THE CHALLENGES AND OPPORTUNITIES IN LAW

UKRAINIAN CASE UNDER THE CONDITIONS OF WAR

Edited by
Tomas Davulis
Ligita Gasparėnienė

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— MONOGRAPH —

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Chapter 1

Personal Non-Property Rights to Life, Health and Medical Care in Ukraine New Challenges during Martial Law

ABSTRACT

In the 21st century, people expect their countries' health authorities to ensure that their right to universal access to quality health care is exercised, including in the event of health emergencies (e.g. pandemic), and the opportunity to live safely in a healthy society. within the realities of war, access to quality medical care is even more difficult. The war in Ukraine, which has been going on since 2014, has led to healthcare-related problems in the temporarily occupied territories, and with the onset of a full-scale Russian invasion of Ukraine, these problems have only intensified and become global. The full-scale invasion of Ukraine by the Russian Federation has led to mass migration of refugees both within Ukraine and to other countries. In the temporarily occupied territories, the population's access to medical care is limited. It is reported that some health care facilities are being closed because there are no medical staff left due to their evacuation, the number of events dangerous to life and health has increased significantly, and there is a threat of epidemics. The main purpose of the presented study is to analyze international and national standards of human rights in the field of health care in Ukraine and identify problems of their implementation and protection in martial law.

The research is based on the analysis of international and national legal acts, statistical indicators, court decisions and materials, and the comparison of positions of scientists on the published results. It is also planned to conduct a brief sociological survey among

residents of the western regions of Ukraine and internally displaced persons who moved to the western regions of Ukraine on 24 February 2022.

Keywords: inalienable human rights, patients, health care in Ukraine, right to life, right to health, medical care, war, martial law

Introduction

Issues of personal non-property rights of an individual are extremely relevant due to the active development of social relations. Personal non-property rights constitute an absolute value and form the basis of spirituality, which enables the full realization of the principles of civil society.

Personal non-property rights are an important component of the total scope of rights of every person. The well-being of each of us depends on what the scope of personal non-property rights will be and how they will be enshrined in legislation.

These non-property rights, such as the right to life, health and medical care, are of particular importance for the entire civil society, both in Ukraine and in other countries. The question arises about what everyone expects from the authorities in the field of health care of their countries. People want these authorities to guarantee their right to universal access to quality health care without fear of financial hardship. They also seek to have effective protection in the event of health emergencies and the opportunity to live safely in a healthy society, where health care actions and relevant public policies contribute to improving life in a welfare economy. People are increasingly demanding that health care authorities in their countries meet the above-mentioned aspirations. Only under the condition of the existence and application of proper mechanisms of legal regulation of the health care sphere, a person can exist, feel safe and develop.

The war in Ukraine, which has been ongoing since 2014, became one of the reasons for the disruption of health care problems in the temporarily occupied territories, and with the beginning of the full-scale invasion of the Russian Federation on almost the entire territory of Ukraine, these problems only intensified and took on a global scale.

From now on, the research on personal non-property rights to life, health and medical care, as well as on new challenges that arose in this area during the martial law in Ukraine, is relevant.

The conducted study demonstrates that traditionally (during the last decades) "the declaration of priority of personal non-property relations in the system of the subject of civil law, which is aimed at the development of the constitutional prin-

ciples of 'anthropocentrism' and is reflected in the subsequent text of civil legislation" is dominant (Ruslan Stefanchuk, 2008). However, the new challenges facing humanity (the COVID-19 pandemic, the military actions of the Russian Federation on the territory of Ukraine) call into question the time-tested ideas of people--centrism (therefore, human rights are decisive and everything else must be subsequent to them), instead, we put forward in the first place the need to balance the rights of an individual and the need of the society as a whole to live in a safe environment. Perhaps the approach is justified when universal human values, to which life and health belong, are a factor which an individual, states and collectives must "obey" when observing their rights. In the presence of this approach, it is quite legal to limit the rights of everyone in the interest of the society (these approaches can be called value-oriented).

