Analizing the system in a legal respect, it is important, above all, to determine an appropriate interpretation of this term. It is a multi-meaning category and, depending on the field of application, it may have different etymological fillings. The "Dictionary of the Ukrainian Language" offers the following definitions: "A system is an order caused by a proper, planned arrangement and mutual connection of the parts of something; a form of organization, structure of something (state, political, economic units, institutions, etc.); a set of any elements, units, parts, united by a common feature, purpose; a structure that is a unity of regularly arranged and functioning parts".[587] Summarizing the above-set definitions, we may draw a conclusion that a system is a combination of elements that correspond to specific characteristics. These characteristics are orderliness, unity, and interaction of elements.

A new edition of the "Great Explanatory Dictionary of Modern Ukrainian Language" claims that the word "system" comes from Greek "systema" (combination). In this Dictionary, the concept under discussion is interpreted, firstly, as a whole consisting of parts and, secondly, as a considerable number of regularly connected elements (subjects, phenomena, views, knowledge, etc.) that constitute a certain integral formation, unity.[588] Thus, one of the interpretations defines system as a combination of elements

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[586] Денисова А. В. Діалектика й системний підхід як основа методології дослідження проблеми адміністративного нагляду органів виконавчої влади України. *Право і суспільство*. 2016. № 6-1. С.111 URL: http://dspace.oduvs.edu.ua/handle/123456789/818

[587] Словник української мови: в 11-ти т. – Т. 9 // АН УРСР, Ін-т мовознав. ім. О.О. Потебні ; 1978. С. 203-204 URL http|ukrlit/org|slovnyk|slovnyk_ukrainskoi_movy_v_11_tomakh

[588] Великий тлумачний словник сучасної української мови (з дод. і допов.) / Уклад. і голов. ред. В.Т. Бусел. К.; Ірпінь: ВТФ «Перун», 2005. С.717 URL: https://chtyvo.org.ua/authors/Busel_Viacheslav/VTSSUM/

that make up one composite element. Consequently, it is possible to study a system as a single integral object. This is exactly how it works with the system of state control and surveillance in the field of executing the budgets in terms of revenues. Therefore, it would be expedient to consider this system as a single whole concept. From the second definition of the term, it follows that a system is a certain unity of elements, which due to their structuring and connections form a certain ordered unity. In this case, the system does not mean a single whole object but a certain phenomenon. Both the first and the second concepts have the right to exist, and we do not consider it necessary to give preference to one or the other understanding within the scope of this work. However, from the methodological point of view, the system of state control and surveillance may be investigated as both a single object and a combination of interconnected elements, depending on the chosen goal and the expected results of the study. In this way, the system as a combination of elements or a single element can be distinguished from other objects. The interaction of the system with other objects occurs as a whole, that is, according to the same rules. The same definition may be applied to the system of state control and surveillance in the field of executing the budgets in terms of revenues. Here, the object with which the system under studies interacts is presented by the legal relations regarding the execution of the budgets in terms of revenues, as well as by the participants of these relations. At the same time, the system is presented by the subjects of budgetary control, whereas unity is ensured by the uniform legislative procedures for implementation of budgetary surveillance and control. On the other hand, single procedures should not be understood as unified and similar. They have to be interpreted as a combination of all procedures that are applied in each specific case in the course of state control and surveillance. We believe that the signs of systematicity characterize control and surveillance to a greater extent in view of its complexity, that is, it extends to all legal relations regarding the execution of the budgets in terms of revenues.

Studying the banking system, Kh. Kachan comes to the conclusion that any system is marked with firm connections between the elements it consists of. The concept of "system" also denotes a relatively high integration of a selected group of elements.[589] This particularly applies to the firm connections between the elements in state control and surveillance in the field of executing the budgets in terms of revenues. They are most clearly reflected in the relations of coordination and subordination between controlling bodies, as well as in financial and legal regulation, which delimits the spheres of responsibility and functions of these bodies. As for integration, it is also present in the system of the bodies of power. In particular, this applies to the bodies of the State Treasury Service, the State Tax Service, the State Customs Service, the State Audit Service, and other bodies of the Ministry of Finance of Ukraine. At first glance, it appears that there is no integration between the above bodies since each of them has separate functions in the field of state control and surveillance. Nevertheless, such integration is reflected not in the very subordination and competence of the above-mentioned bodies of power but in their separate functional assignments within the framework of legal relations regarding the execution of the budgets in terms of revenues, in order to ensure compliance with budget legislation in all areas. T. Tarnavska highlights that the concept of "system" is one of the key philosophical-methodological and peculiar scientific concepts. The scholar claims that this term is used in those cases when "it is necessary to describe the object that is being studied or designed as something whole, complex, and

[589] Качан Х.І. Теоретико-концептуальні засади банківської системи. *Науково-інформаційний вісник Івано-Франківського університету права імені Короля Данила Галицького. Серія: Право.* 2014. № 10. С. 246 URL: https://visnyk.iful.edu.ua/category/%d0%b2%d0%b8%d0%bf%d1%83%d1%81%d0%ba-%d0%b6%d1%83%d1%80%d0%bd%d0%b0%d0%bb%d1%83-%e2%84%9610/

about which it is impossible to immediately get a simple idea".[590] This is what happens in our case when we face the necessity to holistically approach the investigation of state control and surveillance in the field of executing the budgets in terms of revenues, as well as to determine the theoretical basics of the object under studies and to single out its elements to a full extent.

In conclusion, it is worth pointing out that with the purpose of further analysis of state control and surveillance in the field of executing the budgets in terms of revenues, we will refer to the concept of "system" as *an organized combination of elements interconnected by firm ties that form a virtually or conditionally single object or a firm unity of objects, which are marked with regularity, interrelationship, common features or characteristics, other identical properties.* The system under study is characterized by the multifaceted nature of its components. Each of them plays an indispensable role in the full-scale functioning of the mechanism of executing the budgets in terms of revenues and is based on the delimitation of competence and the specific definition of the functions and tasks of each of the controlling bodies.

II. CONCEPTUAL APPROACHES TO UNDERSTANDING THE CATEGORIES OF "CONTROL" AND "SURVEILLANCE"

When studying the system of state control and surveillance in the field of executing the budgets in terms of revenues, it is important to realize that it contains such notions as "control" and "surveillance". Scientists specializing in financial and administrative law do not have a single approach to understanding these two categories, as well as to the problem of distinguishing them. There is a lack of a certain unified approach to applying these terms in Ukrainian legislation. For example, in the Budget Code of Ukraine

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[590] Тарнавська Т.В. Ґенеза поняття «система»: історичний огляд. *Духовність особливості: методологія, теорія і практика*. 2011. № 6 (47). С.130-131 URL: http://nbuv.gov.ua/UJRN/domtp_2011_6_18.

on control in the field of executing the budgets (including the budgets in terms of revenues), the term "control" is used exclusively, while the term "surveillance" is used in the context of control-supervisory activities, which have nothing to do with the budget process.[591] The use of these terms is similar in the Tax Code of Ukraine, the latter determining the control powers of revenue and tax authorities, which constitute an essential element of the system of state control in the field of executing the budgets in terms of revenues. A quite different approach is reflected in the Customs Code of Ukraine. It uses the term "surveillance" along with the term "control",[592] without distinguishing the two categories. To find an appropriate definition of the category "surveillance", it is necessary to turn to the theoretical developments of legal science.

Control and surveillance are frequently regarded within the concept of "controlling activities" as a legal form (specific organizational form) of activities of state bodies, state officials and other entities that carry out management. This legal form is administered on the basis of strict compliance with the requirements for laws and other normative-legal acts. In addition, it always results in certain juridically significant consequences. Scientists suppose that the above two signs may be viewed as the features that collectively qualify any organizational form of activity as a legal one. However, the above thesis is also valid for other, non-controlling activities of the bodies of state power and local self-government. Hence, it might be concluded that such features are not determinative because they do not make it possible to distinguish the investigated object from among other objects of legal validity. The doctrine contains another category,

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[591] Бюджетний кодекс України: Закон України від 08.07.2010 № 2456-VI. *Відомості Верховної Ради України*. 2010 р., № 50, / № 50-51 /, стор. 1778, стаття 572 URL: https://zakon.rada.gov.ua/laws/show/2456-17#Text

[592] Митний кодекс України: Закон України від 13.03.2012 № 4495-VI. *Відомості Верховної Ради України*. Редакція від 19.07.2022. 2012. № 44-45, № 46-47, № 48. Ст. 552. URL: https://zakon.rada.gov.ua/laws/show/4495-17#Text

which more fully covers the system of state control and surveillance in the field of executing the budgets in terms of revenues, as well as includes both elements of control-supervisory activities. Kh. Iarmaki outlines that from a juridical point of view, any control-supervisory activity is a means of ensuring legitimacy.[593] The latter statement is particularly significant for the budget process at all its stages since it is the field in which there can potentially be many violations that cause financial damage to the state. Due to the multi-faceted nature of the sub-stage of executing the budgets in terms of revenues, such activity is extremely versatile, for it is a matter of a holistic system of interaction both between the bodies of executive power and the respective bodies with citizens and business entities that are obliged to make payments to the budget.

We believe that the most significant sign of any "control-supervisory activity" is the ability to administer inspection or surveillance by a controlling entity of a controlled object for compliance with legislation, financial discipline, other norms and rules that are formally defined and clearly regulated. The same opinion has been expressed by O. Andriiko.[594] Control is a legal form of activity, the juridical nature of which is determined by the fact that the respective body of control or its official is placed in conditions where they must directly use the rules of law to solve specific legal tasks. What is more, the norms of material and procedural law act simultaneously as the subject of operations in this case. Control is supposed to ensure the normatively regulated activities by means of analyzing and verifying the implementation of laws and other legal acts, as well as the reasonableness of the actions taken.

V. Kolpakov believes that control is one of the most common and efficient ways to ensure legitimateness. Its essence lies in the

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[593] Ярмакі Х.П. Адміністративно-наглядова діяльність міліції в Україні: монографія. Одеса: Юридична література, 2006. С.9

[594] Андрійко О.Ф. Державний контроль в Україні: організаційно-правові засади: монографія / О.Ф. Андрійко. К.: Наукова думка, 2004. С.30

fact that the controlling subject checks and records the way the controlled object fulfills the tasks assigned to it and performs its functions.[595] The same essence of control is inherent in the control activities in the field of executing the budgets in terms of revenues, whereby the activity of the participants of the budget process is checked in relation to compliance with legitimateness and budget discipline in the field of financial activity at the sub-stage of the budget process. According to V. Averianov, the objects of control comprise the analysis of the implementation of laws, decrees, and other normative acts, compliance with standards and other regulatory and technical rules, normative control, i.e. consideration of the legitimateness of the adoption of legal acts, study of the actual situation and assessment of the actions taken.[596] The Lima Declaration of Guidelines on Auditing Precepts, adopted at the IX INTOSAI Congress, outlines that control is not an end in itself, but is an activity aimed at identifying deviations from accepted standards and violations of the principles of legitimateness, efficiency and economy of wasted material resources.[597]

When exercising control, the authorized bodies and their officials (using organizational and legal methods and means) find out whether the activities of individuals comply with the laws and the tasks set before them; analyze the effect of the subjects of management on the controlled objects of deviation from the set

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[595] Колпаков В.К. Адміністративне право України: підруч. /В.К. Колпаков. К.: Юрінком Інтер, 1999. С.622 URL: https://scholar.google.com.ua/scholar?oi=bibs&hl=ru&cluster=13767562525243053431

[596] Виконавча влада і адміністративне право / В. Б. Авер`янов [та ін.]; ред. В. Б. Авер`янов. – К. : Видавничий Дім «Ін Юре», 2002. С. 455-456 URL: http://kul.kiev.ua/praci-2002-roku/vikonavcha-vlada-i-administrativne-pravo-za-zag.-red.-v.b.-averjanova.-k.-vidavnichiy-dim-in-jure-2002.-668-s.html

[597] Лімська декларація керівних принципів аудиту державних фінансів. Керівні принципи аудиту державних фінансів. Лімська декларація : Декларація Орг. Об'єдн. Націй від 11.09.1997 р. URL: https://zakon.rada.gov.ua/laws/show/998_090#Text

goals and ways of achieving them; take measures take measures to prevent such deviations and bring the culprits to justice. The above statements comply with today's state affairs and can be applied to control in the field of executing the budgets in terms of revenues. What is more, it follows from the above-set judgments on the essence of control that with regard to its content, control in the field of executing the budgets in terms of revenues is a combination of clearly regulated administrative and financial procedures that are applied in specific cases, have time frames and grounds for application envisaged by law. At the same time, the procedures used in the course of control are not some abstract categories but take a distinctly determined place in time, as well as possess a specific subject and object of control.

Regarding the difference between the terms "control" and "surveillance", most scholars distinguish two basic divergences: surveillance is carried out in relation to non-subordinate objects. It is just observation and remonstration of illegal actions and acts, whereas control implies the possibility of directly interfering in the activities of controlled bodies up to the cancellation of illegal acts. In the field of informatization, control includes monitoring the legitimateness and expediency of activity, assessment of its legal, scientific, sociopolitical, organizational and technical positions.[598] For instance, O. Tylchyk and N. Moroz point out that surveillance is a type of sub-departmental control and a form of active observation, which is accompanied by the use of administrative measures of coercion when necessary. Surveillance is possible only with respect to entities that are not organizationally subordinate. On the other hand, control is exercised with respect to organizationally subordinate entities. Surveillance refers to monitoring compliance with the form: checking procedures, order, and appropriateness of

[598] Бурило Ю. П. Нагляд (контроль) в інформаційному секторі економіки/Бурило ЮП. *Порівняльно-аналітичне право*. 2013. №3-1. С. 155 URL: http://pap-journal.in.ua/wp-content/uploads/2020/09/3-1_2013.pdf#page=154

fulfilling assignments. Surveillance does not fulfill the entire set of tasks assigned to control.[599]

Dealing with the concept of "surveillance", V. Kolpakov claims that it is the implementation by special state structures of targeted monitoring of compliance by executive and administrative bodies, enterprises, institutions, organizations, and citizens with the rules envisaged by normative acts.[600] Accordingly, the objectives and tasks of control and surveillance in the field of executing the budgets in terms of revenues are completely the same. However, there is a considerable difference between the content constituents of these two notions. Control is referred to as the application of special procedures, implementation of inspections, and decision-making (in other words, the respective procedures were limited to time frames), while surveillance is defined as observation. Respectively, observation is not limited to specific time frames and can be both temporary and permanent.

Apart from the above-described, there also exist other approaches to understanding the categories under study. As a matter of fact, the "Great Encyclopedic Dictionary" interprets surveillance as one of the forms of activities of the bodies of state power that aim at ascertaining the legitimateness and reasonableness of the decisions made by the surveilled entities, in other words, the objects that have a management body.[601] Under such understanding, the definitions of control and surveillance coincide, which makes it impossible to distinguish between the two

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[599] Тильчик, О. В., Мороз, Н. С. Правові і організаційні засади регулювання контролю у сфері інформатизації. *Соціологія права*. 2018. С. 104 URL: http://dspace.lvduvs.edu.ua/handle/1234567890/3121

[600] Колпаков В.К. Адміністративне право України: підруч. /В.К. Колпаков. К.: Юрінком Інтер, 1999. С.675 URL: https://scholar.google.com.ua/scholar?oi=bibs&hl=ru&cluster=13767562525243053431

[601] Великий тлумачний словник сучасної української мови (з дод. і допов.) / Уклад. і голов. ред. В.Т. Бусел. К.; Ірпінь: ВТФ «Перун», 2005. С. 839 URL: https://chtyvo.org.ua/authors/Busel_Viacheslav/VTSSUM/

categories. As a result, there arises the issue of determining the the scope of the research subject we have chosen, namely its constituents. If control and surveillance are similar notions, then the system under research is composed of the respective elements that may be defined as one and the same category. On the other hand, this system consists of a combination of two categories, which are referred to as control and surveillance. Besides, these categories mutually supplement each other, thus creating the unity of their constituents – the system of state control in the field of executing the budgets in terms of revenues.

Within the research of the issue, V. Harashchuk emphasizes that surveillance is a juridical analysis of the state of affairs regarding the observance of legitimateness and discipline in society. This analysis is carried out with the use of the appropriate, legally specified forms, but without direct interference in the operational and other activities of a legal entity or official, a citizen, etc.[602] The scientist believes that the ability to interfere in the operational or other activities of the object under control differentiates surveillance from control. At first sight, this thesis seems rather reasonable. As an example, the researcher dwells on general surveillance, which (before the reform regarding restrictions of powers in surveillance) was carried out by the bodies of prosecutor's office. However, we believe that the above assumption, which has gained the support of numerous experts, should be critically revised. If we assume that the subject of state surveillance in the field of executing the budgets in terms of revenues has no right to interfere in the operational activities of the object under control, then this subject is not able to respond to the detected violations of the legislation in the course of the respective

[602] Гаращук В.М. Теоретико-правові проблеми контролю та нагляду у державному управлінні: дис. доктора юрид. наук: 12.00.07. Х., 2003. С. 60 URL: http://www.disslib.org/teoretyko-pravovi-problemy-kontrolju-ta-nahljadu-u-derzhavnomu-upravlinni.html

surveillance. Consequently, this will annihilate any practical and functional expediency of surveillance.

For a clearer perception of the elements of the system of state control (surveillance) in the field of budgetary activities, it would be useful to consider some theoretical views on the issue of differentiating between the categories under study, as well as approaches to the respective views. Yu. Bytiak distinguishes the categories of control and surveillance in the way V. Harashchuk does. The former supposes that control is a constituent (element) of management. It ensures systematic verification of the implementation of the Constitution, laws of Ukraine, other normative-regulatory acts, as well as guarantees compliance with discipline and legal order. Besides, its objective is to assist the controlling bodies to interfere in the operation activities of the bodies under control, to provide the former with mandatory instructions, to suspend, change or cancel the management acts, to take coercive measures against the bodies under control. On the other hand, Yu. Bytiak is certain that surveillance aims to detect and prevent offenses, eliminate their consequences, and bring the guilty to justice without the right to interfere in the operational and economic activities of the surveilled objects, as well as to change or cancel management acts.[603] Without underestimating the contribution of the above scholars, we are forced to critically perceive their reasons for distinguishing state control and surveillance. It is also important that Yu. Bytiak and V. Harashchuk outline the peculiarities of objectives and tasks of the categories of control and surveillance as the grounds for differentiating between them. Nevertheless, we are convinced that objectives and tasks of control and surveillance are absolutely identical – to ensure compliance with legislation and legal order, as well as other norms

[603] Адміністративне право : підручник / Ю. П. Битяк (кер. авт. кол.), В. М. Гаращук, В. В. Богуцький та ін.; за заг. ред. Ю. П. Битяка, В. М. Гаращука, В. В. Зуй. Х. : Право, 2010. С. 260 URL: http://194.44.152.155/elib/local/sk780804.pdf

and rules and budgetary discipline, minimizing their violation.

It is essential to single out some basic concepts of distinguishing between the categories of control and surveillance, which could be effectively applied in studying the system of state control (surveillance) in the field of executing the budgets in terms of revenues. *Concept One relies on the statement that control and surveillance are similar categories*. A lot of scientists, for instance V. Shcherbyna,[604] partially agree with this assumption due to the similarity between the basic features of the two terms. They regard the system of control and surveillance as a single unity, without differentiating between the two notions. This point of view may be substantiated by the fact that financial legislation does not provide a distinct, unified approach to distinguishing between control and surveillance as well.

In accordance with *Concept Two*, *surveillance is considered as a narrower category and belongs to the notion of control*. Within a somewhat generalized form of this concept, surveillance is viewed either as a peculiar type of control or the latter's constituent. The researchers, who keep to Concept Two, believe that "surveillance" is a part of the notion "control". Among them is V. Harashchuk who, despite admitting the existence of certain discrepancies between control and surveillance, defines the latter (which is carried out by the bodies with control powers) as a "truncated" or "incomplete" control.[605] Such an approach to differentiation between control and surveillance looks rather interesting although the scholar emphasizes that different legislative acts articulate the two terms

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[604] Щербина В.С. Державний нагляд (контроль) у сфері господарювання: удосконалення правового регулювання. *Юридична Україна.* 2009. № 11. С. 86 URL: http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&Image_file_name= PDF/uy_2011_2%2815%29__5.pdf

[605] Гаращук В.М. Теоретико-правові проблеми контролю та нагляду у державному управлінні: дис. доктора юрид. наук: 12.00.07 / В.М. Гаращук. Х., 2003. С.82 URL: http://www.disslib.org/teoretyko-pravovi-problemy-kontrolju-ta-nahljadu-u-derzhavnomu-upravlinni.html

in such a manner that in some cases, surveillance is perceived as a type of control, whereas in others – it is either associated with control or applied as a substitute for the term "control".

According to *Concept Three, the terms "control" and "surveillance" are different categories in terms of their content*. N. Horbova states that in "juridical literature, the difference between the terms "control" and "surveillance" has been also emphasized. Although there occurs certain inner controversy in the comments of those scientists who point to the discrepancies between the terms under discussion, … there exists a point of view that depending on of the scope of control, a distinction is made between actual control (in the process of which the legitimateness and expediency of the activity is checked) and surveillance (which is limited only to checking the legitimateness). At the same time, the interference in the operational and economic activities of the surveilled object is not admissible, that is, surveillance is an activity only to ensure legitimateness".[606]

All the given concepts have the right to exist. This pluralism of opinions has been facilitated by the legislative uncertainty of the concepts of "control" and "surveillance", which was mentioned previously. As for the field of executing the budgets in terms of revenues, it is worth outlining that both the Budget and the Tax Codes of Ukraine operate the term "control". Therefore, this notion is more acceptable for the use in the area. On the other hand, it would be methodologically erroneous to avoid the analysis of the notion of "surveillance" given the fact that the respective term is mentioned once in the Customs Code of Ukraine and refers to the functions of customs authorities. The latter are the bodies of revenue and tax. They belong to the system of state surveillance (control) in the field of executing the budgets in terms of revenues.