I. Methodological Principles of Regulation of Personal Non-Property Human Rights in the Sphere of Health Care in Ukraine

The allocation of personal non-property rights as part of the subject of private (civil) law has a certain genesis and is the result of progress from ideas about property, natural rights, the development of the concept of human rights and humanity in general to the need to single out a separate group of non-property rights and their inclusion in the subject of civil law.

There is no exact information about when the protection and the actual definition of personal non-property human rights first appeared in legal literature. However, most scientists are inclined to believe that the first mentions can be traced back to Ancient Rome.

Svyatoslav Slipchenko (2018) notes: "The development of teachings on personal non-property rights in European countries can be conventionally divided into three stages" (p. 240). The researcher believes that the period from the French Revolution to the Second World War should be included in the first stage, when at first in France, and later in some other countries of the continental legal system, personal non-property rights were established for a person. The basis of this approach was John Locke's doctrine of natural rights (Locke, translated by Sodomora 2020, p. 7). At that time, a general principle of personal protection was formed in Europe and a search for a mechanism for legal regulation of personal non-property relations was instigated.

The second stage, according to S. Slipchenko, started after the Second World War. It is characterized by a general humanistic vector of the development of

personal non-property rights. It was during this period that the general idea of their non-property character and inalienability was rooted. International standards for the protection of human rights were approved and national legislations of European countries were formed.

The third stage, according to the scientist, began in the 1980s. It is connected with a change in ideas about civil turnover, about the relationship between intangible goods and their carrier, about the mobility of boundaries between property and personal non-property interests.

There is no single approach in court decisions. Property rights often arise in relation to non-property goods, therefore, courts recognize them as property and apply the relevant legislation. This applies both to the decisions of the national courts of European countries and the European Court of Human Rights. In particular, the decision of the European Court of Human Rights in the case of Van Marle v. Netherlands recognized that the right to a business reputation can be property (Van Marle and others v. Netherlands, 1986). The German Federal Supreme Court in the Marlene Dietrich case also recognized the rights to use the name and image of a natural person as property (Marlene Dietrich, Bundesgerichtshof, 1999).

This study deals only with objects (non-property goods) that are capable of satisfying only personal non-property interest (life, health, personal integrity, etc.), so they have no economic importance and, depending on this, only personal non-property rights arise.

The concept of personal non-property rights of an individual gained its greatest development in the second half of the 20th century. It was covered at the constitutional level and in many international legal documents.

Regarding the development of personal non-property rights in Ukraine, until 2004, the Civil Code of the Ukrainian USSR (1963) continued to operate in Ukraine, which protected only those individuals whose non-property rights were related to a property interest, at a time when non-property relations, which were not related to property, were not protected, and were not settled. Only with the adoption of the Civil Code of Ukraine (2003), which contains Book Two "Personal Non-Property Rights of an Individual," the legal regulation of personal non-property rights became systematic. Including Articles 281-290 of the Civil Code of Ukraine (2003), rights in the field of health care were systematically regulated.

It was the adoption of the new Civil Code of Ukraine in 2003 that ensured the most comprehensive branch development of constitutional provisions. At the same time, civil legislation not only incorporated most of the mentioned human rights into its content, transferring them to the category of personal non-property, which gave them the character of private law, but also ensured their effective implementation and comprehensive protection by the compensatory and restorative method

based on legal equality of the parties. None of the civil codes of the post-Soviet countries contains as large a volume of norms relating to personal non-property rights as the Civil Code of Ukraine (2003). Having singled out the personal non-property rights of natural persons in the structure of the Civil Code, Ukraine became one of the first countries that gained independence after the collapse of the union state and implemented the specified provisions.

In the Civil Code of Ukraine (2003), all personal non-property rights, depending on the purpose, are divided into personal non-property rights that ensure the natural existence of an individual and personal non-property rights that ensure the social existence of an individual.

The first group includes: the right to life, the right to healthcare, the right to an environment safe for living and health, the right to freedom, the right to personal integrity, the right to the integrity of personal and family life. In Ukraine, these rights are guaranteed by the Constitution of Ukraine (1996, p. 27, p. 32). Personal non-property rights acquire wider development in branch legislation, in particular in civil law.

The second group includes the rights of an individual to a name, respect for dignity and honor, inviolability of business reputation, personal life and its secrecy, the right to privacy of correspondence, telephone conversations, telegraphic and other correspondence, the right to inviolability of the home, the right to freedom of residence and movement, the right to freedom of literary, artistic, scientific and technical creativity. In Ukraine, these rights are guaranteed by the Constitution of Ukraine (1996, p. 28, p. 31). The Civil Code of Ukraine (2003) additionally enshrines the right to a name (Article 294), inviolability of a business reputation (Article 299), individuality (Article 300), freedom of association (Article 314), etc.

It is also possible to take the order of emergence of personal non-property rights as a basis for their classification: those that belong to natural persons from birth and those that belong to them by law.

The list of personal non-property rights belonging to a person is not exhaustive, in particular in the field of health care. According to the Constitution of Ukraine, a natural person has the right to life, healthcare, the right to an environment safe for living and health, the right to freedom and personal integrity, the right to the integrity of personal and family life, the right to respect for dignity and honor, the right to secrecy of correspondence, telephone conversations, telegraphic and other correspondence, the right to inviolability of the home, the right to freedom of residence and movement, the right to freedom of literary, artistic, scientific and technical creativity.

The systematic interpretation of the content of Article 270 of the Civil Code of Ukraine (2003) makes it possible to divide all personal non-property rights of an

individual in the field of health care, depending on their place in the sources of law, into the following groups:

– personal non-property rights of natural persons that are constitutional (in particular, the right to life, the right to health care, the right to an environment safe for living and health, the right to freedom, the right to the integrity of family life, the right to medical care);
– personal non-property rights of natural persons, which are regulated by the Civil Code of Ukraine (in particular, the right to information and the confidentiality of information on one's health, the right to blood and organ donation, the rights of a natural person undergoing treatment in a health care facility);
– personal non-property rights of natural persons regulated by other acts of legislation (for example, the right to consent, to safety during medical intervention, the right to an individual approach during treatment);
– personal non-property rights of natural persons, which are not regulated by the legislation of Ukraine, are protected in accordance with the rule on the non-exhaustive nature of such rights (in particular, the prohibition of discrimination and protection during scientific research).

Now, almost twenty years after the adoption of the Civil Code of Ukraine (2003)—the content of which is no longer sufficient to regulate personal non-property rights even in the field of health care in their modern understanding and perception of realities—it does not define the concept of a personal non-property right; instead, it indicates its features.

> Personal non-property rights belong to every natural person by birth or by law. Personal non-property rights of an individual have no economic meaning. Personal non-property rights are closely related to an individual. An individual cannot waive personal non-property rights, nor can they be deprived of these rights. A natural person owns personal non-property rights for life (Civil Code of Ukraine, 2003, Article 269).

Also, the issue of personal non-property rights belonging to the sphere of civil law is debatable. Lilia Fedyuk (2006) notes: "The views of scientists on the problem of legal regulation of personal non-property relations by civil law are not unambiguous during the entire period of research on this issue" (p. 10).

The majority of scientists define personal non-property law as private non-property goods, in particular, those "deprived of property content, inextricably linked to the subject of civil law, recognized by society, and therefore protected by civil legislation" (Kharitonov, 2003, p. 171). As Ruslan Stefanchuk (2016) notes: "The rights of an individual as a human being have superseded his/her rights as an owner, as a subject

of obligations" (p. 46). Moreover, these "goods have a single non-economic nature, a value for their bearer, have the functional property of non-commodity, belong to the individual as such and are inseparable from him/her" (Dzera, Kuznetsova and Maidanyk, 2017, p. 588). According to Natalia Kuznetsova (2015): "Respect for each person as an individual should become the norm of everyday life in Ukraine, and a person should be the only absolute value, relative to which all other values are determined" (p. 10).