If it is impossible to unambiguously solve the problem of the

[606] Горбова Н. А. Природа державного контролю (нагляду) та генезис його законодавчого визначення. *Право та державне управління*. 2019. № *1*(34). С.38 http://pdu-journal.kpu.zp.ua/archive/1_2019/tom_1/8.pdf

basic elements of the system of state control (surveillance) in the field of executing the budgets in terms of revenues neither within the current legislation nor within the existing doctrine, then once again it is necessary to turn to the etymological filling of the two words. Summarizing the above interpretations of these concepts, we can ascertain that control refers to a specific activity of inspecting some object, which has a time limit, after which the control is considered complete. On the other hand, surveillance is defined as observation, suggesting that it is carried out on a permanent basis. Here lies the main difference between the two terms. Some scientists share this point, which, however, did not become a part of the doctrine of financial and administrative law due to the prevalence of other opinions. Something similar happens when it comes to scholars' ideas on the difference between surveillance and control based on the right to interfere in the activities of the controlled object. The main point is that control is carried out in cases envisaged by law and can be applied in forms and procedures that significantly burden the activity of the subject under control. After the completion of these procedures, the control is over and is not permanently carried out until the grounds for repeated control procedures (planned or unplanned) occur again. In the case of surveillance, the latter is carried out on a regular basis, and therefore, the surveillance procedures are arranged in such a way as to burden the controlled object as little as possible. However, when violations of the legislation are detected, the surveillance body interferes in order to eliminate them. Surveillance may be both active (permanent monitoring of the object under control) and passive (consists in the authority to respond to violations of the law in case of receiving relevant complaints). The latter is typical of the bodies that have a clearly defined hierarchical structure connected by relations of subordination (such as the bodies of the Ministry of Finance of Ukraine) and contains signs of control.

When it comes to state control, it should be understood as such a control-supervisory activities that are performed by the authorized bodies of state power. The term "control" is used in a broad sense for

the purposes of further analysis. To put it differently, it includes both the bodies of executive power and self-government. Nevertheless, it should be borne in mind that control in the field of executing the budgets in terms of revenues is marked with certain inherent principles or guiding ideas that underlie both the construction of its system and the methods of its implementation. These are: universality (this means that control has to cover all areas of executing the budgets in terms of revenues); systematicity (it is not carried out once or from time to time but according to a certain scheme or constantly); impartiality (achieved by assigning control tasks to persons not interested in its results); reality (ensured by the availability of the necessary qualified personnel of controllers); effectiveness and efficiency (suggest the quick implementation of control actions by the controlling body in case of receiving reports on violations, as well as prevention of offenses and the reasons that contributed to them, timely taking of measures to eliminate them, and in appropriate cases bringing the guilty to responsibility); publicity (makes it possible, and in some cases mandatory, to bring the results of control to the attention of the public or law enforcement agencies, other persons interested in its results). To sum it up, we can offer the following definitions of the elements of the system of control (surveillance) in the field of executing the budgets in terms of revenues.

State control in the field of executing the budgets in terms of revenues is the activity of the authorized bodies of state power, which lies in checking the participants of the budgetary process for compliance with budgetary legislation, budgetary discipline, appropriateness and completeness of mandatory payments to the budget and which is carried out systematically, repeatedly in relation to the object under control, with the use of specific procedures envisaged by law.

On the other hand, *state surveillance in the field of executing the budgets in terms of revenues* is the activity performed by the competent bodies of state power, which lies in checking the participants of the budgetary process for compliance with

budgetary legislation, budgetary discipline in relation to the object under control in the form of legislatively specified procedures of active and / or passive permanent monitoring.

When it comes to the system of state control (surveillance) in the field of executing the budgets in terms of revenues, it is necessary to pay due attention to the presence of the category "budget control" in the existing doctrine, which is used by many scientists in the sphere of financial law. This category outlines the scope of relations regarding the control of compliance with budget legislation. However, it significantly narrows the scope of the concept under study and cannot fully reveal the system of state control (surveillance) in the field of executing the budgets in terms of revenues, which also includes such categories as tax control, customs control, and other types of administrative and financial control. Accordingly, it is advisable to use the concept of "state control (surveillance)", which involves various types of control carried out by the respective bodies in the field of executing the budgets in terms of revenues.

III. ELEMENTS OF THE SYSTEM OF STATE CONTROL (SURVEILLANCE) IN THE FIELD OF EXECUTING THE BUDGETS IN TERMS OF REVENUES

The system of state control (surveillance) in the field of executing the budgets in terms of revenues may be regarded as a combination of institutions and legal norms. As a combination of legal norms, the system of state control (surveillance) in the field of executing the budgets in terms of revenues may be referred to as a set of types, forms, means, and procedures regulated by the norms of financial law for the implementation by authorized bodies of state power of control and surveillance of the objects under control in all areas of executing the budgets in terms of revenues. At the same time, as a combination of institutions, the system of state control (surveillance) in the field of executing the budgets in terms of revenues may be defined as a set of state authorities endowed

with the respective functions and powers to exercise control and surveillance in the field of executing the budgets in terms of revenues, which, due to the separation of competences, cover all aspects of legal relations in the specified area. Hence, the elements of the system of state control (surveillance) in the field of executing the budgets in terms of revenues are the legal norms that regulate the respective state control-supervisory activity, as well as the state bodies themselves that carry out this activity.

The legal support of the system under study is provided by the Constitution of Ukraine, the Budget Code of Ukraine, the Tax Code of Ukraine, the Customs Code of Ukraine, the Law of Ukraine "On the Basic Principles of State Financial Control in Ukraine", other laws and by-laws adopted on their basis. In turn, the legislation (compliance with which is checked at this sub-stage of the budgetary process) may be of budgetary, tax, customs, other financial legal and administrative-legal types. In the Budget Code, the composition of budgetary legislation is rather broad and comprises, apart from budgetary and other legislation, normative-legal acts that are adopted by the participants of the budget process at the local level (for example, decisions on the local budget and other local normative-legal acts adopted with the purpose of its execution).[607] The above norms present both the subject of state control (surveillance) in the field of executing the budgets in terms of revenues – since they are applied in the course of state control (surveillance) in this area – and normative-legal basis for the implementation of the respective control.

Budgetary legislation does not play a single key role within the system of state control (surveillance) in the field of executing the budgets in terms of revenues. It just regulates relations that arise

[607] Бюджетний кодекс України: Закон України від 08.07.2010 № 2456-VI. *Відомості Верховної Ради України* (ВВР). 2010 р., № 50, / № 50-51 /, стор. 1778, стаття 572 https://zakon.rada.gov.ua/laws/show/2456-17#Text

along with the implementation of transactions on the crediting of funds to the respective budget accounts, as well as determines the further targeted use of certain financial resources. Besides, it is effectively combined with tax, customs, and other types of legislation, which regulates tax, customs, and other mandatory payments to the budgets of all levels, as well as exercises control and surveillance over the process. Accordingly, the legal provision of control in the field of executing the budgets in terms of revenues consists in combining the norms of legislation that regulates purely budgetary legal relations, on the one hand, and legislation that regulates appropriate payments to the budgets of all levels, on the other hand.

Another essential element of the system of state control (surveillance) comprises specific procedures, forms, and types of administering activity that aims to comprehensively eliminate legislative violations in the field of executing the budgets in terms of revenues, as well as to compensate the losses caused by such violations. The above-mentioned financial-legal and administrative-legal procedures guarantee effective decision-making on the basis of control-supervisory activities. A clear procedure for the actions of controlling bodies, established by legislation, ensures a unified approach within the system of state control in the investigated area, minimizes abuse by both the controlling bodies and other subjects of the investigated legal relationship, and provides for the effectiveness of control-supervisory activities. V. Pikhotskyi highlights that in the course of comparing the regulatory, legal, and institutional features of control-auditing work in different countries, one should emphasize different approaches to determining the place of accounting departments in the system of the bodies of state administration. One of such approaches presupposes that the organizational scheme of control-auditing work should consist of two levels of hierarchy: at the first level is the highest state control body, which is subordinate to the parliament or the president. This body is entrusted with control over spending the state budget funds. The second level is occupied by state control-auditing units of

ministries, which are subordinate to both the highest body of state financial control and the respective ministry. They exercise full control over the appropriateness of spending the state funds.[608]

It is important that in accordance with Part 2 of Article 19 of the Budget Code of Ukraine, all stages of the budget process include control over the compliance with the budget legislation, audit and assessment of efficiency of managing budget funds.[609] Numerous scholars, including L. Voronova,[610] have always laid particular emphasis on the necessity to cover all stages of the budget process with the control system. This also applies to controlling the execution of the budgets in terms of revenues. This control is carried out not only at the actual stage of execution but also at the stage of reporting or planning budgets for future budget periods. The legislation defines it as the "further control". This indicates that control procedures in the field of executing the budgets in terms of revenues can be carried out at different stages, therefore, it is incorrect to carry out a specific time-binding of the implementation of control to the sub-stage of the budget process that we have determined. The elements of system of state control (surveillance) in the field of executing the budgets in terms of revenues are the legal norms that establish the procedure, tools, and means of various types of control over the execution of the budgets in terms of revenues and are applied by the bodies of state power in accordance with their competence in the field of executing the budgets in terms of revenues.

In addition to purely legal elements, the system of state control

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608 Піхоцький В. Зарубіжний досвід організації державного фінансового контролю та можливість його використання в Україні. *Економіст*. 2016. №1. С. 31-34. С.32 URL: http://nbuv.gov.ua/UJRN/econ_2016_1_9

609 Бюджетний кодекс України: Закон України від 08.07.2010 № 2456-VI. *Відомості Верховної Ради України* (ВВР). 2010 р., № 50, / № 50-51 /, стор. 1778, стаття 572 https://zakon.rada.gov.ua/laws/show/2456-17#Text

610 Воронова Л.К. Фінансове право України: підручник / Л.К. Воронова; Мін-во освіти і науки України. – К.: Прецедент; Моя книга, 2006. С. 183

(surveillance) in the field of executing the budgets in terms of revenues is also composed of certain institutional components. These are the bodies of state power that exercise state control in the field of executing the budgets in terms of revenues in accordance with their competence. An important element of institutional and systemic completeness is the specific scope of control powers of these bodies and the delimitation of the spheres of such control between them according to the established competence. This is done in order to avoid duplication of powers or lack of powers in a specific aspect of public relations regarding the execution of the budgets in terms of revenues.

Since we qualify the execution of the budgets in terms of revenues as a sub-stage of the budget process (this sub-stage exists within the stage of executing the budgets),[611] it is expedient to determine the institutional basis of the system of control over the execution of the budgets in terms of revenues with a due regard to the norms of the Budget Code. Nevertheless, it is also important to take into account that the already mentioned Lima Declaration determines the generally-recognized principles of control of the independent controlling bodies. These principles are: 1) institutional independence; 2) financial independence; 3) personal independence of auditors-controllers; 4) individual liability for the inspection program; 5) sufficiency of powers to obtain information; 6) the right to take measures.[612] All these principles are of universal nature. That is why they may be considered acceptable in any democratic, law-based state, for they have nothing to do with politics, but aim at ensuring effectiveness

[611] Вдовічен В. А. Становлення правової категорії виконання бюджетів за доходами. *Науковий вісник Академії муніципального управління. Серія : Прав*о. 2015. Вип. 1(2). С. 14-20. URL: http://nbuv.gov.ua/UJRN/Nvamu_pr_2015_1(2)__4.

[612] Лімська декларація керівних принципів аудиту державних фінансів. Керівні принципи аудиту державних фінансів. Лімська декларація : Декларація Орг. Об'єдн. Націй від 11.09.1997 р. URL: https://zakon.rada.gov.ua/laws/show/998_090#Text

of control both for the informational display of the real state of the country's financial affairs and for the implementation of control within the state, that is, the inspection of all state bodies and institutions that perform the functions of state power.[613]

The provisions regarding the budget control have been regulated by Chapter V of the Budget Code of Ukraine. Article 109 of the Code assigns to parliamentary control a significant role in the system of state control (surveillance) in the field of executing the budgets in terms of revenues. The Verkhovna Rada of Ukraine exercises control over the implementation of the Law on the State Budget of Ukraine and consolidated budgets in terms of revenues not only by considering reports but also by administering legislative activity when introducing amendments into to the State Budget of Ukraine in those cases when actual revenues do not ensure the fulfillment of planned indicators. On such occasions, it is necessary to make changes to the budget legislation. Thus, the control-supervisory powers of the Parliament are inextricably related to its legislative activity and constitutional powers envisaged by the Constitution of Ukraine.[614] In this case, the control activities are closely interrelated with the activities on managing the budget system. Therefore, it is quite complicated to draw a borderline between control-supervisory and management activities of the Verkhovna Rada.

Parliamentary control in the field of executing the budgets in terms of revenues is exercised by the Verkhovna Rada of Ukraine through and in cooperation with the Committee of the Verkhovna Rada of Ukraine on Budget Issues, as well as the Accounting Chamber

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613 Піхоцький В. Зарубіжний досвід організації державного фінансового контролю та можливість його використання в Україні. *Економіст*. 2016. №1. С. 31-34. С.32 URL: http://nbuv.gov.ua/UJRN/econ_2016_1_9

614 Конституція України: Закон від 28.06.1996 № 254к/96-ВР Редакція від 01.01.2020. URL:https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

of Ukraine, which are assigned by Articles 109 and 110 of the Code the respective powers in this area.[615] The Accounting Chamber is of primary importance within the system of state control in the field of executing the budgets in terms of revenues. It is also the body that both exercises independent control-supervisory activities and ensures the effectiveness of parliamentary control through the interaction with the Verkhovna Rada of Ukraine and People's Deputies of Ukraine. Control-supervisory functions and powers of the Accounting Chamber, which are established by the Law of Ukraine "On the Accounting Chamber", at first glance, duplicate a number of powers and competences of the State Audit Service as one of the main bodies of state financial control.[616] However, such a situation is justified since the State Audit Service acts as the main body of control within the system of the bodies of executive power. At the same time, owing to the division of branches of power, the Accounting Chamber (as it has already been mentioned) is a body of parliamentary control and ensures the effective management of the budget system, including the body of legislative power. Besides, in accordance with its competence, envisaged in the Law of Ukraine "On the Basic Principles of State Financial Control in Ukraine", the State Audit Service is a more comprehensive body both from an organizational and legal points of view.[617] It exercises state financial control in the field of executing the budgets in terms of revenues at all levels of the budget system.

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[615] Бюджетний кодекс України: Закон України від 08.07.2010 № 2456-VI. *Відомості Верховної Ради України* (ВВР). 2010 р., № 50, / № 50-51 /, стор. 1778, стаття 572 https://zakon.rada.gov.ua/laws/show/2456-17#Text

[616] Про Рахункову палату: Закон України від 02.07.2015 № 576-VIII Редакція від 07.05.2022. *Відомості Верховної Ради України* від 04.09.2015 2015 р., № 36, стор. 1754, стаття 360 URL: https://zakon.rada.gov.ua/laws/show/576-19#Text

[617] Про основні засади здійснення державного фінансового контролю в Україні: Закон України від 26.01.1993 № 2939-XII в редакція від 24.11.2021. *Відомості Верховної Ради України* від 30.03.1993 1993 р., № 13, стаття 110 https://zakon.rada.gov.ua/laws/show/2939-12#Text

The bodies of executive branch of power constitute the basis of the system of state control (surveillance) in the field under study. One of the most significant chains in the sphere of control is the Ministry of Finance of Ukraine. It carries out the coordination of activities of the controlling bodies and ensures the implementation of a unified state policy in the field under discussion.[618] The Ministry of finance performs the function of a peculiar "linker" between the central bodies of executive power. Each of the latter, in compliance with their competence, is endowed with control authorities. The activity of the Ministry provides for the effectiveness of the interaction between the State Treasury Service, local financial bodies, and other central executive bodies in the field of control over the execution of the budgets in terms of revenues. The functioning of the entire control system would be unbalanced without appropriate coordination activity. This would definitely result in the decrease of its effectiveness. An important role in ensuring the effectiveness of the above-mentioned bodies and their coordination belongs to the normative legal acts of the Ministry of Finance of Ukraine, which are adopted for the implementation of legislation and its specification in the area under research.

Among other central bodies of the executive power that perform essential functions in the system of state control (surveillance) in the field of executing the budgets in terms of revenues are the State Treasury of Ukraine, as well as different tax and customs bodies. Each body of the system under study has its own areas of control activities, which makes them indispensable participants of control and surveillance. When it comes to purely budgetary relations in the field of executing the budgets in terms of revenues, it is advisable to separately highlight the bodies of the State Treasury Service,[619] which

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[618] Бюджетний кодекс України: Закон України від 08.07.2010 № 2456-VI. *Відомості Верховної Ради України* (ВВР). 2010 р., № 50, / № 50-51 /, стор. 1778, стаття 572 https://zakon.rada.gov.ua/laws/show/2456-17#Text

[619] Положення про Державну казначейську службу України: Постанова Кабінету міністрів України від 15.04.2015 № 215

perform one of the most important functions in the field of executing the budgets in terms of revenues. The powers of the State Treasury Service are described in Article 112 of the Budget Code of Ukraine. They perform both purely technical and analytical functions of control over the budget flows. It is expedient to consider the role and functions of the State Treasury Service within the system of state control (surveillance) in more detail in relation the functions of controlling tax and customs bodies. This will give an opportunity to comprehensively study control-supervisory activities in the area under research.

The central executive bodies perform rather coordinative and managerial functions in the system of state control, whereas the local executive bodies exercise direct control. The legislation that regulates the activities of local state administrations provides control powers both to the local administration as a whole and to its individual structural divisions in particular. What is more, control by state administration should be attributed to supra-sectoral control, while control by its departments (which are the bodies of sectoral management) – to sectoral control. Local state administrations exercise state control over the preservation and rational use of state property in the territories under their jurisdiction. They also monitor the fulfillment of state contracts and obligations before the budget. Hence, the local executive bodies might be subdivided into those that are structural units of the central executive bodies in the field of executing the budgets in terms of revenues and those that are executive bodies of local councils. In the first case, the local executive bodies are connected with the respective central bodies by stable hierarchical subordinate ties, and their independence is limited. In the second case, the respective local executive bodies exercise control within local budgets and ensure the control of local councils over the respective local budget.

A separate niche in the budget system belongs to the local bodies

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Редакція від 01.04.2021. *Офіційний вісник України.* від 05.05.2015 № 33, стор. 27, стаття 964, код акта 76577/2015 https://zakon.rada.gov.ua/laws/show/215-2015-%D0%BF#Text

of self-government and their executive departments on the issues of the budget process. The latter adopt local budgets and exercise control over their execution. This control is autonomous and depends to a lesser degree on the state-wide control-supervisory activities of the central executive authorities. These bodies ensure comprehensive coverage by the state control system of all levels of the budget system and have more organizational and legal opportunities to secure legitimateness at the lower levels of the budget system. The nature of the control function of the bodies of local self-government in the field of control over the execution of local budgets in terms of revenues is quite voluminous. However, some control powers cannot be implemented in practice, for a certain number of them do not provide an opportunity to influence the final result of the work of the objects under control. In the conditions of administrative reform, preventive internal financial control is the most effective form as it allows to prevent violations of legislation, abuses, and losses of financial and material resources. At the stage of financial forecasting and planning, preventive control serves as a prerequisite for making optimal management decisions.

It is also worth mentioning presidential control in budgetary field. The control powers of the President of Ukraine are regulated, above all, by the Constitution of Ukraine. They extend on all branches of power. At first, the President signs the laws adopted by the Verkhovna Rada. In case he disagrees on the laws or they go against the Constitution or international treaties, the President vetoes them with subsequent return for reconsideration by the Verkhovna Rada. He can also cancel the effect of acts of the Cabinet of Ministers of Ukraine and acts of the Council of Ministers of the ARC, which do not comply with the Constitution and laws of Ukraine. The President administers not only direct but also indirect control – by exercising his constitutional right to appoint a third of the members of the Constitutional Court of Ukraine, to form courts, to establish (within the funds envisaged in the State Budget of Ukraine) advisory and other auxiliary bodies and services, etc. Nonetheless, certain powers are not a sufficient basis for including

the respective bodies into the system of state control (surveillance) in the field of executing the budgets in terms of revenues. The specified bodies and their control-supervisory activities in the budgetary sphere do not have stable legal and organizational ties, whereas their participation in this field is not systematic.

In conclusion, it is important to point out that *the institutional element of state control (surveillance) in the field of executing the budgets in terms of revenues* is constituted by the Verkhovna Rada of Ukraine in cooperation with the Budget Committee and the Accounting Chamber of Ukraine, the Cabinet of Ministers of Ukraine, the Ministry of Finance of Ukraine as a coordinating body, the State Treasury Service of Ukraine, the State Tax Service, the State Customs Service, the State Audit Service, and other bodies of the Ministry of Finance of Ukraine, local executive bodies, in particular local state administrations as executive bodies of local councils, bodies of local self-government and their executive committees. Consequently, the system of state control (surveillance) in the field of executing the budgets in terms of revenues is composed of legal elements (legal norms and procedures regulated by them) and bodies of state power that apply the respective norms.

The main objective of the system of state control (surveillance) in the field of executing the budgets in terms of revenues lies in ensuring the compliance with both budgetary legislations and the principles of the budget system by those participating in the budget process and other entities. The task of control (surveillance) is to secure timely and complete receipt of mandatory payments to budgets and their compliance with planned revenues. All elements of the system of control are coordinated by the ministry of Finance of Ukraine. The latter also ensures the unified implementation of state financial policy by all state authorities.

In order to achieve the objective and fulfil the tasks of state control (surveillance) in accordance with the procedure prescribed by law, it is necessary to apply the respective forms, types, means, and procedures of such a control. In case of violations, guilty or responsible persons shall be subject to legal liability.