One of the most important characteristics of personal non-property rights is their absoluteness. Thus, Mykola Stefanchuk (2002) notes that "personal non-property rights which ensure the natural existence of a physical person, have priority over others" (p. 88). He came to the conclusion that these rights do not have objectively established legal limits, which indicates their absoluteness (p. 89). Since the right of one authorized person is opposed by an unlimited circle of persons who are obliged not to violate it, then these rights are absolute (monopoly), which does not indicate the absence of limits to their implementation, because the capabilities of one person end where they intersect with the rights of another person, or rather prevent their legal implementation.

Personal non-property rights to goods that may be in civil circulation (for example, the right to information) also have the feature of exclusivity (Slipchenko, 2013, p. 14). Next, the author justifies that non-property rights to objects that are negotiable are also alienated.

Scientists indicate that personal non-property rights are universal, since they "belong to every natural person, regardless of the scope of his/her legal capacity, and every legal entity, including every natural person, is equal in the opportunity to realize and protect these rights" (Yurkevych and Dutko, 2021, p. 30).

Ruslan Stefanchuk (2008) points out: "The main features of the personal non-property rights of natural persons are their personal nature, non-property, specific object and focus on satisfying physical (biological), spiritual, moral, cultural, social or other non-material needs (interest)" (p. 536).

This study will deal with those non-property rights that ensure the natural existence of a natural person (right to life, right to health care). Since they are provided with means of protection, which is characteristic of private law and is aimed at protecting the private non-property interest of their participants, they are civil.

In September 2015, the United Nations Summit on Sustainable Development, held in New York, adopted the General Assembly Resolution "Transforming our World: the 2030 Agenda for Sustainable Development" (2015) as the final document, which defined 17 Sustainable Development Goals. The goal of most of them is to improve human living conditions, and one of them (03) represents: "Ensure healthy lives and promote well-being for all at all ages" (UN Resolution "Transforming our

world: the 2030 Agenda for Sustainable Development," 2015, p. 15). The General Assembly notes that in order to improve physical and mental health and well-being, as well as to increase the average life expectancy for all, we must provide the population with medical care (UN Resolution, 2015, p. 8).

This task is set before humanity as a whole, and states and institutions of civil society must ensure its fulfillment together. The state must create conditions for the free development of an individual, namely, safe conditions for living, studying, and working, as well as stimulating the production of food and drinking water, the creation and proper functioning of the health care system. In turn, civil society should help the state and motivate everyone to a healthy lifestyle. Likewise, the state and civil society are responsible to future generations for the preservation of a healthy gene pool. Therefore, every person should know and understand their rights and duties, as well as the obligations of the state in the field of health care.

Over time, human rights have undergone changes not only in the catalog of rights, but also in their content. If at the beginning of the 20th century humanity only began to ask questions about the need for international recognition and maintenance of human rights in the field of health care, at the beginning of the 21st century we are already talking about the emergence of a virtual environment and the possibility of a person's existence in it. More and more scientists are raising the issue of the need to preserve man as a biological being. The division of human rights into generations demonstrates their evolution and determines their characteristics. Also, according to the results of an earlier study, different generations of human rights in the field of health care are interdependent and influence each other (Blashchuk, 2021).

The constitutional rights of a person and a citizen include: the right to health care (Constitution of Ukraine, 1996, p. 49), the right to an environment safe for living and health, to compensation for damages caused by the violation of this right (Constitution of Ukraine, 1996, p. 50). The Civil Code of Ukraine (2003) and civil science include the right to life, the right to health care, and the right to an environment safe for living and health among the personal non-property rights of an individual (Articles 270 and 293 of the Civil Code of Ukraine).