CONCLUSIONS

Within the framework of European integration, the issue of the legal nature of the system of state control and surveillance in the field of executing the budgets in terms of revenue is extremely important for Ukraine. One of the major reasons for this is that our country is gradually moving away from the paternalistic concept, changing the paradigm of its development: from the state that "takes care" of society to the state that functions in the interests of society, securing the latter's normal functioning and development. In other words, we are facing a transition from petty regulation and constant interference in society's affairs to minimal, indirect influence on it.

The terms "control" and "surveillance" are frequently reflected in lawyers' consciousness and linger in their legal thinking since they are an integral part of legal language. Control and surveillance are the phenomena inherent in numerous processes that occur in the society and state. Through inspections, observations, and comparisons control and surveillance assess the object under control, which allows to draw conclusions and commit actions that will correct or improve the object's state. Control and surveillance are the phenomena, necessary for the existence and development of society, as well as for the effective functioning of the state. Today, in the conditions of the formation of a sovereign and democratic state, at the time of transition to a new state system, control-supervisory mechanisms in the field of executing the budgets in terms of revenue are acquiring more and more significance. The control and surveillance forms of legal activities affect the dynamics of post-Soviet countries turning into democratic, law-based states. And this is one of the crucial factors that facilitate the formation of civil society.

State control in the field of executing the budgets in terms of revenues is the activity of the authorized bodies of state power, which lies in checking the participants of the budgetary process for compliance with budgetary legislation, budgetary discipline, appropriateness and completeness of mandatory payments to the budget and which is carried out systematically, repeatedly in relation to the object under control, with the use of specific

procedures envisaged by law. State surveillance in the field of executing the budgets in terms of revenues is the activity performed by the competent bodies of state power, which lies in checking the participants of the budgetary process for compliance with budgetary legislation, budgetary discipline in relation to the object under control in the form of legislatively specified procedures of active and / or passive permanent monitoring.

The elements of the system of state control (surveillance) in the field of executing the budgets in terms of revenues are the legal norms that regulate the respective state control-supervisory activity, as well as the state bodies themselves that carry out this activity. Therefore, the legal nature of the system of state control (surveillance) in the field of executing the budgets in terms of revenues has been stipulated: by a combination of legal norms – regulated by the norms of financial law types, forms, means and procedures of implementation by authorized bodies of state power of control and surveillance over the objects under control in all spheres of executing the budgets in terms of revenues; by a combination of institutions – the system of the bodies of state power endowed with the respective functions and powers to exercise control and surveillance in the field of executing the budgets in terms of revenues, which, due to the separation of competences, cover all aspects of legal relations in the field.

At the same time, it should be outlined that control and surveillance in the field of executing the budgets in terms of revenues are certainly of great significance; however, there must be a measure, a limit to such activities. The lack of control can lead to ignoring the interests of the state, as well as lower the reputation of state power and disrupt the balance in using the public finance. On the other hand, excessive control from the higher bodies of state power may result in other bodies of power losing their independence (violation of the principles of decentralization, use of budget funds according to the principle of subsidiarity – closeness to the consumer), violation of human and citizen rights, interference in the activities of the institutions of civil society.

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DIGITAL AGE IN EUROPEAN LAW

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INTRODUCTION

The rapid development of information technology in the modern world has become one of the main trends in the global social environment, which requires appropriate legal support. The EU, as a unique regional cooperation, also notes the relevance and need for the development of the information society. The development of this area of legal regulation is becoming a major aspect of sustainable economic growth of the Member States of the Union and the EU as a whole.

Back in 2000, the European Council adopted the Lisbon Strategy[620], which set the EU's goal of involving every EU citizen in the digital environment in order to strengthen social cohesion and facilitate easier access to public information and transparency in EU action and decision-making. This goal is later implemented by the European Union in the policy documents Europe – 2020[621] and Europe, which is

[620] eEurope 2002 An Information Society For All Draft Action Plan prepared by the European Commission for the European Council in Feira 19-20 June 2000. URL: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0330:FIN:EN:PDF

[621] EUROPE 2020 A strategy for smart, sustainable and inclusive growth. COM/2010/2020 final. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010DC2020&qid=1652801164430

approaching the digital age (A Europe fit for the digital age)[622]. In particular, the latter proclaims that the digital strategy must work for people and businesses, and Europe must strengthen its digital sovereignty and set its own high standards in this area.

The urgency of the topic for Ukraine is obvious. Applying for EU membership is another step toward full participation in the Union of European States. This step requires the advanced development of the Ukrainian legal system in the digital environment in particular. EU standards are Ukraine's path to the new, successful development and economic prosperity.

I. LEGAL BASIS REGULATION OF THE INFORMATION SPACE IN THE EU

The EU's founding act in this area is the **European Electronic Communications Code**[623] established by Directive (EU) 2018/1972 of the European Parliament and of the council of 11 December, 2018. This act was finally replaced in December 2020 with the REFIT – Regulatory Fitness. This Directive is part of a «Regulatory Fitness» (REFIT), the scope of which included four Directives, namely Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Service Directive 2002/212/EC. Each of those Directives contains measures applicable to providers of electronic communications networks and of electronic communications services, under which undertakings were vertically integrated, namely, active in both the provision of networks and of services.

As a result of the legal reforms, it adopted directive named after

[622]A Europe fit for the digital age. URL: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en

[623]Directive (EU) 2018/1972 establishing the European Electronic Communications Code. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972#ntr4-L_2018321EN.01003601-E0004

«Better law-making» 2009[624] and **«Citizen's rights»** 2009[625]. They changed the legal regulation in this area, emphasized the strengthening of competition and further development of the industry.

According to paragraph 4 of the Directive 2009/136/EC, a fundamental requirement of the directive is to provide users on request with a connection to the public communications network at a fixed location and at an affordable price, such as the provision of local, national and international telephone calls, facsimile communications and data services, the provision of which may be restricted by the Member States to the end – user's primary location or residence. But, there should be no constraints on the technical means by which this is provided, allowing for wired or wireless technologies, nor any constraints on which operators provide part or all of the universal service obligations.

According to paragraph 5 of the same directive, data connections to the public communications network at a fixed location should be capable of supporting data communications at rates sufficient for access to online services such as those provided

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[624] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws URL:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0136&qid=1652784843164

[625] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0140&qid=1652785090992

via the public Internet. The speed of internet access experienced by a given user may depend on a number of factors, including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The Community is not appropriate to mandate a specific data or bit rate.

The directive protects the rights of users with disabilities (paragraphs 8, 9, 12, 36, 41); empowers national regulators to regulate the level of retail tariffs, including the grouping of geographical regions; obliges communication service providers to inform consumers about access to emergency services and any restrictions on services; ensures the right of national authorities to disseminate information of public interest through communication providers; does not require providers to control the information transmitted through their networks, this is a matter of national law.

The directive also requires transparency, relevance and accessibility of information on prices for various services if there are several providers. This right is recognized as key. Customers should be informed of their rights to use their personal information in subscriber directories, their purpose and objectives, and the right not to be included in such directories free of charge. It also provides the right to access emergency calls under national numbering (eg. 112), the right to choose and change providers when it suits their interests, including reasonable time, and the right to port numbers.

The security of the use of personal data is guaranteed only by authorized personnel and legally authorized purposes. To this end, Member States should encourage the provision of information to end-users about available precautionary measures and encourage them to protect equipment against viruses and spyware. Providers are guaranteed the right to sue spammers to protect their customers, and the competent government is provided with international cooperation in the fight against cross-border spam and spyware, including through ENISA.

The Directive 2009/140/EC declares that any restriction of rights and freedoms on the internet must comply with the

European Convention for the Protection of Human Rights and Fundamental Freedoms. The aim of the reforms was to reduce the previous rules so that, for the rest, electronic communications would be regulated only by competition law.

In order to implement the provisions more effectively, the directive provides for the strengthening of the independence of national regulatory authorities by clearly defining the grounds for dismissal of the head of such a body and establishing an independent budget for it. The EU Commission has some control over national regulatory authorities after consulting with BEREC. Such a process should follow a simplified procedure and reduce deadlines.

According to the Directive, radio frequencies are scarce resources, so while remaining under the responsibility of the Member States, the latter must carry out strategic planning for them, taking into account the interests of the EU and the development of the internal market in general, with the assistance of the Radio Spectrum Policy Group (RSPG).

The directive aims to consolidate the internal market for electronic communications. In addition, an important point of the directive is to regulate the sharing and sharing of network elements and related facilities for providers of electronic communications networks.

In the 2000s, legal regulation affected areas such as consumer roaming using mobile services by Regulation (EU) 531/2012 of the European Parliament and of the Council of 13 June, 2012 on roaming on public mobile communications networks within the Union (**Roaming Regulation**)[626].

The rapid development of the information space in the EU cannot be realized without normative acts in the field of uniformity of standards. This was the reason for the acceptance of Directive

[626] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012R0531

2014/53/EU[627] of the European Parliament and of the Council of 16 April 2014 on the harmonization of the laws of the Member States relating to the making available on the **market of radio equipment**, like a new version of Directive 1999/5/EC. The directive is the introduction into circulation, movement on the market, and putting into service within the EU of radio and telecommunications equipment, and, in fact, creating a single market for such devices. The main principles of the directive are the protection of the health of the user, and the use of the radio frequency spectrum for radio equipment. Additional requirements are also established for certain types of equipment, their compatibility with other types, and maintaining databases of device parameters. The issues of the procedure for the declaration of conformity with European standards, and verification of such compliance by national supervisory authorities have been regulated.

The reforms of 2009 did not bypass the institutional mechanisms of the information sphere. In 2009, a supranational body of European regulators of communications was founded (**BEREC**)[628]. It is within the framework of WECES that cooperation between national regulatory authorities and the Commission should be carried out: development and application of common approaches, methodology and recommendations for the application of legislation, assistance to national authorities in regulating the industry, assistance to the European Parliament, Council and Commission in applying best practices.

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[627] Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0053

[628] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1971

BEREC consists of the Council of Regulators, a collegiate body formed from the heads or representatives of national regulatory authorities established in the member states with the main task of reviewing the market for electronic communication networks and services, one member from each State. The office shall be a body of the Union. It shall have a legal personality. In each Member State, the BEREC Office shall enjoy the most extensive legal capacity accorded to legal persons under national law. It shall, in particular, be capable of acquiring and disposing of movable and immovable property and being party to legal proceedings. It shall be represented by its Director. The BEREC Office shall have its seat in Riga. The task of the Council of Regulators is to make decisions within the competence of BEREC and to fulfill its tasks specified in Art. 3 of Regulation 1211/2009 establishing BEREC. BEREC shall comprise a Board of Regulators or in working groups. The Board of Regulators shall be composed of one member from each Member State. Each member shall have the right to vote. The Commission shall participate in all deliberations of the Board of Regulators without the right to vote and shall be represented at an appropriately high level.

In 2020 the Commission made its proposal on the **Digital Services Act** together with the proposal for the **Digital Markets Act**, on which the European Parliament and Council reached a political agreement on 22 March 2022[629]. The political agreement reached by the European Parliament and the Council is now subject to formal approval by the two co-legislators. Once adopted, the DSA will be directly applicable across the EU and will apply fifteen months or from 1 January, 2024, whichever later, after entry into force. The Digital Services Act will introduce a series of new, harmonised EU-wide obligations for digital services, like: «rules for the removal of illegal goods, services or content online, safeguards for users whose content has been erroneously deleted by platforms, new obligations for very large platforms to take risk-based action to prevent abuse of their

[629] Digital Services Act (DSA) URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545

systems, wide-ranging transparency measures, including on online advertising and on the algorithms used to recommend content to users, new powers to scrutinize how platforms work, including by facilitating access by researchers to key platform data, new rules on traceability of business users in online market places, to help track down sellers of illegal goods or services, an innovative cooperation process among public authorities to ensure effective enforcement across the single market»[630]. Digital Markets Act will: «apply only to major providers of the core platform services most prone to unfair practices, such as search engines, social networks or online intermediation services, which meet the objective legislative criteria to be designated as gatekeepers; define quantitative thresholds as a basis to identify presumed gatekeepers. The Commission will also have powers to designate companies as gatekeepers following a market investigation; prohibit a number of practices that are clearly unfair, such as blocking users from un-installing any pre-installed software or apps; require gatekeepers to proactively put in place certain measures, such as targeted measures allowing the software of third parties to properly function and interoperate with their own services; impose sanctions for non-compliance, which could include fines of up to 10% of the gatekeeper's worldwide turnover, to ensure the effectiveness of the new rules. For recurrent infringers, these sanctions may also involve the obligation to take structural measures, potentially extending to divestitute of certain businesses, where no other equally effective alternative measure is available to ensure compliance; allow the Commission to carry out targeted market investigations to assess whether new gatekeeper practices and services need to be added to these rules, in order to ensure that the new gatekeeper rules keep up with the fast pace of digital markets»[631].

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[630] Europe fit for the Digital Age: Commission proposes new rules for digital platforms. URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347

[631] Europe fit for the Digital Age: Commission proposes new rules for digital platforms. URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347

I. Protection of personal data

The digital age in legal relations inevitably requires legal regulation of personal data protection. Along with the acceleration of information exchange via the Internet, there is a threat of using computer technology to process and use the data of Internet users without their consent. In order to protect against personal data breaches in the second half of the 20th century, laws on the protection of personal data were adopted in many European countries. The national protection laws adopted had the common goal of ensuring the right to privacy on the basis of international standards. However, given the differences in the legal systems of European countries, there is a need for legal unification of personal data protection at the interstate level.

Fundamental to the protection of personal data in Europe remain the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Article 10) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981 (Ukraine joined in 2011). EU law on this issue has been developed on the basis of these European standards.

It remains in force today Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April, 2021 establishing the Digital Europe Programme[632] to the period 2021-2027.

Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.

General Data Protection Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive

[632] Regulation (EU) 2021/694 of the European Parliament and of the Council of 29 April 2021 establishing the Digital Europe Programme and repealing Decision (EU) 2015/2240. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0694&qid=1652851983043

95/46/EC[633] proclaims, that: «the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security and the free movement of such data, is the subject of a specific Union legal act. This Regulation should not, therefore, apply to processing activities for those purposes»[634]. The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the «Charter») and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.

The protection of personal data in the EU is guaranteed on the basis of the principle of non-discrimination (in particular regardless of nationality and place of residence) and aims to promote the area of freedom, security, and justice and the development of the internal market.

The right to the protection of personal data is not an absolute right. It must be in balance with other rights guaranteed by the EU Charter of Fundamental Rights (the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression

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[633] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679&qid=1652859004429

[634] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity) on the basis of proportionality.

Rapid technological development and globalization require humanity to promote the free movement of data while ensuring a high level of protection. Fragmentation through national protection by the Member States hinders legal certainty and threatens data protection risks in the EU, especially online. This regulation is intended to correct this error.

General Data Protection Regulation (item 13[635]) provides for the exclusion of its provisions on micro, small and medium-sized enterprises, with less than 250 employees, on accounting, and does not apply to legal entities. Its provisions are also excluded for national security data of EU Member States; the action also does not apply to the processing of personal data during purely domestic or personal activities not related to professional or commercial activities. The processing of personal data by non-EU registered entities is individual to the regulation if it is related to the monitoring of the conduct of entities taking place in the EU.

Any processing of personal data must be lawful and justice (item 34-60[636]). For processing to be lawful, the data must be processed with the consent of the person concerned on other legitimate grounds. Data processing without the consent of the person may be for reasons of public interest in the area of health ("public health"). To ensure fairness of processing, the person must be informed of the existence of

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[635] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679&qid=1652859004429

[636] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679&qid=1652859004429

the processing operation and its purpose. The person must have access to the data collected about him with the right to make changes or changes to them. The data controller must report breaches of personal data, such as loss of control.

Examining the provisions of the General Data Protection Regulation, it is important to note that it specifies the concept of personal data and expands the responsibilities and powers of the relevant subjects. Information on the past, current, or future state of a person's physical or mental health is accompanied by information on the provision of medical services. The definition of "biometric data" is proposed, which means personal data obtained from specific technical processing relating to the physical, physiological, or behavioral characteristics of an individual, which confirms the unique identification of this individual, such as images or fingerprints.

"The general principles set out in the regulation, include: principles of legality, fairness, transparency, target limitation, data minimization (requirement to be adequate and limited to data that are relevant and necessary to achieve the purpose for which they are processed), accuracy, limitations storage, integrity and confidentiality. The new rules apply to the processing of data of individuals in companies, enterprises, etc., which are located not only in Europe, but also operate outside the EU and are related to the processing of personal data within the EU. The rules do not apply to the processing of data on legal entities, as well as data relating to anonymous information and deceased persons. The rules of this regulation do not apply to the processing of personal data by an individual in the course of purely personal or domestic activity and thus without regard to professional or commercial activities"[637].

The Data Protection Regulation has implemented the harmonization of national legislation by EU member states. It

[637] Bryzhko V. M. Suchasni osnovy zakhystu personalnykh danykh v yevropeiskykh aktakh. Informatsiia i pravo. 2016. № 3 (18). С. 45-57 URL: http://ippi.org.ua/brizhko-vm-suchasni-osnovi-zakhistu-personalnikhdanikh-v-єvropeiskikh-pravovikh-aktakh-stor-45-57.

confirmed the existence of a comprehensive legal framework for the processing and protection of personal data of individuals in the European Union. However, due to constant technical progress, new problems and risks arise that need to be addressed and resolved at the legislative level and in practice. However, personal data processed by public authorities under this Regulation should be governed by the Directive (EU) 2016/680 and the Directive 2002/58/EC[638] of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (**Directive on privacy and electronic communications**). The main difference between Directive 2002/58 is that it does not apply to legal persons, but only to natural persons.

Directive (EU) 2016/680 establishes: «the level of protection of the rights and freedoms of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should be equivalent in all Member States. Effective protection of personal data throughout the Union requires the strengthening of the rights of data subjects and of the obligations of those who process personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data in the Member States»[639] (item 7).

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[638] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002L0058&qid=1652861303213

[639] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data,

The directive has an effect on the processing of personal data by competent authorities carrying out specific tasks. Such bodies may include not only public authorities, such as the judiciary, the police, and law enforcement, but also any other body or legal person exercising public authority under the law of an EU Member State, such as financial institutions in specific cases (item 11[640]).

The activities of law enforcement agencies in the context of this directive may be carried out without prior notice, such as at demonstrations, major sporting events, and riots, and to maintain law and order against threats that may lead to offenses. Moreover, the term "offense" is an autonomous concept as interpreted by the Court of Justice (item 12-13[641]).

The directive does not affect the principle of "public access" to official documents, i.e. personal data held by the competent authorities may be disclosed in the public interest (item 16[642]).

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and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

[640] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

[641] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

[642] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the

Requests for disclosure must always be in writing, substantiated, and periodic, i.e. not related to the entire document submission system (item 22[643]).

The directive (item 30[644]) provides for the delimitation of data by categories such as suspects; persons convicted of a criminal offense; victims and other parties, such as witnesses; persons possessing relevant information or contacts; and associates of suspects and convicted criminals.

The normative act also provides for the right of the personal data person to access the mechanism of request for a free receipt, access, correction, or deletion of personal data and to restrict processing. To protect personal data, the controller or data processor must cooperate with the supervisory authorities, in particular to report breaches of personal data no later than 72 hours after learning of the disclosure.

The transfer of data from an EU Member State to third

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prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

643 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

644 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0680&qid=1652860634193

countries or international organizations requires the consent of the Member State from which the information was obtained.

Regulation (EU) 2016/679 established the European Data Protection Board as an independent body of the Union with legal personality. The Board should contribute to the consistent application of Regulation (EU) 2016/679 and Directive (EU) 2016/680 throughout the Union, including by advising the Commission.

Another special act in the protection of personal data is Regulation (EU) 2018/1725[645] of the European Parliament and of the Council of 23 October, 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data. This regulation established the **European Data Protection Board** as an independent body of the Union with legal personality. Its main function is to oversee the activities of EU bodies through a network of data protection officers, one in each EU body. Officers are responsible for personal data protection policies and may also express an opinion on matters within their competence on projects developed by the body in which they work.

This Regulation deals with the legal regulation of the protection of individuals with regard to the processing of personal data and the free movement of data by the EU institutions. To ensure this task, the regulations provide for the establishment of a special independent supervisory body. «European Data Protection Supervisor should continue to exercise his or her supervisory and advisory functions in respect of all Union institutions and bodies, on his or her own initiative or upon request. In order to ensure

[645] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1725

consistency of data protection rules throughout the Union, when preparing proposals or recommendations, the Commission should endeavor to consult the European Data Protection Supervisor. A consultation by the Commission should be obligatory following the adoption of legislative acts or during the preparation of delegated acts and implementing acts as defined in Articles 289, 290, and 291 TFEU and following the adoption of recommendations and proposals relating to agreements with third countries and international organizations as provided for in Article 218 TFEU» [646] (item 60). «Every data subject should have the right to lodge a complaint with the European Data Protection Supervisor, and the right to an effective judicial remedy before the Court of Justice in accordance with the Treaties, if the data subject considers that his or her rights under this regulation are infringed or where the European Data Protection Supervisor, does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case» [647] (item 60).

The regulations do not apply to the data of deceased persons and legal entities. The regulation applies to the activities of the EU

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[646] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1725

[647] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1725

institutions which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU (item 12-13[648]).

Therefore, the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

I. Legal regulation of relations on the Internet

Today, the Internet is a part of the lives of most people in Europe, it is changing it in various ways. However, the legal regulation of such changing relations remains fragmentary at both the national and international law levels.

The basic acts EU in this area are The Regulation laying down measures concerning open internet access,[649] and The Directive establishing the European Electronic Communications Code[650].

The Regulation (EU) 2015/2120 aims to ensure the openness of the internet and to avoid fragmentation of the internal market as a result of measures taken by the individual EU Member States, based on general rules adopted at the EU level. First of all, the regulation aims to ensure the rights of end-users of the Internet to access and disseminate information and content, as well as to use and provide programs and services without discrimination through its Internet access service. Any commercial practice of service

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[648] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018R1725

[649] The Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120&qid=1652875573237

[650] European Electronic Communications Code. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972#ntr4-L_2018321EN.01003601-E0004

providers cannot affect the restriction of these rights. To avoid such restrictions, national and other competent authorities are obliged to intervene on the basis of monitoring activities when commercial agreements undermine the essence of end-user rights (item 7)[651]. The regulation is not intended to regulate the legality of content, programs, or services. National regulatory authorities shall closely monitor and ensure compliance with the Regulation, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. «For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services. National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and to BEREC»[652] (Article 5).

One of the main tasks of the Directive establishing the European Electronic Communications Code is strategic planning, coordination, and harmonization at the EU level of the use of radio frequencies in order to ensure full advantage in the EU internal market of the interests of end users of electronic services and maximum protection of EU interests worldwide. Scope of the Code: Internet, mobile Internet, mobile communications, analog and digital television, as well as fixed and car radios. Radio frequency management should be coordinated with the work of international and regional organizations in this field, namely the International Telecommunication Union (ITU) and the European Conference of

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651 The Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120&qid=1652875573237

652 The Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120&qid=1652875573237

Postal and Telecommunication Administration (CEPT).

This directive does not cover the content of services such as broadcasting, financial services, and certain other information society services. The definition of "electronic communication service" should contain three services: Internet access services, interpersonal communication services (paragraph 5-7, article 2)[653], services that consist entirely or mainly of signal transmission (item 15)[654]. To fall within the definition of a service, it must be provided for a fee. However, remuneration is not always valued in cash, for example, in exchange for information or the provision of personal data. This definition is followed by the practice of interpretation by the EU Court[655] (for example, advertising, which is a condition for access to the service).

An important achievement of the European Electronic Communications Code (Section 2) is the introduction of a harmonized system of general authorization granted to electronic communications enterprises. It avoids discrimination against the rights of such undertakings in different Member States and harmonizes the conditions for the use of general authorization.

Crimes are committed not only in ordinary life, but also on the Internet and other networks – online. That is why in 2001, the Council of Europe accepted The Convention on Cybercrime. More than 60 countries of the world ratified the Budapest Convention, including Ukraine (2006). It remains the most relevant international treaty that protects people and their rights from

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653 European Electronic Communications Code. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972#ntr4-L_2018321EN.01003601-E0004

654 European Electronic Communications Code. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018L1972#ntr4-L_2018321EN.01003601-E0004

655 Judgment of the Court of Justice of 26 April 1988, Bond van Adverteerders and Others v The Netherlands State, C-352/85, ECLI: EU:C:1988:196. URL: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-352/85

crime on the Internet.

More than 140 countries have cooperated with the Council of Europe to strengthen their legislation and the ability to combat cybercrime. The purpose of the Council of Europe in the cyber rule was to criminalize crimes against confidentiality, integrity, and accessibility of cyber – and systems, offenses related to the computer, criminal content, in particular, such as child pornography, racism, xenophobia, as well as offenses that encroach on authorial and related rights.

EU legislation adopted in this branch refers to EU competencies in the areas of freedom, security, and justice derived from Title V of the Treaty on the Functioning of the European Union. The main normative act in this area in the EU is directive on attacks against information systems 2013[656]. The directive is based on the above-mentioned Convention, is its normative framework, and the accession to it by all Member States is recognized as a priority. The directive provides for cybercrime in the form of imprisonment, liability for such crimes for legal entities is provided, and the responsibility of criminal groups is increased.

To improve The Directive including the police and other specialized law enforcement services of the Member States, as well as the competent specialized Union agencies and bodies, such as Eurojust, Europol and its European Cyber Crime Centre[657], and the European Network and Information Security Agency (ENISA)[658].

Under the Association Agreement, Ukraine has committed itself to implement the acts defined by the Agreement itself,

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[656] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. URL: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013L0040

[657] European Cybercrime Centre - EC3. Official webpage. URL: https://www.europol.europa.eu/about-europol/european-cybercrime-centre-ec3

[658] The European Network and Information Security Agency. Official webpage. URL: https://www.enisa.europa.eu/

including in the field of electronic communications. «In the telecommunications services sector, the Association Agreement with the EU provides for the prospect of reciprocal granting of the internal market regime. This means that there should be no restrictions in the sector on the provision of services by Ukrainian legal entities in the EU and vice versa. This goal can be achieved with a positive assessment of the EU's compliance with Ukraine's regulatory approximation to EU law in the field of electronic communications»[659].

An important step in this direction was the adoption on September 30, 2020 of Ukraine's European Integration Law №3014 "On Electronic Communications"[660], which regulates the provision of telephone services and Internet access. The law will protect the rights of subscribers and improve the conditions for the development of the telecommunications business. The law entered into force on January 1, 2022.

The law, based on the EU Code, was developed by BRDO experts, and the working group included representatives of operators, providers, associations, and BRDO experts. The BRDO Office of Effective Regulation is an independent think tank, a key platform for united reform organizations that share common values for change. The office was established in 2015 as a non-governmental, non-profit organization to assist the government in carrying out medium- and long-term economic reforms.

II. Practice of the European Court of Human Rights in resolving cases relating to Internet activity

The practice of the European Court of Human Rights in cases, related to Internet, is quite indicative relating to determining the

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659 Intehratsiia Ukrainy do Yedynoho tsyfrovoho rynku Yevropy: peretvorennia pereshkod na vikna mozhlyvostei. URL: https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/Integratsiya-Ukrayiny-do-YEdynogo-tsyfrovogo-rynku-YEvropy_peretvorennya-pereshkod-na-vikna-mozhlyvostej.pdf

660 Pro elektronni komunikatsii. Zakon Ukrainy vid 16.12.2020 № 1089-IX. URL: https://zakon.rada.gov.ua/laws/show/1089-20#Text

most acute issues of legal regulation of digital relations in Europe. As of the end of May 2019, the European Court considered about 2.5 thousand cases related to internet issues. The bulk of such cases wes initiated by complaints about the violation of two articles *of* The European Convention on Human Rights (ECHR; formally the Convention for the Protection of Human Rights and Fundamental Freedoms): *Art. 8 "Privacy"*[661] *(*Article 8 provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society"*) and Art. 10 "freedom of expression"(*Article provides the right to freedom of expression, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". This right includes the freedom to hold opinions, and to receive and impart information and ideas, but allows some restrictions*)*. In addition, the applicants relied on violations of the right to property, the protection of which had become extended to intellectual property, the right to a fair trial, freedom of assembly and association, and prohibition of discrimination.

The European Court, in its decisions, clarified the boundaries of private life, indicating that it includes such aspects as the image of a person, his/her personal data, including biometric information, DNA samples, etc. Protecting communications from control by authorized persons (government agencies and others, such as employers) is of great importance. In a number of decisions, the European Court has formulated criteria for the admissibility of employer control over the use of the internet by employees, allowing for a balance between the employee's right to respect for private life and the interests of the employer.

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661 Guide on Article 8 of the Convention – Right to respect for private and family life, home and correspondence. Council of Europe. European Court of Human Rights, 2020. 148 p. / European Court of Human Rights. URL: https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

The European Court proceeds from the fact that the dissemination of information on the internet falls under the protection of Art. 10 of the Convention.

At the same time, the Court acknowledged that the level of protection of information, posted on the Internet, differs from that one, provided by the State to information distributed in the media. Of significant interest are the legal positions developed by the Court, regarding the blocking of Internet sites, the responsibility of Internet providers for the disseminated information and comments, the relationship between freedom of dissemination of information and copyright, etc. Also, the European Court traditionally pays special attention to the problem of ensuring a fair balance between competing for human rights. The Ukrainian legislative and law enforcement authorities need to take into account the approaches developed by the European Court of Justice in order to reduce the number of possible complaints it receives from our citizens as well as with the aim of scuccessful incorporation of EU Law principles and rules into the national legal system. It seems that the analysis of the practice of the European Court may be useful for identifying the latest trends in the development of the human rights system, assessing the degree of compliance of national information legislation and law enforcement practice with European standards.

The European Court has analyzed and generalized its practice for more than a decade. In 2011, its review of Internet cases was prepared and updated in June 2015.[662] The structure of the review makes it possible to judge which issues the Court itself considers most significant: whether it has jurisdiction over internet-related cases; protection of data and their storage (we are talking mainly about personal data); freedom of expression; protection of intellectual property, access to information and the internet; obligations of states to counter violence and other criminal activities on the internet. The

[662] Report Research Division ECHR, Internet: Case-law of the European Court of Human Rights. 2011, 2015 (update). URL: https://www.echr.coe.int/Documents/ Research_report_internet_ENG.pdf

review analyzes not only individual cases directly related to the internet, but also previously considered cases.

It should be noted that today there is an active discussion about the changes that the human rights system has undergone in recent years. In particular, attempts are being made to theoretically substantiate such new human rights as the right to access the internet, the right to be forgotten, etc. Regardless of whether they will be recognized as independent human rights or will be protected in the context of traditional human rights, their analysis is quite important for studying EU digital law.

Right to privacy. Since the sphere of private life is so vast that it is difficult to give it a legal definition, those judgments of the European Court that allow delineating the boundaries of this sphere, highlighting its components that are subject to legal protection in accordance with Art. 8 of the Convention – Right to respect for private and family life.

Thus, in decisions of the European Court, it was recognized that the following aspects of privacy are subject to protection: – personal data, including fingerprints and DNA samples[663]; – personal information[664]; – the name of a citizen – in terms of protection against publication of it in full, and in some cases even only the name of the person, without indicating his surname, if this is sufficient for identification[665]; – secrecy of communications (including e-mail and

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663 ECtHR. S. and Marper v. the United Kingdom [GC]. Applications nos. 30562/04 and 30566/04. Judgment of 4 December 2008. Para. 41 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-90051

664 ECtHR. Flinkkilä and Others v. Finland. Application no. 25576/04. Judgment of 6 April 2010 // European Court of Human Rights. HUDOC. URL: http://hudoc. echr.coe.int/eng?i=001-98064 (дата обращения: 12.01.2019); Saaristo and Others v. Finland. Application no. 184/06, Judgment of 12 October 2010. Para. 61 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-101017

665 ECtHR. Kurier Zeitungsverlag und Druckerei GmbH v. Austria (no. 2). Application no. 1593/06. Judgment of 19 June 2012. Paras. 52–57 //

online communications)[666]; – the right to own image[667].

Professional activity is not excluded from the protected sphere of private life.[668] The problem of protecting the privacy of employees from control by the employer, including control of telephone conversations, e-mail and Internet use, is extremely relevant. Thus, in the case of Bărbulescu v. Romania[669], the Court considered the complaint of a person dismissed from a private company for using the Internet for personal purposes. In the decision of the Grand Chamber of the European Court, in this case, criteria are formulated to ensure a balance between the rights and interests of the employee and the employer. Ensuring respect for private life in investigating crimes, conducting intelligence, and other activities related to ensuring national security is a serious problem. It arose long before the advent of the Internet, but the development of the Web made it extremely acute. The European Court has considered a number of such cases. For example, K.U. v. Finland[670] involved the placement of a sexual advertisement on

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European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-111524

666 ECtHR. Copland v. the United Kingdom. Application no. 62617/00. Judgment of 3 April 2007 // European Court of Human Rights. HUDOC. URL: http://hudoc. echr.coe.int/eng?i=001-79996.

667 См.: ECtHR. Von Hannover v. Germany (no. 2) [GC]. Applications nos. 40660/08 and 60641/08. Judgment of 7 February 2012. Para. 96 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-109029; Verlagsgruppe News GmbH and Bobi v. Austria. Application no. 59631/09. Judgment of 4 December 2012 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-115013

668 ECtHR. Copland v. the United Kingdom. Application no. 62617/00. Judgment of 3 April 2007

669 ECtHR. Barbulescu v. Romania. Application no. 61496/08. Judgment of 5 September 2017 // European Court of Human Rights. HUDOC. URL: http://hudoc. echr.coe.int/eng?i=001-177082.

670 ECtHR. K.U. v. Finland. Application no. 2872/02. Judgment of 2 December 2008 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i= 001-89964

behalf of a minor on a dating site and the provider's refusal to disclose the client's identity upon police request.

The domestic courts did not find a provision in the law that required a provider, in violation of professional secrecy, to disclose identification data in case of suspicion of a minor offense such as defamation. However, the European Court considered that in such cases, priority should not be given to freedom of expression and confidentiality, but to such legitimate goals as prevention of crime and protection of the rights and freedoms of others (paragraph 49), and found a violation of Art. 8 of the Convention.

An integral part of the investigation of crimes is secret surveillance, including the use of technical means. The Court later formulated the general position that, in such cases, applicants must demonstrate the existence of a "reasonable likelihood" that "the measures in question were applied to them".[671] These issues resurfaced in the famouse case of Roman Zakharov v. the Russian Federation.[672] The subject of the complaint was the establishment in Russia of a system of secret wiretapping of mobile telephone communications in the absence of effective legal remedies. The applicant did not complain that his conversations were monitored. His complaint was that the communication service operators enabled the authorities to carry out operational and investigative measures (paragraphs 11, 13, 152, 174, etc.). In considering the case, the key question was whether Russian law provides effective remedies against covert surveillance measures. In order for an interference with human rights to be recognized as "based on law", the contested measure must not only be provided for in legislation, but the relevant legislation must meet a number of requirements developed in the case law of the European Court, namely: the law

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[671] 2 ECtHR. Kennedy v. United Kingdom. Application no. 26839/05. Judgment of 18 May 2010. Paras. 122–125 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/eng?i=001-98473

[672] CtHR. Roman Zakharov v. Russia. Application no. 47143/06. Judgment of 4 December 2015 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr. coe.int/eng?i=001-159324

must be accessible to the person concerned and the consequences its applications must be foreseeable (para. 228).

The Right to Be Forgotten. Among the rights whose development is directly related to the spread of the internet is the so-called right to be forgotten. In the early 2000s abroad, it was mentioned quite rarely[673], and in Ukraine, it was not actively discussed yet. But in recent years, this right has aroused interest of foreign scientists. The precedent that finally recognized the right to be forgotten in the member states of the European Union was the judgment of the EU Court of May 13, 2014 in the case of Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González[674]. This case arose in connection with the demand of a Spanish citizen to Google to remove from the search results the information that he did not contribute to the social security fund.

The Court's decision, however, emphasizes that the right to exclude information only affects search results and does not provide for the removal of a link from search engine indexes. Later, the right to be forgotten (also called the right to erasure) was enshrined in Art. 17 of the General Data Protection Regulation of 27 April, 2016[675], which lists the grounds, on the one hand, allowing the subject of personal data to require the controller to delete them, and on the other hand, giving the right to refuse to satisfy such

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673 Werro F. The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash // Haftungsrecht im dritten Millennium / Ed. by A.C. Ciacchi, C. Godt, P. Rott, L.J. Smith. Baden-Baden, 2009. P. 285–300

674 CJEU. Grand Chamber. Case C-131/12 Google Spain SL and Google Inc.v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González. Request for a preliminary ruling: Audiencia Nacional (Spain). Judgment of 13 May 2014. // InfoCuria — Case-law of the Court of Justice. URL: http://curia.europa.eu/juris/liste. jsf?num=C-131/12

675 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) // OJ. L 119. Vol. 59. 4 May 2016.

requirements. In particular, grounds for refusal may be the need to process data in order to exercise the right to freedom of expression and dissemination of information; for the performance of a legal obligation or authority of the controller; for archiving for scientific, historical or statistical purposes, etc.

The European Court has also begun to consider complaints related to the right to be forgotten, although their number is still small. The first was the case of Khelili v. Switzerland[676], where the Court found a violation of Art. 8 of the Convention, the refusal to delete from the police databases the entry which referred to the applicant's profession as "prostitute".

In Peel v. Sweden[677] the European Court of Justice noted that the applicant could have requested that search engines remove all traces of an (illegal) comment, citing as grounds the aforementioned Google Judgment of the European Court of Justice.

The case of M.L. and V.V. v. Germany[678] was related to the requirement to anonymize a number of materials in the Internet Archive (the applicants were convicted of murder, and the relevant reports were kept in the archives of the media). The Court declared the application inadmissible on the following grounds: the existence of public interest; wide publicity of the case; objective and reliable nature of publications; lack of intent to damage the reputation of the applicants. Thus, in judicial practice, the right to be forgotten is protected as an element of the right to respect for private life, provided for in Art. 8 of the Convention. However, it often comes into conflict with freedom of speech, but the first steps

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[676] ECtHR. Khelili v. Switzerland. Application no. 16188/07. Judgment of 18 October 2011 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/ eng?i=001-107033

[677] 5 ECtHR. Pihl v. Sweden. Application no. 74742/14. Decision of 7 February 2017. Para. 33 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe. int/eng?i=001-172145

[678] ECtHR. M.L. and W.W. v. Germany. Applications nos. 60798/10 and 65599/10. Judgment of 28 June 2018 // European Court of Human Rights. HUDOC. URL: http:// hudoc.echr.coe.int/eng?i=001-183947

have already been taken towards achieving a "fair balance" between the protection of each one of these rights.

The right to access the internet. Of great interest is the question of the formation of the right to access the internet. And while the debate about whether access to the internet can be considered as an independent right is still far from been completed, the relevant claims are protected to a certain extent by the European Court. It reviewed several cases in which convicts in correctional facilities complained about being denied access to the internet or certain websites. For example, in the case of Kalda v. Estonia[679] the administration's refusal to provide the convict with access to websites with legal information was challenged, and in the case of Jankovskis v. Lithuania[680] – to educational internet resources. In both cases, the Court held that there had been a violation of Art. 10 of the Convention, because the domestic courts "failed to convincingly demonstrate" the need to impose such restrictions (in other words, the restrictions were not sufficiently substantiated).

Protection of intellectual property. The relationship between human rights and intellectual property rights is a very interesting problem that has only recently attracted serious attention from researchers. In particular, it is considered in detail by L. Helfer and G. Austin in work "Human Rights and Intellectual Property: Outlining the Global Interface"[681]. The position of the European Court on this issue and the history of how the right of intellectual property was gradually included in the scope of its activities is highlighted by the former President of the Court Dean

[679] ECtHR. Kalda v. Estonia. Application no. 17429/10. Judgment of 19 January 2016. Paras. 52–53 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr. coe.int/eng?i=001-160270

[680] ECtHR. Jankovskis v. Lithuania. Application no. 21575/08. Judgment of 7/01/2017. Paras. 59–64 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr. coe.int/eng?i=001-170354

[681] Helfer L.R., Austin G.W. Human Rights and Intellectual Property: Mapping the Global Interface. New York, 2011.

Shpielmann[682]. Among other things, he shows how copyright, originally perceived only as a legitimate restriction on freedom of expression, gradually turned into a means of its protection.

Of great interest is the case of Nei and Sunde Kolmisoppi v. Sweden[683], related to the activities of the popular file-sharing service The Pirate Bay. The applicants were convicted of maintaining an Internet site, through which users exchanged digital materials such as films, music and computer games protected by copyright. The European Court recognized that the interference with the rights, provided for by art. 10 of the Convention, was based on the law and pursued a legitimate aim.

Assessing the need for this intervention, he compared the interests of applicants to facilitate the exchange of relevant information and the interests of copyright holders to protect them. Thus, the Court recognized that freedom of expression and copyright could be opposed to each other. Bearing in mind that the applicants had not taken any steps to prevent the infringement of copyright despite the appeals received, the Court concluded that the interference with their rights was "necessary in a democratic society" and declared the application inadmissible. This approach was developed in the cases of Ashby Donald v. France[684] and Akdeniz v. Turkey[685]. In the first case, photographers were convicted of distributing photos from a fashion show on the internet without the consent of the copyright holders (fashion houses), and the Court

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[682] D.Shpielmann. Copyright and human rights // Международное правосудие. 2016. № 1. С. 122–134

[683] HR. Neij and Sunde Kolmisoppi v. Sweden. Application no. 40397/12. Decision of 9 February 2013 // European Court of Human Rights. HUDOC. URL: http:// hudoc.echr.coe.int/eng?i=001-117513

[684] ECtHR. Ashby Donald and Others v. France. Application no. 36769/08. Judgment of 10 January 2013 // European Court of Human Rights. HUDOC. URL: http://hudoc. echr.coe.int/eng?i=001-115979

[685] ECtHR. Akdeniz v. Turkey. Application no. 20877/10. Decision of 11 March 2014 // European Court of Human Rights. HUDOC. URL: http://hudoc.echr.coe.int/ eng?i=002-9493

considered the interference with their rights to be proportionate. In the second case, the complaint related to the blocking of a site, that exchanged music files, – was declared inadmissible. Thus, the European Court recognizes that freedom of expression can, in principle, be restricted in order to protect copyright.

CONCLUSIONS

Today, the Internet is a means of communication, development, and realization of fundamental human rights, which allows to overcoming obstacles to the transnational development of mankind. However, the internet is also a means of violating such rights. That is why the sphere of Internet relations today is a key direction in the development of law, particularly in Europe.

The article had to not aim to conduct a state-of-the-art review of normative and application of law practices, organizational mechanism of adjusting of modern legal relations in a sphere of the internet.

The basic normatively legal acts of the EU in the sphere of the legal adjusting of relations on the internet, are considered. The EU bases the activity in this sphere on the basis of long-term programs and plans for the protection of human rights on the internet.

It will be that a right for EU in the sphere of digital technologies answers the modern calls of both changeable and evolutionary development of the life of modern humanity and to the negative phenomena of such, as criminality that is the consequence of such digital evolution of legal relationships.