Therefore, the Constitution of Ukraine and the Civil Code of Ukraine consider these rights as separate personal non-property rights of an individual.

In addition, special legislation in the field of health care, namely the Fundamentals of the Legislation of Ukraine on Health Care (1992) indicates in Article 6 that the right to health care includes, among other things, natural environment safe for living and health, as well as healthy conditions of work, education, living and recreation. Therefore, the specified law considers the right to a safe environment as part of

the right to health care. It remains to be determined what is included in the content of the right to a safe environment.

Global trends contributed to the formation of citizens' rights to an environment safe for living and health in Ukraine. It was at the international level that the idea of declaring the human right to live in a favorable environment first arose.

In the scope of a person's rights to a safe environment, this problem was raised for the first time in the 1970s. In particular, the Declaration of the Stockholm Conference of the United Nations Organization on Environmental Protection (1972) was adopted, which proclaimed: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." (Principle 1). This document became instrumental in the process of forming the rights to a safe environment.

The protection of human life and health from the adverse environmental effects has long been the subject of consideration within the framework of the general protection of the ecological interests of society. This approach did not provide a proper attitude to the protection of the citizen's subjective right to an environment safe for living and health.

With the development of civil science, it became obvious that the right to an environment safe for living and health belongs to the institution of personal non-property rights. Today there is no doubt that the regulation and protection of the right to an environment safe for living and health as a personal non-property right should be ensured by civil law.

Thus, the right to health care is a private non-property right of an individual and includes the right to a safe environment and information about the condition of the environment; the right to consumer products (food and household items) that are safe for an individual and information about their quality; the right to adequate and safe conditions of work, living, education, etc., as well as the right to protection and compensation in case of violation of the above-mentioned rights.

The relationship between the right to health protection and the right to an environment safe for living and health can be defined as follows: the right to health protection includes the right to an environment safe for living and health, which in turn includes the right to product safety.

II. Characteristics of Individual Types of Personal Non-Property Human Rights in the Field of Health Care in Ukraine

1.1. The Concept of Life, Health, the Right to Life and the Right to Health

Life and health are non-property benefits that are protected by law through: the right to life and healthcare, which includes the right to medical care.

Scientists propose to consider the right to life as a combination of these elements: the right to preserve life; the right to personal integrity; the right to demand from the state the implementation of measures aimed at supporting life; the right to manage one's own life; the right to health care and medical assistance (Stetsenko, 2008, p. 290).

The right to life is recognized by most international human rights instruments. For example, Article 3 of the Universal Declaration of Human Rights (1948), Article 6 of the International Covenant on Civil and Political Rights (1973), Article 6 of the Convention on the Rights of the Child (1989), etc.

In Ukraine, the right to life is provided by the Constitution of Ukraine (1996): "Every person has an inseparable right to life. No one can be arbitrarily deprived of life. The duty of the state is to protect human life. Everyone has the right to protect his/her life and health, and the life and health of other people from illegal actions" (Article 27).

In the legal sphere, life is interpreted as a certain benefit, i.e., as something that satisfies people's needs. Life is one's personal intangible good.

It depends on the state of health, i.e., it should be characterized by a certain state of physical, mental, social and spiritual well-being. Therefore, recognizing the right to life for every person, we cannot ignore the right to health.

The study of the right to health should begin with the interpretation of the terms "health," "right to health," and the position of health in the catalog of human rights.

Health is a concept used in various sciences, in particular in law. The Constitution of Ukraine (1996), Article 3 places the concept of "human health" alongside "human life" among the most important social values (p. 3).

Non-property good, which is part of the object of civil legal relations for the provision of medical services, means "health." Human health has always been regarded as one of the most important life values, the greatest personal good.

The degree of ensuring the life and health of a person in a particular state is an indicator of the development of its civil society. A person's life and health are interrelated because a person is a biological being that is born, lives and dies. Roman Maidanyk, researching the human right to life, notes: "Human life means the physical, psychological and social functioning of a person as a complex biosocial organism" (Maidanyk, 2016, p. 9).