The effective institutional activity of CE and EU is shown in the sphere of protection of human rights on the walk of life of digital legal relationships, including in the field of criminalization of delict, that accomplished by means of the internet.

The transfer of public relations to the internet significantly affects their nature, and gives rise to new claims within the framework of traditionally recognized human rights (if not fundamentally new rights), such as the right to access the internet or the right to be forgotten. All this requires the development of new approaches to the understanding and protection of human

rights that meet modern realities. The practice of the European Court has had a huge impact on the development of the content of such human rights as privacy, including the protection of personal data, respect for honor and dignity, freedom of expression, etc., which are undergoing significant transformations in the Internet era. Therefore, of significant interest are the legal positions developed by the Court, regarding the blocking of Internet sites, the responsibility of Internet providers for the disseminated information and comments, the relationship between freedom of dissemination of information and copyright, etc.

The Ukrainian legislative and law enforcement authorities need to take into account the approaches developed by the European Court of Human Rights in order to reduce the number of possible complaints it receives from our citizens as well as with the aim of successful incorporation of EU Law principles and rules into the national legal system. It seems that the analysis of the practice of the ECHR may be useful for identifying the latest trends in the development of the human rights system, assessing the degree of compliance of the national information legislation and law enforcement practice with European standards.

No less important are the criteria developed by the European Court for assessing the quality of the law on which the interference with human rights is based. In cases related to the Internet, the Court quite often states that the interference "was not based on the law", and not due to the absence of any normative act providing for the measures taken, but due to its inadequate quality. It seems that only the consideration by national legislators and law enforcers of the approaches developed by the European Court will reduce the number of complaints received from citizens.

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11. Europe fit for the Digital Age: Commission proposes new rules for digital platforms. URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347

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THE ROLE OF THE COUNCIL OF EUROPE IN THE ENLARGEMENT OF THE EUROPEAN UNION AND THE MAINTENANCE OF THE EUROPEAN LEGAL ORDER: THEORETICAL ASPECT AND CURRENT CHALLENGES

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INTRODUCTION

The active development of international relations and the urgent need to solve a significant number of problems of all humanity gave a powerful impetus to the appearance on the international arena, in addition to states, of other subjects of international law, namely international intergovernmental organizations (IGOs). States created international institutions as an arena in which they could jointly resolve complex issues. Since the end of the Second World War, states have been participating in an increasing number of IGOs and given them an increasingly wide range of political powers in areas as diverse as trade, security, human rights or the environment[686]. Today, international institutions work in many different directions, have distinct and common goals, principles, but are created to support the international legal order in all its manifestations, and exactly the IGOs of the European continent that play a significant role in its provision. The leading positions are clearly occupied by both the Council of Europe (CoE) and the European Union (EU), which together, in close partnership, confirm their commitment to the main European values, European identity and the purpose of their creation.

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[686] Panke D., Stapel S. Towards increasing regime complexity? Why member states drive overlaps between international organisations. *The British Journal of Politics and International Relations.* August 2022. P. 1. URL: https://journals.sagepub.com/doi/pdf/10.1177/13691481221115937.

A distinctive feature of the development of the CoE was that, having been formed as a response to the consequences of the Second World War (when human rights came to the fore as a value), and having passed the stage of the "Cold War" (demonstration of the superiority of human rights and values of Western democracy over the Soviet bloc), the CoE became in fact the first IGO capable of meeting the needs of international law of the world community of the 21st century and reflects the modern needs of international civil society[687].

The core values of the CoE are human rights, democracy and the rule of law, which it pursues on three operational dimensions – standard-setting, monitoring and cooperation[688]. These are these values, these are the three supporting structures, these are the actual foundations of the Organization, these are the three principles that act as a triad, which are in a mutual and inseparable unity. It is this triad of principles that is embedded in the identity of the heritage to which the founding states of the CoE confirmed their commitment[689], which is appointed in the Preamble of the Statute of the Council of Europe[690]. Later, European values became the basis for the creation and today are common for the functioning of other IGOs of the European continent, such as the EU, OSCE, etc.

The CoE was the first established international institution, created in 1949 with the goal of unification of nations and

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[687] Буткевич О. В. Функціонування Ради Європи в XXI столітті: між «європейським консенсусом» і правовим плюралізмом. *Міжнародний конгрес європейського права*: збірн. наук. праць (м. Одеса, 21-22 квітня 2017 р.). Одеса: Фенікс, 2017. С. 306–307.

[688] Schmahl S., Breuer M. The Council of Europe: Its Law and Policies. Oxford: Oxford University Press, 2017.P. 640.

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[690] Statute of the Council of Europe. European Treaty Series. No. 1. London, 5.V.1949. URL: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=001.

cooperation of European states in various spheres. At the same time, it was the CoE that responded to the challenges of that period and took a direct part in the process of EU expansion, and continues to support the European legal order in today's conditions. It is worth agreeing with V. Manukyan "that the creation of the CoE was a defensive, "instinctive" reaction of Europe to the enormous humanitarian dangers of the second half of the 20th century – fascism and communism"[691].

Recent events in connection with Russia's attack on Ukraine and a full-scale war have again raised a discussion in the scientific community and civil society about the inability to support the international legal order at the UN level and the ineffectiveness of certain IGOs, including specialized UN agencies and even non-governmental organizations, to respond to challenges modernity. It was during the Russian aggression against Ukraine that the undoubted role of the CoE was once again confirmed as the main source of European identity, common values, Europeanization, standards and in the maintenance of the European legal order and the fight against "racism" in the 21st century.

I. THE CONTRIBUTION OF THE COUNCIL OF EUROPE TO THE DEVELOPMENT OF COOPERATION WITH THE CENTRAL AND EASTERN COUNTRIES OF EUROPE IN THE CONTEXT OF THE ENLARGEMENT OF THE EUROPEAN UNION

At a time when the issue of EU expansion at the expense of Central and Eastern European countries (CEECs) was practically not raised, the CoE became the first European institution to establish cooperation with them and began to expand its membership by gradually integrating them into its legal space. A similar conclusion was reached by D. V. Abbakumova, noting that

[691] Манукян В. І. Страсбургское право. Европейский суд по правам человека. Право, практика, комментарий. Харьков: Право, 2017. С. 84.

"the Council of Europe reacted quite positively to the aspirations of the communist states at that time to establish cooperation with Western partners and became the first European international organization that began to accept the states of Eastern Europe and former Soviet republics. She thought it was better to involve these states in dialogue than to isolate them"[692]. From the very beginning of the era that came after the end of the "Cold War" and the ideological confrontation in Europe, the CoE was one of the first organizations that responded to these changes and took practical steps towards the integration of post-communist states into European structures[693].

The first intentions of the CoE regarding the establishment of relationships with the CEECs were confirmed in the Declaration "On the future role of the Council of Europe in European construction" (1989). In the document, the Organization confirmed its readiness for dialogue regarding the observance of the principles of human rights and pluralistic democracy enshrined in the Statute of the Council of Europe, the Convention on the protection of human rights and fundamental freedoms (ECHR) and the European Social Charter. Also were positively evaluated carried out the certain democratic reforms and it was emphasized that their success was directly related to the deepening of cooperation with the CoE[694].

In order to establish contacts with the parliaments of the CEECs, provide them with legal assistance, and prepare for full membership,

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[692]Аббакумова Д. В. Комітет Міністрів Ради Європи: міжнародно-правова природа та повноваження: монографія. Харків: Право, 2016. С. 188.

[693] Піляєв І. С. Рада Європи в сучасному інтеграційному процесі: монографія. Київ: Видавничий дім «Юридична книга», 2003. С. 238.

[694] Declaration (89)40 on the future role of the Council of Europe in European construction. Adopted and signed at the 84th Session of the Committee of Ministers, on the occasion of the 40th anniversary of the organization. Strasbourg. 5 May 1989. URL: https://rm.coe.int/1680535ad9.

was developed a special form of cooperation, namely "specially guest status" in the Parliamentary Assembly of the Council of Europe (PACE)[695]. In accordance with PACE Resolution 920(89), the "specially guest status" can be granted to national legislative assemblies of European non-member countries which have shown their interest and which apply and implement the Helsinki Final Act and the instruments adopted at the CSCE conferences, together with the 1966 United Nations International Covenants on civil and political rights and on economic, social and cultural rights[696].

At the current stage, the CoE has introduced a significant number of forms of cooperation with non-member states. The organization involves them in participation in the work of its bodies and institutions in the statuses of "observer", "partner in democracy", "partial agreements", etc., but only the "specially guest status" precedes the status of full membership in the CoE. By its essence, obtaining this status is the first stage on the way to membership in the CoE and a special form of cooperation between the CoE and third states, which was introduced only for the CEECs with the aim of providing them with assistance in the implementation of democratic values and further European integration and accession to the EU in the future.

A significant number of acts of the bodies of the CoE contain intentions regarding the interest of the CoE in cooperation with the CEECs for the further development of the European legal space by contributing to the process of enlargement of the CoE. This is confirmed by the corresponding provisions in the documents, such as "the aim of the Committee of Ministers and the Parliamentary

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[695] Resolution 917 (1989). On a special guest status with the Parliamentary Assembly. Adopted by the Parliamentary Assembly. Strasbourg. 11 May 1989 (5th Sitting). URL: https://pace.coe.int/en/files/16328/html.

[696] Resolution 920 (1989). On a special guest status with the Parliamentary Assembly. (Amendment of the Assembly's Rules of Procedure). Adopted by the Parliamentary Assembly on 5 July 1989. URL: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16331&lang=e n.

Assembly alike must be to support developments in Central and Eastern Europe, to enable the countries concerned to fulfil the conditions for membership of the Council of Europe as soon as possible, so that they may participate fully in the task of European construction."[697]. The CoE is an efficient structure for involving the CEECs states in full participation in the development of Europe[698], occupies a unique position in the international arena, and a special place in the future institutional architecture of the East[699]. Also was confirmed the crucial role of the CoE in the process of building a democratic Europe, and was noted the progress made in the process of EU expansion[700]. The Vienna Declaration of 1993 confirmed that "The Council of Europe is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression. For that reason the accession of those countries to the Council of Europe is a central factor in the process of European construction based on our Organisation's values"[701].

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[697] Recommendation 1119(1990) on the situation in Central and Eastern Europe. Text adopted by the Parliamentary Assembly on 31 January 1990 (25th Sitting). URL: https://www.cvce.eu/content/publication/2003/12/17/733d08bb-0d51-4bbf-bec8-9b46d7cd9d99/publishable_en.pdf.

[698] Recommendation 1124 (1990) on relations with the countries of Central and Eastern Europe (General policy of the Council of Europe). Text adopted by the Parliamentary Assembly on 8 May 1990 (3rd Sitting). URL: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15158&lang=en.

[699] Recommendation 1568(2002). Future cooperation between European institutions. Text adopted by the Parliamentary Assembly on 26 June 2002 (20th Sitting). URL: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17020&lang=en.

[700] Recommendation 1394(1999) on Europe: a continental design. Text adopted by the Parliamentary Assembly on 26 January 1999 (3rd Sitting). URL: https://rm.coe.int/09000016804c8a36.

[701] Vienna Declaration. Adopted by the Vienna Summit of Heads of State and Government of the member States of the Council of Europe. Viena. 9 October 1993. URL: https://rm.coe.int/0900001680536c83.

Apart from that, the EU bodies, namely the European Parliament, also confirms the important role of the CoE in spreading the democracy in the CEECs, and emphasize that the EU continues to be interested in the development of relations with the CoE, which serve as a basis for cooperation with the CEECs[702].

In addition, the CoE played the main role in the democratic transformations that took place in the CEECs in the post-communist period and continues to fulfill this mission. Scientist I. S. Pilyaev characterized the contribution of the CoE to the expansion of the EU as "democratization", which means the transitional process of democratic reforms in the CEECs[703]. On this issue, M. V. Buromenskyi claims that as the course of history convincingly proves, the democratization of states is not an accidental phenomenon for the modern world. This is an objective reality that "rests on an extremely authoritative legal basis in the form of universal and regional treaties on the protection of human rights"[704].

At the same time, the democratic transformations taking place in European states are legitimately under the influence of the CoE, which has the relevant powers according to the Statute, and its governing bodies have formulated the legal standards of democracy[705]. The contribution of the CoE to the development of democracy in the CEECs is difficult to overestimate[706]. Membership in the CoE provides an opportunity to solve problems that arise on

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[702] A3-0408/93. Resolution on relations between the Union and the Council of Europe. European Parliament. 15.12.1993. *Official Journal of the European Communities*. № C 20/46. 24.01.1994. P. 45.

[703] Піляєв І. С. Рада Європи в сучасному інтеграційному процесі: монографія. Київ: Видавничий дім «Юридична книга», 2003. С. 260.

[704] Буроменский М. В. Политические режимы государств в международном праве. (Влияние международного права на политические режимы государств): монография. Харків: Ксилон, 1997. С. 125.

[705] Свида Т. О. Міжнародно-правове співробітництво держав у рамках Європейської Комісії «За демократію через право»: автореф. дис. … канд. юрид. наук. Харків, 2009. С. 3.

[706] Анцупова Т.О. Наближення української системи правосуддя до стандартів Ради Європи. *Міжнародний конгрес європейського права*: збірн. наук. праць (м. Одеса, 21-22 квітня 2017 р.). Одеса: Фенікс, 2017. С. 301.

the European continent by finding joint solutions, as well as to contribute to the development and coordination of pan-European legal positions to ensure a uniform interpretation and application of the organization's conventional heritage. Access to the CoE certifies "the democratic choice of the state, its desire to strengthen the guarantees of human rights protection and develop democratic institutions within the state"[707].

This gives us reason to consider the CoE as the "legal core" of the birth of democracy in the integration process, and the EU as the final process of democratic reforms, membership in this special IGO. Today, the CoE and the EU are making maximum efforts to cooperate in matters of development, spread and consolidation of democracy both in the CEECs and in all member states of the CoE and the EU on the European continent[708].

The contribution of the CoE to further cooperation with the CEECs in the context of EU expansion is realized through the activities of not only its statutory bodies PACE, Committee of Ministers (CMCoE), the Congress of Local and Regional Authorities of the Council of Europe, but also other institutions such as the European Court of Human Rights (ECtHR), the Venice Commission, and a number of other institutions and committees that directly or indirectly involved in this work. So, for example, PACE established in the second half. 70s of the XX century the set of requirements for mandatory accession to the main conventions of the CoE and is currently an effective mechanism for spreading the foundations of European democracy in the member states of the CoE[709].

One of the most effective means of implementing democratic transformations was developed in the CEECs, namely the introduction of special programs of assistance and cooperation, the purpose of

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[707] Аббакумова Д. В. Комітет Міністрів Ради Європи: міжнародно-правова природа та повноваження: монографія. Харків: Право, 2016. С. 187.

[708] Кузьма В. Ю. Міжнародно - правові аспекти співробітництва Ради Європи з Європейським Союзом: дис. … канд. юрид. наук. Одеса, 2018. С. 58.

[709] Шварцева М. І. Парламентська (Консультативна Асамблея) Ради Європи: дис. … канд. юрид. наук. Харків, 2015. С. 97.

which was focused on the implementation of constitutional and legislative reforms. A special role in the creation of a European legal space within the boundaries of "Great Europe" is played by assistance programs for the development of consolidation and democratic stability in the CEECs, work on which the CoE began in 1989. These programs were aimed not only at preparing states for joining the organization, and to a greater extent, designed to integrate the national legal systems of the CEECs into the European legal space. The main emphasis in these programs in the field of legal cooperation was on the protection of human rights aimed at ensuring compliance with the norms of the ECHR and the case law of the ECtHR. The importance of these programs lies in the gradual and harmonious integration with the CoE and the participating states, the participation of the CEECs in the processes and forms of European cooperation[710]. These programs are based on the achievements of intergovernmental cooperation in the CoE, and can be not only a reference material, but also a model (both in terms of structure and mechanisms) of such cooperation[711]. At the same time, the programs are aimed at strengthening and accelerating democratic reforms in the new states so that in the future they can freely participate in the development and improvement of European legal standards[712].

The CoE, with its experience of fighting for the protection of the highest standards of democracy and the rule of law, is the basis for new forms of cooperation with the enlarged EU. PACE calls upon the EU and on the applicant states to consider the CoE as an active partner in the EU's pre-accession strategy, through the broad

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[710] Гнатовський М. М. Європейський правовий простір. Концепція та сучасні проблеми: монографія. Київ: Вид. дім «Промені», 2005. С. 99-100.

[711] Луць. Л. А. Європейські міждержавні правові системи та проблеми інтеграції з ними правової системи України (теоретичні аспекти): монографія. Київ, 2003. С. 117.

[712] Аббакумова Д. В. Комітет Міністрів Ради Європи: міжнародно-правова природа та повноваження: монографія. Харків: Право, 2016. С. 32.

spectrum of its legal arsenal with regard to democratic governance and the protection of human rights and minorities, and in particular by making full use of the CoE's increasingly effective monitoring procedure as regards the obligations and commitments entered into by member states. The CoE is the institution that allows those states remaining outside the EU to participate in the the European project, thus avoiding the creation of new dividing lines and a sense of exclusion among the non-EU member states of the CoE[713].

Accession to the CoE is considered a preparatory stage for EU membership, serving as evidence of belonging to the European legal culture and a stimulus for further political and democratic transformations[714]. With its efforts to create a European legal space, the CoE prepares the ground for the successive enlargement of the EU[715]. The CoE took an active part in the processes of democratic reforms in Eastern Europe after the end of the Cold War and, thus, acquired a special potential in this political sphere[716].

The CoE made a significant contribution to the process of democratization of the CEECs not only at the end of the 20th century, but continues to actively cooperate with the EU regarding the European Neighborhood Policy (ENP), designed to create a

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713 [713]Resolution 1290(2002). Future cooperation between the European institutions. Adopted by the Parliamentary Assembly of the Council of Europe at its 21st sitting of the 2002 session. Strasbourg. 26 June 2002. URL: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17021&lang=en.

714 Фалалєєва Л. Г. Захист основоположних прав у інтеграційному правопорядку Європейського Союзу: монографія. Київ: ФОП Кандиба Т. П., 2020. С. 54.

[715]Гнатовський М. М. Європейський правовий простір. Концепція та сучасні проблеми: монографія. Київ: Вид. дім «Промені», 2005. С. 102.

716 EU engagement with other European regional organisations. Frame: authors Chané A.-L., Hauser A., Jaraczewski J., Jóźwicki W., Kędzia Z., Šimáková M. A., Suchocka H, Wallace S. Work Package No. 5 – Deliverable No. 2. 30 April 2016. 250 p. URL: https://repository.gchumanrights.org/server/api/core/bitstreams/19fa224b-7e12-4473-a99d-46230d14234f/content.

zone of stability, peace and prosperity to the east and south of the borders of the enlarged EU by establishing close long-term relations with neighboring states in order to achieve a closer political association and the maximum possible degree of economic integration[717]. In this regard, J. K. Junker emphasized that the CoE plays a special role in achieving the EU's goals in connection with enlargement, so its significant contribution to the ENP is an obvious consequence of its mission: it is the only pan-European structure for the protection of human rights, it promotes democracy and the rule of law at the pan-European level, and its rule-making activity serves in the field of human rights and contributes to increasing legal consistency[718].

The Memorandum of Understanding between the Council of Europe and the European Union (2007) emphasizes that "bearing in mind the common aim of promoting and strengthening democratic stability in Europe, the CoE and the EU will increase their common efforts towards enhanced pan-European relations, including further co-operation in the countries participating in the European Union's Neighbourhood Policy or the Enlargement process, with due regard to the specific competences of both institutions and in conformity with CoE member states observance of their obligations and commitments"[719]. The organizations during the 25th Quadripartite meeting also confirmed that the ENP is an important element for the promotion of human rights, democracy and the rule of law in the participating states and agreed to develop the interaction between the Action Plans of the ENP participants

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[717] European Neighborhood Policy (ENP). Official Page. URL: https://www.eeas.europa.eu/eeas/european-neighbourhood-policy_en.

[718] Doc. 10897. Council of Europe-European Union: a sole ambition for the European continent. Report by Jean-Claude Juncker. 11 April 2006. URL: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=11264&lang=en.

[719] Memorandum of Understanding between the Council of Europe and the European Union. 10 May 2007. Strasbourg. 8 p. URL: https://www.eeas.europa.eu/sites/default/files/mou_2007_en.pdf.

and the activities of the CoE through the preparation of new joint programs and their implementation and evaluations together[720].

In recent years, the CoE and the EU have been coordinating their regional policies, in particular regarding the eastern direction of EU enlargement, in the process of cooperation within the ENP. Since 2009, the EU's "Eastern Partnership" (EaP) policy has been in operation, aimed at strengthening relations with the EU's eastern neighbors and is a continuation of the direction of the existing ENP[721]. In 2011, a joint program between the CoE and the EU was introduced within the framework of joint program in six states (including Ukraine) in order to accelerate their political association and economic integration with the aim of approaching the standards of the CoE and the EU in such key areas as public administration and election standards; judicial reform; fighting cybercrime, corruption and promoting good governance[722].

In April 2014, the CoE and the EU agreed in a joint Statement of Intent on targeted cooperation measures that will contribute to strengthening the potential of those states that are members of the CoE, namely the implementation of internal reforms designed to bring them closer to the standards of the CoE and the EU in matters of human rights protection, democracy and the rule of law. The CoE will use its experience in the best way to support the states in the implementation of the provisions of the Conventions of the CoE, other legal instruments and the results of monitoring bodies, coordination of joint programs, projects[723]. This document once

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[720] CM/Inf(2007)44. 25th Quadripartite meeting between the Council of Europe and the European Union. Decisions adopted. Strasbourg. 24 October 2007. URL: https://rm.coe.int/09000016805aedac.

[721] The Eastern Partnership (EaP). Official page. URL: https://www.eeas.europa.eu/eeas/eastern-partnership_en.

[722] Eastern Partnership Facility. URL: http://www.eap-facility-eu.coe.int/.

[723] Statement of Intent for the cooperation between the Council of Europe and the European Commission in the EU enlargement region and the Eastern partnership and Southern Mediterranean countries (EU

again confirmed the undeniable role of the CoE in the further enlargement of the EU in the face of modern challenges.

The membership of the CEECs in the CoE was one of the first steps on the way to joining the EU. The state joins the organization in order to improve its legal system and make it more effective. In particular, states will not be able to join the EU until they convince the CoE that they fully comply with the norms of the ECHR[724].

Thus, the analysis of the activity of the CoE in the process of its enlargement at the expense of the CEECs in the context of the future enlargement of the EU made it possible to highlight the following features: establishment of cooperation and introduction of the "special guest status" for the CEECs at the PACE; introduction and implementation of aid programs that contribute to the deepening of the democratization processes of the CEECs on the way to integration into both the CoE and the EU; the involvement of almost all statutory bodies and auxiliary institutions of the CoE, both directly and indirectly related to the EU enlargement process through the use of a number of legal instruments; cooperation between the CoE and the EU in the construction of the European legal space through the invitation to full membership in the CoE and preparation for membership in the EU; implementation of joint programs of the CoE and the EU, which are implemented in candidate states for EU membership; direct participation of the CoE in the policy of EU enlargement – the policy of the Eastern Partnership, the Southern Partnership, etc[725]. Despite the problems looming over the European continent and Russia's war against Ukraine, the CoE will continue to be the platform on which all issues

Neighborhood region). Done in Brussels on 1 April 2014. URL: https://rm.coe.int/168066b99e.

[724] Аббакумова Д. В. Комітет Міністрів Ради Європи: міжнародно-правова природа та повноваження: монографія. Харків: Право, 2016. С. 192.

[725] Кузьма В. Ю. Міжнародно - правові аспекти співробітництва Ради Європи з Європейським Союзом: дис. … канд. юрид. наук. Одеса, 2018. С. 68-69.

are raised regarding overcoming the consequences of aggression and a bridge for Ukraine's further movement along the path of integration and accession both to the EU and in the future in NATO.

II. THE ROLE OF THE COUNCIL OF EUROPE IN EUROPEANISATION, EUROPEAN INTEGRATION AND DISINTEGRATION

The idea of the European unity and globalization processes are one of the factors that formed the basis of European integration. With the development of the integration of European states, theoretical justifications for this process appeared. The peculiarity of the theories is that they follow fast and developed practical processes in European integration organizations, and not the other way around. In scientific doctrine, this phenomenon is mostly associated with the EU and the European Communities, and various features of this process are cited[726]. However, ECtHR judge M. M. Hnatovsky notes that, despite the fact that the term "integration" has not changed, scientists still do not have a single point of view on what is the integration of the states of the European region[727]. The CoE is a significant presence in European integration but, although appreciated by human rights lawyers, its varied policy competences and outputs are largely overlooked by social scientists[728]. However, even a formal analysis allows us to distinguish three main organizational and legal forms of European

[726] Смирнова К. В. Асоціація між Європейським Союзом і третіми країнами: сучасний стан і динамізм в умовах інтеграції і дезінтеграції: монографія / за ред.: К. В. Смирнова, О. В. Святун, І. А. Березовська та ін. Київ: ВПЦ «Київський університет» 2021. С.

[727] Гнатовський М. М. Європейський правовий простір. Концепція та сучасні проблеми: монографія. Київ: Вид. дім «Промені», 2005. С. 26.

[728] Macmullen A. Intergovernmental functionalism? The Council of Europe in European integration. *Journal of European Integration.* 2004. P. 405. DOI: 10.1080/0703633042000306544.

integration – the EU, the CoE and the OSCE[729].

Although the CoE did not directly set itself the task of promoting European integration, in historical terms, its foundation and activity represent a stage in the development of European international organizations, which immediately preceded the emergence of international organizations with supranational elements. [730]In this context, S. Holovaty emphasized that the CoE was destined to become the cradle of the European Community, which was based on devotion to the fundamental European ideals that the CoE professed[731]. The CoE is the barrier that states must overcome to join the EU, not a single state that was not a member of the CoE has become a member of the EU for more than 70 years of the Organization's existence.

The end of the Cold War led to an increase in the organization's members. This was not an easy process since the political, social and cultural integration of the new members was a challenge both for the social construction of the organization as well as the structural capacities of the candidate or new members[732].

It is true "that the countries of Central and Eastern Europe lost no time in applying to join the Council once the Berlin Wall had gone. They saw membership of the European democratic family as vital to legitimizing their new political institutions and stabilizing the democratic process – and their enthusiasm for the Council was compounded by the fact that its values were precisely the values which the Communist dictatorships had denied them. They also wanted to secure a first foothold in western structures, seeing

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[729] Гнатовський М. М. Європейський правовий простір. Концепція та сучасні проблеми: монографія. Київ: Вид. дім «Промені», 2005. С. 43.

[730] Шпакович О. М. Наднаціональний характер міжнародних організацій. *Порівняльно-правові дослідження.* 2010. № 1. С. 26.

[731] Головатий С. Верховенство права: монографія: У 3-х книгах. Книга 1. Верховенство права: від доктрини до принципу. Київ.: Видавництво «Фенікс», 2006. С. 1223.

[732] Zervaki A. Resetting the Political Culture Agenda: From Polis to International Organization. New York: Springer, 2014. P. 45.

Council membership as just one step in a process which would eventually lead them to the EU and NATO This is why the Council is sometimes described as an "antechamber" to the EU – or even a kind of "purgatory". In fact, the EU encouraged the Council to expand: it was not at all sure that the central and east European countries should be allowed to accede to the Treaty of Rome, and hoped that Council membership would keep them quiet in the meantime – and at least remove the need for an early decision. It was accordingly agreed that the Council would prepare them for possible EU membership by encouraging them to democratize their institutions, respect the rule of law and protect human rights"[733].

M. A. Vakhudova emphasizes the fact that "membership in the CoE is considered as a seal of "democracy" and as a pass or waiting room for membership in the EU. The CEECs sought membership because it was supposed to govern them on the basis of a credentials for their successful implementation of democracy. This creed was useful for attracting international aid and foreign investment and was considered a prerequisite for EU and NATO membership. So the benefits of membership in the CoE were significant, but so were the requirements"[734].

In the scientific doctrine, the CoE is also called the "antechamber"[735], "halfway" and "waiting room" for joining the EU, because the interest of the post-communist states in open international organizations was only growing, and the CoE was considered as a way of facilitating further advancement.

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[733] Benoît-Rohmer F., Klebes H. Council of Europe law. Towards a pan-European legal area. Strasbourg: Council of Europe Publishing, 2005. P. 116-117.

[734] Вахудова М. А. Нерозділена Європа: Демократія, важелі впливу та інтеграція після комунізму / Пер. з англ. Т. Цимбала. К.: Вид. дім «Києво-Могилянська академія», 2009. С. 157.

[735] Tarschys D. The Council of Europe as an Antechamber to the European Union/ *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* / Edited by Engelbrekt A. B., Moberg A., Nergelius J. UK: Hart Publishing, 2021. P. 143-146.

Membership in this organization, confirming the democratic status of the respective state, fulfills one of the prerequisites in the EU and NATO[736]. The CoE is the legal mechanism that serves to establish dialogue and cooperation between the EU and European states that are outside its institutional boundaries, a strong organizational and legal bridge that will continue to connect the EU with third countries. However, the founding treaties of the EU, and not the Statute of the Council of Europe, do not mention the contribution of this organization to the process of EU enlargement. Although the CoE was not formally given a role in the EU enlargement process, its assessments in many cases became the basis for the European Commission's assessments. In this way, the benefits of CoE membership strengthened the influence of both international organizations, giving legitimacy to the standards they set and creating material sanctions for violating these standards[737].

The CoE standards duplicate part of the EU's Copenhagen criteria for accepting new members, namely: the stability of institutions that guarantee democracy, the rule of law, and respect for human rights, which are the main goals of the CoE[738]. The political conditions of the Copenhagen criteria fully correspond to the objectives of the CoE, which determines the indisputable importance of the CoE for the EU enlargement process. In this context, I. S. Pilyaev notes that "the Council of Europe plays an

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[736] Croft S., Redmond J., Rees G. W., Webber M. The enlargement Europe. NY: Manchester University Press, 1999. P. 152.

[737] Вахудова М. А. Нерозділена Європа: Демократія, важелі впливу та інтеграція після комунізму / Пер. з англ. Т. Цимбала. Київ: Вид. дім «Києво-Могилянська академія», 2009. С. 159.

[738] Drzemczewski A., Scott D. Council of Europe Cooperation with the EU in the Human Rights Field. *European Yearbook on Human Rights /*edited by Benedek W., Benoît-Rohmer F., Kettemann M. C., Klaushofer R., Nowak M. Antwerp · Vienna · Graz: Intersentia. 2016. P. 286. URL:https://www.academia.edu/43117708/Council_of_Europe_Cooperation_with_the_EU_in_the_Human_Rights_Field_with_Andrew_Drzemczewski_.

important role as an institution that sets norms and standards, and this function is particularly relevant to the process of EU enlargement"[739]. The law-making activity of the CoE in the areas outlined by the Statute serves as a solid and reliable basis for economic and security cooperation, and the integration of European states into such international regional organizations as the EU and the OSCE, which contributes to the formation of a single European law[740].

A number of scientists emphasize that "the Council of Europe is a place for the spread of European standards beyond the borders of the EU member states, which creates a favorable climate for EU cooperation with third countries (members of the Council of Europe) in the areas of freedom, security, and justice. Moreover, the ratification and implementation of CoE conventions in the specified areas are mandatory items on the agenda of EU cooperation with third countries"[741]. The EU is interested in the activities of the CoE, membership in which is considered as a preparatory stage for joining the EU, during which it is possible to partially adapt the legislation and law enforcement practice of the candidate states to EU legal standards[742].

The establishment of the CoE became the first long-term project of the unification of European peoples, which embodied the ideals of European unity, it created the fundamental prerequisites developed, inter alia, by the EU and the OSCE. The experience of seven decades of functioning of the institutional and legal mechanism of the CoE ensured its establishment as an

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[739] Піляєв І. С. Рада Європи в сучасному інтеграційному процесі: монографія. Київ: Видавничий дім «Юридична книга», 2003. С. 257.

[740] Санченко А. Є. До питання про acquis Ради Європи. *Бюлетень Міністерства юстиції України.* 2011. № 8–9. С. 88.

[741] Європейське право: право Європейського союзу: підручник у трьох кн. / Кн. третя: Право зовнішніх зносин Європейського Союзу / В. І. Муравйов, М. М. Микієвич, І. Г. Білас та ін. К.: Ін Юре, 2015. С. 199.

[742] Яковюк І. В. Правові основи інтеграції до ЄС: загальнотеоретичний аналіз: монографія. Харків: Право, 2013.С. 556.

authoritative, influential and representative, pan-European IGOs, proved its ability to improve, form a culture of tolerance, develop cultural and legal traditions, which is an actual lever of influence on the preservation and strengthening of political and legal identity of Europe, European legal culture[743].

The CoE and the EU are the two main regional organizations that work towards the same goal (though in different ways) – the unity of the peoples of Europe. "Europeanness" as a condition for acquiring the "right to integration" is recognized by the mentioned organizations for all states geographically belonging to Europe, the legal and political system of which meets the criteria of democratic political regime, recognition of the principle of the rule of law, the effectiveness of legal guarantees of respect for human rights and freedoms, which is essential expands the political and legal boundaries of the European continent[744].

The membership of the CEECs in the CoE in the process of EU enlargement served, firstly, as a transitional stage of the restructuring of legal systems through democratization into the European legal space, and secondly, as a starting point for the integration process on the way to EU membership. We have reason to suppose that the CoE creates the basis of European integration that takes place within the EU, thus, it directly contributes to the enlargement of the EU, attracting more and more new European states to it.

For the candidate states, membership in the CoE was actually the first step to the accession into the EU. In this aspect, the CoE plays the role of an intermediate and necessary stage – a legal platform for further integration way. Although there is no official *de jure* document regarding that the fact of joining to the CoE is a

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[743] Фалалєєва Л. Г. Захист основоположних прав у інтеграційному правопорядку Європейського Союзу: монографія. Київ: ФОП Кандиба Т. П., 2020. С. 68-69.

[744] Гнатовський М. М. Європейський правовий простір. Концепція та сучасні проблеми: монографія. Київ: Вид. дім «Промені», 2005. С. 178.

mandatory and intermediate stage for accession the EU, *de facto* membership in the CoE is a prerequisite for membership in the EU[745].

In the post-enlargement era, the CoE has established itself as an important component of a historical project of Europeanization[746]. The concept of "Europeanization" is multifaceted and multi-vector, in which there are different directions of its implementation[747], as well as meanings, approaches to interpretation, and mostly equated with processes within the framework of the functioning of the EU. The genesis and development of the concept of Europeanization is primarily traced in the English-language literature on political integration in Europe. With the beginning of integration processes in Western Europe, researchers' interest in the phenomenon of European integration and Europeanization began to grow rapidly. Each wave of deepening and expansion of integration within the framework of the creation in the post-war period of the currently most influential regional MOs (EU, CoE, OSCE) gave a new impetus to theoretical approaches to the study of these processes. In the middle of the 20th century at the beginning 21st century such objective factors, among others, were the adoption of the ECHR[748].

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[745] Кузьма В. Ю. Міжнародно - правові аспекти співробітництва Ради Європи з Європейським Союзом: дис. … канд. юрид. наук. Одеса, 2018. С. 68-69.

[746] Yannis A. Stivachtis & Habegger M. The Council of Europe: The Institutional Limits of Contemporary European International Society? *Journal of European Integration*. 2011. P. 159. URL: https://www.tandfonline.com/doi/abs/10.1080/07036337.2011.543524.

[747] Радишевська О. Р. Генезис поняття «європеїзація»: загальногуманітарний та правовий дискурс. *Науковий вісник публічного та приватного права.* № 5. Т. 2. С. 165. URL: http://nvppp.in.ua/index.php/vip6-2019/2-uncategorised/73-naukovij-visnik-publichnogo-ta-privatnogo-prava-5-tom-2.

[748] Смирнова К. В. Асоціація між Європейським Союзом і третіми країнами: сучасний стан і динамізм в умовах інтеграції і дезінтеграції:

Professor V. I. Muravyov highlights that the Europeanization of law is a special phenomenon inherent in European states. It consists in the creation of legal norms and practices of their application in internal legal systems, harmonized with the norms of European interstate associations. The process of Europeanization of law affects the use of legal terminology. In particular, this directly concerns the term "European law". European law covers the legal norms of both the CoE and the EU, thanks to which the Europeanization of the internal legal systems of European countries takes place. The processes of Europeanization of the internal legal systems of the European states are connected with the spread of European integration to the majority of the continent's states. A significant contribution to the Europeanization of the law of European states continues to be made by the CoE, the establishment of which in 1949 is directly related to the idea of unifying Europe after the Second World War. The international conventions adopted under the auspices of the CoE contribute to the Europeanization of the internal legal systems of European states, since, after their ratification, they become part of the internal law of the states that ratified these documents. The ECtHR directly contributes to the Europeanization of the domestic law of the member states of the CoE by adopting decisions aimed at uniform interpretation and enforcement of the norms contained in the ECtHR[749].

According to O. D. Mikhel, "the process of Europeanization is broader than purely European integration. Although the activities of such European organizations as the European Free Trade Area (EFTA) in the economic sphere, the Organization for Security and Cooperation in Europe (OSCE) in the sphere of international relations, as well as the CoE in the sphere of the protection human

монографія / за ред. : К. В. Смирнова, О. В. Святун, І. А. Березовська та ін. Київ: ВПЦ «Київський університет» 2021. С. 59-60.

[749] Муравйов В.І. Ідея європеїзації права і інтеграції права. *Міжнародний конгрес європейського права*: збірн. наук. праць (м. Одеса, 21-22 квітня 2017 р.). Одеса: Фенікс, 2017. С. 10-11.

rights, often overlap and even coincide with the activities of the EU not only organizationally, but also at the level of identity (the EU and the CoE, for example, have the same flag and anthem), they have their own historical roots and their own institutions"[750].

Europeanization, as a rule, is understood as a hierarchical (English "top-down") approach that focuses on transferring the norms and rules of the EU and the CoE to the level of other states. The use of the term "Europeanization of law" to study new features of European integration is connected with the so-called the "systemic effect" of European regional organizations, i.e. the reverse influence of the supranational system of administration created in Europe on the national structures of their member states[751].

In the rule-making practice of European states and IGOs, there are no definitions of "integration" and "Europeanization", however, representatives of the legal scientific doctrine have not lost interest during the last decades, but have gained significant relevance in the context of Ukraine's aspirations to join the EU. It is appropriate to emphasize that the Europeanization of the Ukrainian legal system began after Ukraine gained independence in 1991. Since then, the priority goal of foreign policy has been integration into international structures and the acquisition of membership in the CoE and the EU. As soon as membership in the CoE became a reality, Ukraine took the first steps to ensure compliance of national legislation with recognized European standards in the field of

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[750] Міхель Д. О. Визначення поняття процесу "європеїзація" та його вплив на сучасне суспільство. *Наукові праці Чорноморського державного університету імені Петра Могили.* 2011. Т. 162. Вип. 150. С. 24. URL: http://nbuv.gov.ua/UJRN/Npchdupol_2011_162_150_7.

[751] Радишевська О. Р. Генезис поняття «європеїзація»: загальногуманітарний та правовий дискурс. *Науковий вісник публічного та приватного права.* № 5. Т. 2. С. 165. URL: http://nvppp.in.ua/index.php/vip6-2019/2-uncategorised/73-naukovij-visnik-publichnogo-ta-privatnogo-prava-5-tom-2.

democracy and human rights[752]. Ukraine's membership in the CoE is a mandatory and transitional stage of joining the EU, since the process of integration with the EU is inextricably linked with the law of the CoE, because all EU member states were and are now members of the CoE, and compliance with and implementation of its standards is considered one of criteria for joining the EU[753].

However, the ongoing process of ideological integration has profoundly changed the nature of the European project. This has led to encroachments on what constitutes the identity of certain states. Brexit, the inclusion in the Constitution of Russia of the primacy of constitutional norms over those arising from the precedent law of the ECtHR testifies to these changes[754]. The annexation of Crimea and Russia's war against Ukraine shows that the danger of this century is the strong ideology of "racism", which does not correspond to European identity, humanity, processes of Europeanization and European integration. The CoE is the genesis of European integration, the basis for progress along the path of integration, and the EU is the highest level that states want to reach in matters of democracy, human rights and the rule of law.

A few years ago, the term "disintegration" appeared in scientific legal circulation alongside the term "integration" and is associated with the process of Great Britain's exit from the EU (Brexit). Integration and disintegration are objective processes that are interconnected and develop synchronously as two multidirectional processes[755]. But in the meantime, the decrease in the number of

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[752] Петров Р. А. Європеїзація української судової системи як складова євроінтеграційної політики України. *Право України*. 2012. №1/2. С. 300.
[753] Святун О., Федорова А. Історія становлення і розвитку науки права Ради Європи в Україні. *Європейське право.* 2013. № 1–2. С. 197.
[754] Mathieu B. Redefining the Relationship Between National Law and European Law. *Central European Journal of Comparative Law.* 2021. Vol. II. № 1. P. 139. URL: https://ojs.mtak.hu/index.php/cejcl/article/view/6035/4717.
[755] Смирнова К. В. Асоціація між Європейським Союзом і третіми країнами: сучасний стан і динамізм в умовах інтеграції і дезінтеграції:

members of the CoE should also be attributed to disintegration, namely in the context of the exclusion of Russia from the Organization.

III. THE COUNCIL OF EUROPE AND THE CHALLENGES OF THE MODERN EUROPEAN LEGAL ORDER

The CoE occupies a prominent place in the architecture of the world legal order and makes a worthy contribution to the constructive regionalization of international law, specifying and developing it taking into account cultural and legal traditions and the needs of European society[756]. The CoE developed political and legal principles for the regulation of comprehensive practical cooperation of member states, contributed to the removal of the protection of human rights from the sphere of internal competence of the state, and also encourages the comprehensive and systematic improvement of legislative support, taking into account the dynamics of the development of European and other international standards, encouraging them to be guided by them during law enforcement, correct it in a timely manner. However, today, when the continent is facing numerous challenges and threats, there is a certain asymmetry of expectations and opportunities for restoring and building peace, strengthening security and ensuring stability in Europe the model of the 21st century[757].

Today, in a difficult period for the entire continent, the question of compliance of the activities of the CoE arises with the requirements of modernity. The latest events in Ukraine, namely Russia's aggression against Ukraine and the annexation of Crimea, show that the most obvious violations, the most clear challenges to

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[756] Санченко А. Є. До питання про acquis Ради Європи. *Бюлетень Міністерства юстиції України.* 2011. № 8–9. С. 88.

[757] Фалалєєва Л. Г. Рада Європи та Європейський Союз: особливості правового статусу, узгодження стандартів правозахисту. *Вісник Київського національного університету імені Тараса Шевченка*. Міжнар. відносини. 2018. Вип. 1/2 (47/48). С. 58.

international law are precisely in the field of human rights, and the resolution of the conflict is more or less effectively manifested not in the activities of purely intergovernmental forums (such as the UN), and in the functioning of organizations aimed at protecting human rights. First of all, the role of the CoE and the ECtHR should be noted here, which are able to respond to challenges to human rights by applying the "European consensus" – an unambiguously established standard for the protection of fundamental rights, taking into account the specific characteristics of the respective state or subregion[758].