According to the definition in the Charter (Constitution) of the World Health Organization (1946): "Health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity" (Preamble). Article 3 of the Fundamentals of the Legislation of Ukraine on Health Care (1992) defines health as "a state of complete physical, psychological and social well-being, and not just the absence of diseases and physical defects" (p. 3).

As can be seen, the domestic legislator gives a similar definition to the concept of "health," replacing the term "mental" with the term "psychological" well-being. The discussion regarding the relationship between these categories goes beyond the scope of this study, however, while arguing about their relationship, researchers agree that these are different concepts (Lefterov, 2013, p. 47; Savchuk et al., 2018).

Scientists studying health as a medical category agree that health is a state of the human body and identify six main types of essential elements for defining health:

1) health as a norm of functioning of the body at all levels of its organization;
2) health as a dynamic balance (harmony) of the body's vital functions;
3) health as full performance of basic social functions, participation in society and active work;
4) the organism's ability to adapt to changing environmental conditions;
5) absence of pathological changes and normal well-being;
6) complete physical, spiritual, mental and social well-being (Boychuk, 2017, p. 6).

Well-being, as we can see, has certain components:

– physical (contains information about how the body functions, all its organs and systems, the level of their reserve capabilities, characterized by the presence or absence of physical defects, diseases, including genetic ones);
– psychoemotional (mental) component of health (characterizes the state of the mental sphere, the presence or absence of neuropsychological abnormalities, the ability to understand and express one's emotions, the attitude towards oneself and others);
– intellectual (cognitive) component of health (contains data on how a person learns information, uses it, the effectiveness of searching and accumulating the necessary information, which ensures the development of the personality and its adaptation in the surrounding world);
– social component (presupposes the individual's awareness of himself as a person, the performance of relevant functions in society, reflects the way of communication and relationships with different groups of people);
– personal (spiritual) (denotes how a person perceives himself as a person).

The state of human health is variable and has different indicators depending on the factors that appear starting from conception and ending with the death of

a person. Depending on the health of the parents and their living environment, a newborn baby already has a certain level of health, and it will change in the future. In addition to objective factors affecting health, human well-being is also influenced by social factors, including access to resources and technology. No less important is a person's internal attitude towards himself, his health and those around him. A person's ability to resist various factors, adapt to them and recover characterizes his level of health. The higher the level of health, the lower the risk of disease, the better a person responds to the challenges of his living environment. One can improve his health with constant training (not only physical training).

Therefore, human health is a certain state of a person, which is characterized by well-being in all spheres of human activity and has a certain quality (level).

A person in health care relations acquires a special status, the status of a patient. The concept of "patient" in science is debatable.

The legal definition of a patient is enshrined in Article 3 of the Fundamentals of the Legislation of Ukraine on Health Care (1992), which states that a patient is a natural person who has sought medical care and/or is provided with this care (p. 3).

This definition is incomplete because it does not take into account the human condition. It is appropriate to pay attention to the "Law On Health Care Institutions" of the Republic of Lithuania (1996), which defines a patient as a person who "uses the services of health care institutions, regardless of whether he/she is sick or healthy" (p. 2).

This opinion is shared by Anatoliy Zelinskyi (2006), who points out that defining a patient only as a person who has sought medical help is an incomplete description, "it must be supplemented, since the realization of the right to health can be carried out by participating in a medical experiment as a research subject" (p. 143).

Anna Koval (2011) focuses on the fact that a patient is a person who, on a voluntary basis or without voluntary consent, "entered into a relationship with a medical institution, a health care professional, a doctor in private practice and (or) another employee of medical institutions, institutions of any form of property" (p. 20).

The patient, as a participant in the legal relationship, acquires a certain legal status, receives a number of rights and assumes certain responsibilities. The authors of the practical guide "Human Rights in the Field of Health Care" (2012) indicate that the rights of patients include a set of rights, duties and obligations, according to which people try to get and receive services in the field of health care (p. 512).