Until recently, the CoE was accused of undermining the values on which the Organization was founded. Scientist L. G. Falaleeva notes that, at the same time, precisely in the situation of the return of the Russian Federation (RF) and the restoration of the rights of its delegation to the PACE (voting rights, the right to be represented in the Bureau and the Standing Committee, the right to participate in election observation missions, etc.) in the absence no constructive steps and during the continued neglect and gross violation by the aggressor state of all the basic principles of international law, which serve as the defining principles on which the modern legal order is based in the relevant spheres of international relations. The CoE with the adoption of the Resolution (June 25, 2019) demonstrated a change in approaches, a certain revaluation of values, lack of a single strategy in Europe. Undoubtedly, the return of the Russian delegation to this respectable international institution undermines the value foundations of the functioning of the CoE, designed to serve as levers of influence on the preservation and strengthening of the political and legal identity of Europe, its worldview and

[758] Буткевич О. В. Функціонування Ради Європи в XXI столітті: між «європейським консенсусом» і правовим плюралізмом. *Міжнародний конгрес європейського права*: збірн. наук. праць (м. Одеса, 21-22 квітня 2017 р.). Одеса: Фенікс, 2017. С. 308.

civilizational landmarks[759].

However, today the situation is actually different. In accordance with the Statute, the CoE, on February 25, 2022, decided to suspend the RF's rights of representation in the CMCoE, and PACE with immediate effect as a result of the armed attack of the RF on Ukraine[760]. And on March 15, 2022, PACE unanimously adopted a conclusion according to which the RF can no longer be a member state of the Organization[761]. On March 16, 2022, RF was already excluded in the context of the procedure initiated in accordance with Art. 8 of the Statute[762]. As a result of the termination of the membership of the RF in the CoE, the legal and political mechanisms of the CoE cease to operate for persons under its jurisdiction. Monitoring visits and relevant reports of PACE, election observer missions, visits and reports of the CoE Commissioner for Human Rights and many other monitoring mechanisms are stopped[763].

Professor T. O. Antsupova notes that the activity of IGOs, in particular the CoE, is a constant balancing act between politics and

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[759]Фалалєєва Л. Г. Захист основоположних прав у інтеграційному правопорядку Європейського Союзу: монографія. Київ: ФОП Кандиба Т. П., 2020. С. 72.

[760] Council of Europe suspends Russia's rights of representation. Newsroom. 25.02.2022. Council of Europe. URL: https://www.coe.int/en/web/portal/-/council-of-europe-suspends-russia-s-rights-of-representation#:~:text=In%20line%20with%20the%20Statute,Federation's%20armed%20attack%20on%20Ukraine.

[761] Opinion 300 (2022). Consequences of the Russian Federation's aggression against Ukraine. Text adopted by the Assembly on 15 March 2022 (4th sitting). URL: https://pace.coe.int/en/files/29885/html.

[762] CM/Del/Dec(2022)1428ter/2.3**.** Consequences of the aggression of the Russian Federation against Ukraine. Procedure under Article 8 of the Statute. 1428ter meeting, 16 March 2022. URL: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5d7d9.

[763] Анцупова Т. О. Наслідки виключення РФ з Ради Європи. *Закон і бізнес.* 17.03.2022. URL:https://zib.com.ua/ua/150910.html.

law, the search for compromises to ensure peace and stability. Therefore, the application of sanctions for violations of CoE law should be based on legal certainty and proportionality. Ensuring the European legal order through certain legal mechanisms and instruments should be fully valuable and desirable for all CoE member states[764].

In addition, on February 28, 2022, the ECtHR received a request from Ukraine to take urgent temporary measures against the Government of the RF in accordance with Rule 39 of the Rules of Court in connection with "massive violations of human rights committed by Russian troops in the course of military aggression against the sovereign territory of Ukraine". The request was registered under application No. 11055/22, Ukraine v. Russia (X), and was considered by the President of the ECtHR. The Court took into account the current military operations that began on February 24, 2022 in various parts of Ukraine, and considers that they create a real and continuing risk of serious violations of the conventional rights of the civilian population, in particular in accordance with Art. 2 (right to life), Art. 3 (prohibition of torture and inhuman or degrading treatment or punishment) and Art. 8 (right to respect for private and family life) of the ECHR. And already on March 1, 2022, in order to prevent such violations and in accordance with Rule 39 of the Rules of Court, the ECtHR decided to instruct the Government of the RF to refrain from military attacks on the civilian population and civilian objects, including residential premises, ambulances and other civilian objects, which are especially protected, such as schools and hospitals[765].

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[764] Анцупова Т. О. Роль Ради Європи у забезпеченні європейського правопорядку: сучасні виклики (на матеріалах тез конференції Міжнародний правопорядок: сучасні проблеми та їх вирішення, м. Київ, 19 лютого 2015 р.). *Науковий вісник Херсонського державного університету. Серія: Юридичні науки*. 2015. № 5(4). С. 127. URL: http://nbuv.gov.ua/UJRN/Nvkhdu_jur_2015_5(4)__31.

[765] ECHR 068 (2022). The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian

Despite the decision of the ECtHR, Russia did not stop flagrantly violating the Statute of the Council of Europe, the ECHR and humanitarian norms, which is incompatible with the status of a member state of a democratic European institution. The CoE continued to receive evidence of the indiscriminate use of artillery, rockets and bombardment by the Russian armed forces with prohibited phosphorus and cluster bombs, attacks on civilian objects and humanitarian corridors, hostage taking, attacks on dangerous objects in Ukraine (in particular, nuclear plants)[766].

The CoE is "a forum capable of responding to the global challenges of the third millennium"[767]. The functioning of the CoE institutions for more than half a century since its foundation has shown that this organization has gone much further (and in many respects contrary to) the goals set forth in its Statute[768]. This is an unprecedented event that happened during the 70-year period of the functioning of the CoE, the expulsion of a member of the Organization for a gross violation not only of the provisions of the Statute, but also of all the principles of peaceful coexistence.

territory. Press release issued by the Registrar of the Court. 01.03.2022. URL: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7272764-9905947%22]}.

[766] Краснікова О. В. Виключення з Ради Європи як санкція за порушення міжнародних зобов'язань. *Юридичний науковий електронний журнал.* 2022. № 3. С. 251. URL:http://lsej.org.ua/3_2022/57.pdf.

[767] Recommendation 1394(1999) on Europe: a continental design. Text adopted by the Parliamentary Assembly on 26 January 1999 (3rd Sitting). URL: https://rm.coe.int/09000016804c8a36.

[768] Буткевич О. В. Функціонування Ради Європи в XXI столітті: між «європейським консенсусом» і правовим плюралізмом. *Міжнародний конгрес європейського права*: збірн. наук. праць (м. Одеса, 21-22 квітня 2017 р.). Одеса: Фенікс, 2017. С. 305-306.

CONCLUSIONS

In the conditions of modern challenges, the CoE continues to retain the status of the most influential European institution. The CoE itself is the only regional IGO that expelled the RF for aggression during the Russian-Ukrainian war. The World Tourism Organization followed the example of the CoE and suspended the work of the RF, the Human Rights Council. Although the work of all IGOs is based on compliance with international law, imperative norms of *jus cogens*, customary law. As you can see, the RF has violated all the fundamental principles of modern international law, which are enshrined in both the UN Charter and the Final Act of the Conference on Security Cooperation in Europe. The UN as a guarantor of peace and security in the world, specialized agencies of the UN, the IAEA, the OSCE, individual international non-governmental organizations do not fully fulfill their assigned tasks and, in turn, show their inability to act in the conditions of modern challenges. Until the UN and other IGOs are reorganized or reformatted, we assume that the CoE will start dealing with security and defense issues on the European continent alongside the EU and NATO. The CoE has proven that it performs an important mission within the limits defined by the Statute and is moving forward, gradually establishing new spheres of influence at the regional level.

Ukraine, as a member of the CoE, is carrying out reforms in this difficult time and is on guard to protect the common values of all states and international institutions – the protection of human rights, the rule of law, and democracy. Having received the status of a candidate for membership in the EU, Ukraine is gradually moving along the path of integration, implementing CoE standards, ratifying the Istanbul Convention of the CoE, thus getting closer and closer to the start of negotiations on joining the EU. With the support of the CoE, Ukraine confirms its original desire to live in a free, democratic, legal state, supporting the European legal order, taking care of the safety of not only its people, but also the future of the entire European continent.

Considering the above, it can be stated that the scientific doctrine and documents of the Organization quite often associate the following

phenomena and note the active work and role of the CoE in the complex processes of European integration, Europeanization, disintegration, European legal space, European identity, creation of European law, etc. If initially, the CoE was created as a defensive reaction to fascism and colonialism, at the current stage it makes a significant contribution to the support of the European legal order built on European values in the fight against "racism".

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APPROXIMATION AND EUROPEANIZATION OF UKRAINIAN LEGISLATION TO EU LEGISLATION IN THE FIELD OF STATE AID AND SERVICES OF GENERAL ECONOMIC INTEREST

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INTRODUCTION

Today, relations between Ukraine and the European Union are a leading component of the Ukrainian foreign policy strategy and the most important link of the modern system of international relations, in particular its pan-European and regional segments. The essence of Ukrainian-European relations is to decide on an adequate algorithm for further cooperation: full-fledged accession of Ukraine to the EU with registration of full membership; associative relations with certain limitations of the integration aspirations of the Ukrainian side; establishment of contractual bilateral relations of a certain type within the framework of the "Eastern Partnership" policy, for example, in the format of "special format of cooperation".

After February 24, 2022, Ukraine chose the only way to join the EU, instead, the Association Agreement (AA) and the obligations assumed by Ukraine in accordance with it remain valid despite the acquisition of candidate status. On the contrary, the degree of responsibility has now increased.

The approximation of Ukrainian legislation to EU law is a core element for the full implementation of the Association Agreement, in particular for the introduction of a Deep and Comprehensive Free Trade Area. One of the tasks of the Association Agreement is to establish conditions for enhanced economic and trade relations

leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union.

Approximation is necessary, first of all, for our state, in particular, one of the institutes that allow us to really talk about the existence of a market economy and budget discipline, as well as to activate the attraction of international investments, is the institute of State aid. State aid to business entities is a common phenomenon, but it needs to be subject to certain rules, especially for those enterprises that provide so-called services of general economic interest. It is not possible to provide these services without such state support – which allows for different interpretations of cases of the provision of such state aid, even when, by all indicators, it should be recognised as incompatible.

Ukraine should take into account the positive trends and the development of the institution of state aid to economic entities that provide services of general economic interest not only for the harmonisation of its own legislation, but also for the development of a uniform law enforcement practice on this issue, because some cases in this vein are already under consideration in the Antimonopoly Committee of Ukraine and their decision will serve as the basis and starting point for solving further cases in the future.

Theoretical approaches to the definitions of "harmonisation (approximation)" and "Europeanisation"

The policy of harmonisation of national law is a prerequisite for the functioning of the internal market. Harmonisation means deeper integration than respecting the EU's fundamental economic freedoms, as it seeks to create a single legal order within a single economic space, while the fundamental freedoms operate within different legal systems. Harmonisation means conformity with a common legal standard across the EU.

At the outset, it should be noted that harmonisation of legislation across national systems, which involves amending domestic law, requires the use of all legal techniques, such as the harmonisation of norms, inter-sectoral acts, and the domestic legal system as a whole at all its levels.

The EU's power to harmonise national law is enshrined in Articles 114, 115 Treaty on the Functioning of the European Union (TFEU). Under Article 114 of the TFEU, the EU is entitled to harmonise national legislation and administrative practices governing the operation of the internal market. The EU is free to choose any legal instrument to achieve this objective (Article 114 TFEU refers to "measures"), although the most common act for harmonisation is the EU Directive as the most flexible instrument. Article 114 (1) TFEU enshrines the rule on harmonisation (approximation) of legislation: " save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. At the same time, the most sensitive areas for state sovereignty, namely tax legislation, visa regime and freedom of movement of employees, are excluded from the scope of Article 114 TFEU. Consequently, the main scope of Article 114 TFEU remains freedom of trade in goods. The EU has the power to adopt a harmonisation act where there are or could be obstacles to free trade and where there is a perceptible restriction on competition.

Harmonisation of EU law is a technically complex process consisting of two stages. In the first stage, the EU authorities develop and adopt a directive, a legal act addressed to the states, and are obliged to implement it into the national legal system within a time limit specified in the directive. The directives are a

model for the regulation of certain legal relations, according to which the state builds its domestic legal regulation. Consequently, the directives are not directly enforceable, as their addressees are countries and not private individuals – subjects of public law. Therefore, the harmonisation process also includes a second stage, when the directive is implemented through the adoption of a law, a by-law or a change in jurisprudence. Only after the completion of the second stage do the rights and obligations arise for the state actors. Failure to comply with the deadline for implementation triggers a public-law mechanism to monitor the compliance of states with their obligations. This mechanism is enshrined in the Treaty on the Functioning of the European Union and consists in the fact that the European Commission, on its own initiative or at the request of a Member State, may appeal to the Court of Justice of the EU against inaction by a national authority. The decision of the Court of Justice of the EU can entail serious financial sanctions for the offending state. Of course, the essence of harmonisation is to influence the national legal systems of the member states in order to bring the legal regulation of individual institutions closer rather than to completely unify them. In this aspect, harmonisation of legislation should avoid the total copying of international norms and preserve the national uniqueness of legislation.

The term "adaptation" is often used in Ukrainian official documents. In accordance with the provisions of the Strategy for the Integration of Ukraine into the European Union of 11 June 1998, adaptation consists in bringing Ukrainian legislation closer to the modern European legal system. It envisages reforming the legal system of Ukraine and gradually bringing it into compliance with European standards. Adaptation is mainly a one-way process. In the hitherto existing Law of Ukraine "On the National Programme of Adaptation of the Legislation of Ukraine to the Legislation of the European Union" of 2005, there is a legal definition of the word "adaptation" as the process of bringing Ukrainian laws and other legal and regulatory acts into conformity with the acquis communautaire" [138].

Y. Kapitsa notes that in EU law the terms "approximation" and "harmonisation" are used. In the case of "approximation" it refers to the achievement of a certain level of compliance. For their part, 'harmonisation' may mean both achieving a certain identity of the norms of the law of the Member States of the European Union through the adoption of EU regulations and determining common objectives for the Member States through the adoption of EU directives.

According to R. Petrov, the transposition of the fixed acquis communautaire into the legal systems of third countries means that the parties to the EU external agreements assume obligations to apply and possibly even implement the acquis communautaire fixed at the time of formal agreement signing. However, the scope and content of the fixed acquis communautaire does not preclude their further revision and expansion in the course of the development and strengthening of bilateral relations between the EU and other countries. It is a process aimed at achieving "adaptation", "convergence", "harmonisation", "unification" with EU law or other international organisation, and involves many methods and techniques to achieve the goal of transposing the EU acquis into the legal systems of third countries.

As to the term "Europeanisation", frequently used in academic and publicist discourse to refer to harmonisation of Ukrainian law with EU law, the following should be noted.

Researcher C. Smith defines Europeanization as a process of spread and adoption of European norms, values and beliefs over time and space among the European states as a whole, including EU countries [111].

In 1994, British scientist R. Ladrech, having analysed the experience of European integration both of the EU members already existing at that time and candidate-countries, derived his definition of 'Europeanisation' as the gradual process reorienting the direction and forms of (internal) politics to the level when the political and economic dynamics of the European Community become part of the organisational logic of national politics and its

creation.

K. Radaelli, whose definition is most commonly used by other scholars, describes Europeanisation as "a complex process of creation, diffusion and institutionalisation of formal and informal rules, procedures, political paradigms, styles, 'the way things are done', and shared beliefs and initial norms. are defined and adopted in the political process of the EU, and then incorporated into the logic of domestic discourse, political structures and public policy .

For example, when the Economic Monetary Union (EMU) was formally introduced by the Maastricht Treaty in 1992, member states could only sign if their national central banks were independent; this put pressure on the German Bundesbank to complete its transformation because it had already been effectively independent for several years, but France, by contrast, was under immense pressure to reform its state-controlled Bank of France if it wanted to join the EMU as it had hoped . Thus, on a fundamental level, Europeanisation is useful in demonstrating how EU policies are forcing states to carry out domestic reforms.

This was the case of Germany if we consider the field of telecommunications regulation: Germany was used to a large monopoly in the market of public telecommunications operators, but the then EU rules of the late 1980s and early 1990s prohibited monopolies and required fair competition in this field. It might have been conceivable that such a change in policy would have put enormous pressure on Germany to change its policy, but such a change was already seen by local actors as part of a wider programme of market liberalisation, and so Germany was able to apply these existing practices to externally imposed reforms in order to limit inconvenience and maintain a degree of control over the changes.

Ukrainian researcher O.Rudik noted that "...European researchers have given a narrower definition of Europeanisation, defining it as a process of formation, diffusion and institutionalisation of formal and informal rules, procedures, policy paradigms, styles, modes of action, shared beliefs and norms that

were first defined and approved in EU decision-making and then incorporated into the logic of internal discourses, particular features, political structures and public policy directions of member states. Although this definition is not definitive, it emphasises the importance of analysing changes not only in the output of the political system, i.e. public policy, but also in the underlying structures and norms".

We can conclude that Europeanisation can in no way be reduced to notions of harmonisation or approximation of legislation (i.e. only the normative aspect is taken). That is why, when we speak about Europeanisation of state aid and general economic interest services in the Ukrainian legal system, we primarily mean their transposition (transposition) and construction from scratch in accordance with European standards with the involvement of international technical assistance. Given that competition rules are one of the main components of the acquis, when Ukraine's European integration moves to such a stage as the opening of accession negotiations and subsequent implementation of conditions for approximation of legislation, the "Europeanisation" of Ukrainian competition law and, in particular, the institution of state aid, is particularly important.

As to approximation of legislation (approximation), on a legal level in the EU, we can recall such a document as the Guide to the Approximation of European Union Environmental Legislation of 1998, but updated and the latest version of 2 August 2019. The most interesting part is the introductory theoretical part. Paragraph 1 reveals the main definitions related to the process of "approximation", namely that approximation of legislation (approximation) is a unique obligation of European Union membership. This means that countries seeking accession to the European Union must harmonise their national laws, regulations and procedures in order to ensure that the totality of EU law contained in the acquis applies. That is, the term "approximation" is a holistic system and consists of certain components, which are outlined below.

As the obligation of approximation continues after accession, the process of approximation becomes an opportunity for countries to organise their institutions and procedures and to train their staff for the day-to-day processes and responsibilities for the adoption, implementation and application of European Union law. The documents identify three key elements: first, to adopt or amend national laws, regulations and procedures in such a way that the requirements of the relevant EU legislation are fully incorporated into the national legal order. This process is known as transposition. While countries have considerable discretion in choosing the most appropriate national mechanism, this discretion is limited in some respects by the general principles of Union law. Secondly, to provide the institutions, procedures and adequate budgets needed to implement laws and regulations, the so-called implementation process. Thirdly, to ensure the necessary controls and sanctions, to ensure full and proper implementation of the law, and timely amendments if a certain regulation does not work (enforcement) .

We will use the term "approximation" for all the results of this long-term discussion and to simplify understanding of such a complex legal process, because, firstly, in our opinion, it most fully reveals the process of bringing Ukrainian legislation in line with EU law in the Association Agreement, secondly, using logic established in the EU itself – each our commitment consists conditionally of three parts – transposition (transfer of norms), their implementation (i.e. creation of a statute of the Association Agreements), and, secondly, using logic established in the EU itself – each our commitment consists conditionally of three parts – it is transposition (transfer of norms), implementation of norms (i.e. creation of a constitution).

Articles 262-267 of the Association Agreement with Ukraine, unlike those with Moldova and Georgia, are more exhaustive with regard to State Aid: only the Association Agreement with Ukraine mentions provisions transposed from the EU legislation on services of general economic interest. Annex XXIII of the Association

Agreement contains a glossary of terms for the correct application and interpretation by the Parties of the most important provisions of EU legislation on State Aid, one of which is services of general economic interest.

The Law of Ukraine "On State Aid to Business Entities" specifies that it does not extend to support of economic activities related to the provision of services of general economic interest (SGEI) in terms of compensation of justified costs of providing such services. Paragraph 14, part one, article 1 of the Law of Ukraine "On State Aid to Business Entities" determines that SGEI are services associated with the satisfaction of particularly important general needs of citizens that cannot be provided on a commercial basis without state support. Given the above definition, SGEI may include services that meet the following conditions: such services are related to the satisfaction of particularly important general needs of citizens; they cannot be provided on a commercial basis without state support.

However, the fourth paragraph of Article 262 of the Association Agreement provides that undertakings authorised to provide services of general economic interest or of a profitable monopoly nature shall be subject to the rules contained in Part 2 of Chapter 10 of the Agreement in so far as the application of such rules does not prevent them, legally or factually, from performing the specific tasks assigned to them. An explanation of the terms used in Part 2 of Chapter 10 can be found in Annex XXIII to Chapter 10 of the Association Agreement.

Paragraph (c) of Annex XXIII states that the term SGEI " This means economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. The activity must exhibit special characteristics as compared with the general economic interest of other economic activities.

A new Action Plan for the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member

States, on the other hand, containing a list of tasks and steps was approved on 25 October 2017.

The action plan on services of general economic interest contains only one task 853 "Defining the list of services of general economic interest". This task was completed in 2018, but cannot be considered as implementation, as the European Commission deliberately refused to define such a list, as it is not possible to define which services are services of general economic interest due to their special nature and the freedom of definition of such services by the EU Member States. The EU Member States have not yet implemented it, as it is defined in Protocol 26 to the Treaty on the Functioning of the European Union.

Prospects for changing existing paradigms in the practical understanding and application of state aid and services of general economic interest in Ukraine

The Law of Ukraine "On the Antimonopoly Committee of Ukraine" stipulates that one of the main tasks of the Antimonopoly Committee of Ukraine (AMCU) is to participate in the formation and implementation of competition policy in terms of monitoring state aid to economic entities and control over the admissibility of such aid for competition. Due to the frequent appeals of state support providers and recipients, the AMCU, summarising the received questions, has the right to provide clarifications on issues within its direct competence. In 2018, the AMCU issued a Clarification dated 20.03.2018 № 4-rr/dd "Regarding Services of General Economic Interest (SGEI)". This clarification accumulates in summary all the applicable EU rules on SGEI, namely the constitutive elements and criteria for defining SEPs, the Altmark criteria, upon satisfaction of which the compensation of reasonable costs of providing SGEI will not constitute State aid to economic operators and two consequences: a positive consequence and a negative consequence. The positive consequence is understood as "in accordance with part two of Article 3 of the Law of Ukraine "On State Aid to Business Entities", the Law does not apply to support of economic activity related to provision of SGEI as regards compensation of justified

costs of providing such services", i.e. if such compensation satisfies the four Altmark criteria. In turn, the negative consequence applies to all other cases: if the compensation of justified costs for the provision of SGEI does not meet the 4 cumulative criteria set out in paragraph 2 of the clarification, such a measure would constitute state aid to business entities. It is also important to note that AMCU continues to cooperate with the EU technical assistance project "Support to the Antimonopoly Committee of Ukraine for the Implementation of State Aid Regulations" (SESAR project), which contributes the lion's share to the harmonisation of Ukrainian legislation and the construction of a European-like competition control system. The preparation of clarifications on the application of state aid legislation is impossible without effective international technical assistance and expert support.

Ukraine, the main goal of which is to join European structures such as the EU as a full member state, is nevertheless in an unfavourable social and economic situation, which can be resolved through rather drastic measures to reform relevant social institutions and areas of public life, in particular such sensitive areas as public passenger transport, public broadcasting services, etc., which are also subject to special regulation in the EU and the European Commission, and are in the focus of the EU Court of Justice. Given the corresponding increase in social tensions, policy harmonisation in this area is still being carried out step by step in accordance with established rules in the EU – and as a result the Anti-monopoly Committee of Ukraine has begun to make its first decisions on the admissibility of state aid for compensation to economic operators tasked with providing services of general economic interest.

One of such aspects is the establishment of a system of state support for public transport enterprises by state and local authorities at taxpayers' expense, which falls within the definition of "State aid" and should be granted subject to and in strict compliance with the rules provided by the Law of Ukraine on State Aid to to Business Entities and the relevant EU acts or exempted

from such control in case of appropriate support for the provision of common services

Accounting for these EU rules in Ukraine is a direct obligation under the Association Agreement, therefore the Anti-monopoly Committee of Ukraine has certain practice and experience in cases related to the provision of compensation to undertakings which provide passenger transport services. Pursuant to Article 368 of Chapter 7 of Section V of the Association Agreement, cooperation between the parties, Ukraine and the EU, aims to facilitate the restructuring and renewal of the Ukrainian transport sector and the gradual harmonisation of existing standards and policies with those in the EU, in particular by implementing the measures set out in Annex XXXII. Annex XXXII of the Association Agreement provides for the obligation for Ukraine to implement Regulation (EC) №1370/2007.

The Law of Ukraine "On State Aid to Business Entities" establishes that services of general economic interest are services associated with the satisfaction of particularly important common needs of citizens that cannot be provided on a commercial basis without state support. Pursuant to article 3, paragraph 2, part 2 of this law, this law shall not apply to support of economic activity connected with rendering services of general economic interest in terms of compensation of justified expenses for rendering such services.

Any compensations from the state/local budget to cover such costs or in support of the statutory activity of the utility providing such passenger transport services shall be examined by AMCU for compliance with all conditions for granting such state aid under the already classic concept in EU law. Altmark. For such funding to be recognized by AMCU as compensation for services provided by recipient entities for the performance of public duties, the following conditions must be met: the undertaking must fulfil public service obligations and those obligations are clearly established and defined; the parameters from which the compensation is calculated are determined in advance in an objective and transparent manner;

the compensation is not excessive and does not exceed the amount necessary to cover all or part of the costs incurred by the public undertaking. If this procedure has not been followed, the level of compensation required shall be determined on the basis of an analysis of the costs which are typical for that enterprise and shall be adequately provided with the means of transport to carry out those services, having regard to the enterprise's corresponding income and reasonable profit.

For example, consider the AMCU's decision to declare new state aid inadmissible for competition, which Vinnytsia City Council granted to public enterprise "Vinnytsia Transport Company" for compensation of damage from free carriage of citizens on public holidays.

In this landmark decision the AMCU clearly refers to Regulation (EC) 1370/2007 as a basis for its decision on the illegality of state aid and also recognizes that public transport services clearly fall under item 14 part one article 1 of the Act, namely as services of general economic interest – services associated with the satisfaction of particularly important general needs of citizens, which cannot be provided on a commercial basis without public support. However, AMCU emphasises that "the Department of Energy, Transport and Communications of Vinnytsia City Council announced that it concludes temporary contracts with the carriers providing passenger transportation services by public transport, which in its turn contradicts paragraph 2 of Article 5 of the Regulation, which states that any competent local authority, if not expressly prohibited by national law, may decide to provide public passenger transportation services on its own. Therefore, the absence of competition in determining the road carrier on a public bus route is a violation of Article 43 of the Law of Ukraine "On Road Transport" and, as a result, such actions distort competition.

This case is also significant because it is the first time that AMCU won the proceedings in all three instances, and the decision of the Supreme Court refers directly to the law of the European Union: in paragraph 77 of Decision of 31 March 2020 on case №

640/65/19, the Supreme Court, sitting as a panel of judges of the Administrative Court of Cassation, notes that the impossibility of qualifying the services provided by the utility company "Vinnytsia Transport Company" as services of general economic interest makes it impossible to apply the provision on not extending the public procurement.

This inability to qualify is due to the non-compliance of this state aid with the Altmark test that AMCU carried out during the investigation phase of the case, namely that the undertaking providing these services must be selected through a public procurement procedure. If such a procedure has not been followed, the level of compensation required shall be determined on the basis of a cost analysis typical of the undertaking and duly provided with the means of transport to carry out the services, taking into account the undertaking's relevant income and reasonable profit.

The Supreme Court in another case № 640/21523/19 on the cassation appeal of the Antimonopoly Committee of Ukraine ruled to recognise as state aid the support provided in accordance with the decision of the Kyiv City Council dated 13 December 2018 № 416/6467 "On the Budget of the City of Kyiv for 2019", Program of economic and social development of the city of Kiev for 2018 – 2020, approved by the decision of the Kyiv City Council of 21 December 2017 № 1042/4049 to the utility companies performing the functions of the customer for capital repairs, reconstruction, construction of educational institutions, healthcare facilities, landscaping, residential buildings with social facilities, engineering networks, administrative buildings, sports infrastructure facilities and the Kyiv Zoological Park. The Supreme Court, after analysing all materials, decided to set aside the decision of the District Administrative Court of Kyiv of 23 December 2019 and the ruling of the Sixth Administrative Court of Appeal of 18 March 2020 on case №. 640/21523/19 – in terms of satisfying the claim for recognition, support is not state aid, on the grounds that the Law of Ukraine "On State Aid to Business Entities" does not cover support for economic activities associated with the provision of SGEI.

The courts of the first and appellate instances noted that the Kyiv City State Administration was an authorised body whose competence included deciding on the performance of the customer's functions for the construction, reconstruction and overhaul of municipal property by granting these functions to the relevant public utilities. In decision making on implementation of customer's functions by public utility companies, Kyiv City State Administration acted on basis and within powers and manner determined by applicable law, and the implementation of customer's functions through public utility companies is the direct implementation of economic activities of the local government through the public utility company, as expressly stated by the legislation. Therefore, in this case, a tender is not required for ordering construction, reconstruction or capital repairs of social infrastructure. The courts also pointed out that the four Altmark criteria in the case were met.

AMCU also argued that the court of first instance had no right to recognize that support for utility companies to perform the customer's functions is not state aid, as this is the sole authority of the AMCU as the competent authority under the Law of Ukraine "On State Aid to Business Entities". This is an evidence of groundless interference of the court of first instance with discretionary competence of the Committee's bodies.

The Supreme Court decided that by deciding on performance of the customer's functions by public utility companies, Kyiv City State Administration acts on the basis and within its authority and in the manner prescribed by applicable law, while performance of the customer's functions by public utility companies is exactly the direct performance of economic activities of the local self-government authority by public utility company, which is directly stated by the applicable legislation. Therefore, in the context of this case, in order to act as the customer of construction, reconstruction and capital repair of social infrastructure, a tender is not required. In fact municipal enterprises being the third party in this case satisfy the needs of the territorial community of Kyiv

in objects of the production infrastructure and perform tasks of the local government regarding availability of this infrastructure. Consequently, they provide services of general economic interest confirming conclusions of the courts of previous instances that the Law of Ukraine "On State Aid to Business Entities" does not apply to the activities of public utilities in the performance of customer functions.

Thus the Supreme Court recognised such support as State aid and upheld the decision of previous courts in the other part, in particular, regarding finding unlawful and reversing the decision of the Antimonopoly Committee of Ukraine that such state aid is inadmissible for competition under the Law of Ukraine "On State Aid to Economic Entities".

AMCU's Decision № 423-p on public transport services, which should be cited as an example, demonstrates a different approach. In AMCU's Decision № 423-p "On Consideration of Case № 500-26.15/14-20-DD on State Aid" dated July 03, 2020 the Social Security Department of the Sloviansk City Council granted state aid in the form of a subsidy and current transfers for compensation of expenses for public transport services to certain categories of citizens to the Communal Enterprise "Sloviansk Trolleybus Department" of the Sloviansk City Council. The AMC in this decision made an analysis of the provision of such state aid by applying the Altmark test and also considered whether such services are of general economic interest.

When asked about the definition of transport services as SGEI, the AMCU responded as follows: according to the definition of SGEI given in the Law, services that meet the following conditions may be classified as SGEI: related to the satisfaction of particularly important general needs of citizens; cannot be provided on a commercial basis without state support.

According to part two of article 14 of the Law of Ukraine "On Municipal Electric Transport", setting of tariffs for travel by transport is carried out taking into account the need to ensure break-even operation of carriers and protection of low-income

citizens. In case the fare level is set at a level which does not cover expenses related to passenger transportation, the carrier's losses are compensated by the authorised body, which approves the fares, at the expense of relevant budgets. That is why, taking into account the definition in paragraph 14 of Article 1 of the Law and the relevant interpretation in the acts of EU legislation of the notion of SGEI carried out in accordance with Article 264 of the Association Agreement between Ukraine and the EU, the transportation of passengers by public transport, namely by electric transport (metro trains) is connected with satisfaction of particularly important common needs of citizens which cannot be provided on a commercial basis without state support and are services of general economic interest.

Regarding the assessment of the state support measure for compliance with the criteria in the Altmark case, an interesting legal situation arose in that decision, namely that AMCU found that the first Altmark criterion was partially achieved and the last three were not achieved at all. And by logic, such state support should be considered as non-reimbursement of reasonable expenses for provision of services of general economic interest in accordance with part two of article 3 of the Law of Ukraine on State Aid to Business Entities and is not state aid.

But referring to part one of article 6 of the Law of Ukraine on State Aid to Business Entities, pursuant to which state aid may be recognised as compatible if it is granted for purposes, in particular, for implementation of national development programs or solution of social or economic problems of general economic interest, the AMCU makes the following conclusion: taking into account the definition in paragraph 14 of Article 1 of the Law of Ukraine on State Aid to Business Entities and the relevant interpretation in the acts of EU legislation of the concept of SGEI, carried out in accordance with Article 264 of the Association Agreement between Ukraine and the EU, the carriage of passengers by public transport, namely by electric transport, is related to meeting particularly important common needs of citizens which cannot be provided on commercial

basis without public assistance – such public transport services are provided by the state.

At the same time, if the criteria in the Altmark case are not met, Regulation 1370/2007/EC on public rail and road passenger transport services is used to carry out an appropriate assessment of the admissibility of public assistance for the provision of public transport services.

Having carried out accordingly the analysis of compliance with the text of the Regulation, AMCU ruled that, taking into account the above, state aid in the form of subsidies and current transfers for reimbursement of travel expenses for public transport of certain categories of citizens, whose benefits are guaranteed by the state, namely: payment of wages, deductions for social activities, payment of electricity, utility company "Sloviansk Trolleybus Department" for the period from 01.01.2020 to 31.12.2024 in total amount of 75 000 000 UAH, is compatible for competition according to article 6 of the Law of Ukraine "On the State Aid to Business Entities" upon fulfilment of such obligations, in particular to develop and approve the methodology of calculation of compensation for the provision of services of general economic interest, in accordance with part four of article 263 of the Agreement, as well as the requirements contained in the Annex to the Regulation (EC) № 1370/2007 of the European Parliament and Council of 23 October 2007 on public services.

As a result, the Sloviansk City Council adopted decision № 1756 of 16.12.2020 on approval of the Methodology for calculating the compensation for the provision of services of general economic interest – public passenger transport in the city of Sloviansk in execution of the AMCU decision, as stated in the chapeau of the decision.

At the same time, such methodologies for calculation of the compensation are already available in many cities of Ukraine, in particular, Lutsk, Khmelnytskyi, Severodonetsk – and this is not the full list – and all of these methodologies have been developed on the basis of the AMCU order in consideration of cases on provision of

state support by city councils of these cities to their public utilities.

It is worth mentioning that not so long ago, the AMCU issued a clarification dated 09.12.2021 №.3-r/dd "On Provision of Support to Business Entities Providing Services in Urban Electric Passenger Transportation" based on its own generalised practice. While confirming in its clarification the importance and significance of the Altmark criteria, AMCU still comes to another landmark conclusion: "the law enforcement practice shows that in most cases considered by the Committee the four Altmark criteria were not met. Firstly, because the agreements on provision of passenger transport services by public transport had not been concluded between the carriers and local or state authorities or, if such agreements had been concluded, their term of validity did not cover the period of state support. Secondly, because the providers of state aid did not provide sufficient justification that the compensation for the provision of services of general economic interest had been determined in advance in an objective and transparent manner that it was justified and, accordingly, the state support cannot be considered as such that it is not State aid".

At the same time, sensitive services such as public transport cannot be left without public support, so the AMCU returns to the analysis of public measures for no longer meeting the Altmark criteria for compensation and, consequently, the decision to recognise such measures as not public aid, but for the possibility of recognising such state aid as compatible. After all, if the compatibility criteria are not met in full either, AMCU, applying its own broad competence, may "in case the requirements of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public rail and road passenger transport services are not fully complied with, grant state aid obligations which it must fulfil within the period prescribed by the Antimonopoly Committee of Ukraine.

All this may serve as evidence of Ukraine's direct commitment to the provisions of the Association Agreement in the field of state aid, as well as the application of EU law in the Ukrainian legal order. The introductory part of the decision of the Sloviansk City Council indicates the legal basis for the adoption of this document, namely to determine the procedure for calculation of the amounts of compensation payments for the provision of services of general economic interest in accordance with paragraph four of Article 263 of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand.

Also, the AMCU implicitly "extends" the list of services of general economic interest through its practice, while in the Resolution of the Cabinet of Ministers of Ukraine № 420 on the approval of the list of SGEI – services such as transport services or public broadcasting services are simply absent.

An increasingly urgent issue in Ukraine we hear is the building of an independent public service broadcaster system – and since 2014, with the support of the Council of Europe and the European Union, Ukraine has made striking transformational steps in this direction. At the same time, there remain issues of significant importance in the European Union – namely the funding of public service broadcasting and its support from the state. Given on the one hand the need to ensure its independence, including from the state, and on the other hand the public purpose of delivering information to the public without influence of particular forces on editorial policy, which should be supported by the state, difficult dilemmas arise – all of which are resolved in the framework of state aid and public interest services.

The considerable responsibility in the development of practice and supervision of the correct application of the rules for the decision on state aid to public service broadcasters rests on the shoulders of competition authorities, in particular the Antimonopoly Committee of Ukraine (AMCU).

In addition, the AMCU has already considered several cases on state aid to regional public broadcasters in Ukraine: cases No 500-26.15/39-18-DD of 25 April 2019; No 500-26.15/33-20-DD of 14 May 2020; No 500-26.15/86-20-DD of 11 February 2021. Having analysed these decisions, the following conclusions can be drawn: AMCU, referring to the European Union law in terms of SGEI, decides that the services must be addressed to citizens or be in the public interest in general and cannot be provided on a commercial basis without state support, and also cites the clarification of the relevant COIE in this area, namely the Ministry of Information Policy of Ukraine (letter №. 09-04/03 of 27.08.08.2019) (ref. №. 6-01/9905 of 28.08.2019), "... Article 49 of the Law of Ukraine "On Television and Radio Broadcasting" provides for the order of dissemination of official messages and other mandatory information. Given the role of the media in the development of the state and civil society, ensuring the right of citizens to access to information, we believe that the services of communal television and radio organisations are related to the satisfaction of particularly important common needs of citizens". That is, the AMCU recognises public broadcasting services as services of general economic interest with a sequential case-by-case analysis on the Altmark test.

Having concluded that all Altmark criteria have not been cumulatively fulfilled, the AMCU proceeds to examine whether such public broadcasting services are admissible, since, according to the Commission's Communication , the public broadcasting service is intended to provide comprehensive coverage of the social and political life of a city, region or country, a public purpose which comes to the forefront in examining the compatibility and eligibility of public aid within the relevant market. It is noteworthy that in these decisions AMCU does not refer to the List of Services of General Economic Interest as approved by Resolution №. 420 of the Cabinet of Ministers of Ukraine, where such services as public broadcasting services are not available. AMCU conducts its own analysis and determines which services are services of general

economic interest. There is an evolution from the 2019 decision to the 2021 decision on AMCU's conditions for recognition of state aid as permissible for public broadcasting services, namely: AMCU order to local governments to define such services of general economic interest in public broadcasting by an appropriate regulation/agreement (Memorandum)), which should clearly define: the content and duration of the services (throughout the relevant duties); a clear definition of services; the nature of special or exclusive rights provided for the service; description of the compensation mechanism and parameters for calculation and review of compensation (methodology). It is covered by the existing EU practice under the first Altmark criterion, as well as the provisions of the European Commission's Decision of 20.12.2011 and the Framework Communication on SGEI . It should also be noted that this commitment to a regulation and its content as a legal basis for the initiation of such services is planned to be enshrined at the level of the Law in the new version of the Ukrainian Law on State Aid to Business Entities.

At the same time, the role of AMCU in the process of implementation of Article 263 of the Association Agreement cannot be noted: in fact, its decision on permissible or illegal state aid rendered to city councils of Ukrainian cities to their public utilities contain instructions to approve the methodology for calculating compensation for the provision of services of general economic interest or establish other obligations, i.e. through such a mechanism "activate" the implementation of European Union law and the process of fulfilling obligations by their direct detainees in exchange for recognition of their support falling under the terms of "state aid" is compatible.

CONCLUSIONS

In the absence in the profile Law on State Aid to Business Entities of certain regulatory provisions of EU law on SGEI, local authorities in Ukraine still continue to provide state support using the resources of local budgets to support enterprises providing

such services. The unequivocal fact, supported also by AMCU's practice, is that such support falls within the definition of state aid and requires appropriate control as provided by the Law of Ukraine "On State Aid to Business Entities". However, it shall be taken into account that not every such state aid is non-competitive. Such state aid may be provided to compensate for the costs of carriers providing such services and falling under services of general economic interest. Local governments must then be very circumspect and clearly consider all Altmark criteria that define state support as compensation for services of general economic interest, and therefore not as state aid.

The recent practice of AMCU in deciding on the admissibility of state aid for compensation to companies providing SGEI was marked by the following novelties: recognition of certain services (including public transport, postal and public broadcasting services) as services of general economic interest given the fact that the Cabinet of Ministers of Ukraine has issued Resolution № 420 on approval of the list of SGEI (which, in particular, does not comply with the European practice); assignment to local self-governments to adopt the list of services of general economic interest. Generally, we believe that this situation will only improve and the practice of AMCU will be strengthened in regulations, in particular, if a new version of the Law of Ukraine "On State Aid to Business Entities" is adopted to take into account the main provisions of EU law on SGEI, as well as relevant draft laws of Ukraine, e.g. on reforming the postal services, passenger transportation system by road and urban electric transport etc. in line with the European Union standards.

The jurisprudence of administrative courts led by the Supreme Court in the panel of judges of the Administrative Court of Cassation has noted the direct application of EU law and the EU-Ukraine Association Agreement in resolving public law disputes over the legality of decisions, actions or inactions, such as those of the State Aid authorised body – AMCU – fall within the jurisdiction of administrative courts. In particular, administrative courts in resolving such disputes use not only primary and secondary EU

legislation, but also the case law of the Court of Justice of the EU on these issues, which will undoubtedly contribute to the legal integration of Ukraine as a part of the greater European integration system, as well as to the Europeanisation of administrative law and procedure. With acquiring EU candidate status, it is especially important for Ukraine to show the evolution of law enforcement practice as one of the components of approximation to the EU acquis, which in turn implies correct and effective application not only of substantive EU law, but also of the established practice of the EU Court, adapting it to Ukrainian realities and considering all circumstances of the case at hand.

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Україна в системі сучасного міжнародного правопорядку та європейської інтеграції : проблеми доктрини та практики в контексті сучасних гуманітарних викликів : колективна монографія / в авторській редакції. Чернівці, Україна : Чернівецький національний університет імені Юрія Федьковича, 2022. 648 с.

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У монографії розглядаються теоретичні та практичні аспекти розвитку сучасного міжнародного права та місце України в євроінтеграційних процесах. Дана монографія висвітлює проблеми доктрини й практики сучасного міжнародного права в контексті гуманітарних викликів сьогодення. Видання буде в цілому корисним для юристів-міжнародників, студентів та аспірантів, суддів, юристів-практиків, а також усіх тих, хто цікавиться проблемами міжнародного права в його широкому розумінні.

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