The legal status of patients should include not only the right to treatment, but also those related to the preservation and maintenance of health, health informational rights, etc. This is another indication that a person is entering into legal relations related to his/her health.

The Charter of the United Nations World Organization (1946) indicates that one of the fundamental rights of every human being, regardless of race, religion, political

opinion, economic or social status, is the opportunity to enjoy the highest attainable standard of health.

In international documents, the right to health is recognized and supported, starting with Article 25.1 of the Universal Declaration of Human Rights (1948), Article 6 and Article 24 of the Convention on the Rights of the Child (1989) and Articles 10, 11, 12, 14 of the Convention on the Elimination of All Forms of Discrimination against Women (1979). Thus, in Article 12 of the International Covenant on Economic, Social and Cultural Rights (1973), the states mentioned therein recognize the right of every person to the highest attainable level of physical and mental health (p. 12). The European Social Charter (1996) states that everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable (Part 1, paragraph 11).

The abovementioned makes it possible to single out the right to health, which belongs to every person from birth. The right to health is a fundamental human right (first-generation right), which is inseparable from the right to life and is protected together with it. This notion is confirmed by Article 27 of the Constitution of Ukraine (1996), according to which everyone has the right to protect his/her life and health, and the life and health of other people from illegal actions (Part 2 of Article 27).

Human life and health are protected non-property benefits, i.e. objects in respect of which civil rights and obligations arise. The Civil Code of Ukraine (2003, Article 281) includes life among the personal non-property rights of an individual. Also, the right to health is not singled out as a separate private non-property right, instead, a person is given the opportunity to protect both his or her life and health and the life and health of another person from unlawful attacks by any means not prohibited by law. This position of the legislator is inconsistent.

Legal literature has already raised the issue of the need to distinguish the right to health as a separate personal non-property right, the object of which is health (Buletsa, 2005; R. Stefanchuk, 2007; Lisnicha, 2007).

R. Stefanchuk (2007) notes: "The concept of 'health' also has its own special legal meaning, in which it is designated as a certain object of relevant legal relations" (p. 155). During the study of various aspects of the concept of health, the scientist notes that "individual health is a private legal category and concludes that the concept of 'health' as a personal non-property good is a complex concept that is manifested not only in the organism, that is, the human body, but also in mental processes, states that also affect the body." (Stefanchuk, 2007, p. 157). In another work, the author defines the right to health and analyzes its content (Stefanchuk, 2003).

As a basic first-generation human right, the state guarantees and protects the right to health. In the Decision of the Constitutional Court of Ukraine on the con-

stitutional submission of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of Article 216.6 of the Criminal Procedure Code of Ukraine (2018), it is stated:

> Articles 27 and 28 of the Constitution of Ukraine institutionalize not only the negative duty of the state to refrain from actions that would violate the human right to life and respect for their dignity, but also the positive duty of the state, which consists, in particular, in ensuring an adequate system of national protection of constitutional human rights through the development of appropriate normative and legal regulation; implementation of an effective system of protection of human life, health and dignity; creation of conditions for human realization of their fundamental rights and freedoms; guaranteeing the order of compensation for damages caused as a result of violation of constitutional human rights; ensuring the inevitability of accountability for violation of constitutional human rights (Clause 2.1).

The Economic and Social Council of the United Nations in its Comment on Article 12 of the International Covenant on Economic, Social and Cultural Rights (2000) notes: "The right to health, like all human rights, imposes three types or levels of obligations on the participating States parties: *respect, protect and fulfill*. In turn, the obligation to perform contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The duty to *protect* requires States to take measures to prevent third parties from interfering with Article 12 guarantees. Finally, the obligation to *fulfill* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health" (General Comment 14). Ukraine has ratified the Covenant, which means that it has assumed the relevant obligations.

Likewise, Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The interpretation of the content of the Convention as a "living organism" is carried out by the European Court of Human Rights, which quite often in its practice finds violations of the Convention in order to protect various aspects of the right to health.

The European Court of Human Rights in § 63 of the decision Vasileva v. Bulgaria notes:

> … although the right to health is not as such among the rights guaranteed under the Convention or its Protocols … the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical

integrity and, secondly, to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage" (Vasileva v. Bulgaria, § 63).

In the case of Tomov and Others v. Russia, the Court established a violation of Article 3 of the Convention in connection with the conditions of transportation of prisoners (critical lack of space, inappropriate sleeping patterns, long journeys, limited access to sanitary facilities, faulty heating and ventilation, etc.) (Tomov and Others v. Russia, 2019). In many cases, it also found violations of Article 13 of the Convention due to the lack of an effective judicial remedy for health rights.

For example, the right to respect for private life may be violated in the case of forced sterilization. Sterilization is a serious interference with a person's reproductive health, as it concerns one of the basic functions of the human body, something that affects various aspects of personal integrity, taking their physical, mental, emotional, spiritual well-being and family life into account. It may be lawfully carried out at the request of the person concerned, for example as a method of contraception, or for therapeutic purposes in the case of medical necessity (V.C. v. Slovakia, § 106). The court also decided that states have an obligation to provide effective legal guarantees to protect women from uncoordinated sterilization, with a special emphasis on protecting the reproductive health of women of Roma origin. In several cases, the Court has concluded that Roma women need protection from sterilization due to prejudice against this vulnerable ethnic minority (V.C. v. Slovakia, §§ 154-155; I.G. and Others v. Slovakia, §§ 143-146).

In general, the practice of the Court requires a separate study, but it can be said that the Convention and the Court are effective tools for the protection of human rights in the field of health care.

Some scientists (Hurska, 2002) also define the right to health by including this or that set of other rights. In particular, such elements are distinguished as: the right to receive qualified medical care, the right to modern medical care, the right to prosthetics and rehabilitation equipment, the right to cosmetic treatment, the right to organ donation and transplantation, the right to participate in a medical experiment, the right to environmental and sanitary-epidemiological well-being and radiation safety, the right to information about the state of health and factors affecting it, the right to compensation for damages, the right to respectful and humane treatment by medical and service personnel, the choice of a doctor and a medical institution, the right to a consultation and other medical services if necessary, the right of access to a lawyer or other legal representative, the right to the observance and practice of religion, etc.

Although this approach correlates with the legislator's approach, it has a number of problems that prevent it from being accepted as correct. First of all, according to

it, the right to health is not a separate right, but a set of rights. Otherwise, it is difficult to agree with the position that the right to health as a separate subjective civil right contains not the rights of the bearer as structural components, but separate subjective civil rights. In addition, as already mentioned above, some of the mentioned rights cannot be included in the category of those that ensure the natural existence of a natural person.

Thus, the concept of the "right to health" from the point of view of private law includes information about such a benefit of an individual as the benefit of "health." It has an intangible character. The right to health is a subjective human right, a personal non-property right, whose object is health. It consists of the freedom of natural persons to determine freely, at their own discretion, their behavior regarding their health (the opportunity to act independently in order to achieve the best state of health), as well as taking into account the absolute nature of this right, the possibility to demand of other persons not to cause harm to health or interfere with the right to protect health by authorized means.

1.2. The Right to Health Care as a Second-Generation Human Right

Article 12 of the International Covenant on Economic, Social and Cultural Rights (1973) calls on the states participating in this Covenant not only to recognize the right to the highest attainable standard of health, but also indicates the measures that the states participating in this Covenant must take for the full exercise of this right.

As the United Nations Economic and Social Council (ECOSOC) notes, commenting on article 12 of the Covenant: "The right to health is closely related to and dependent on the realization of other human rights, as contained in the International Bill of Rights, including the right to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedom of association, assembly and movement. These and other rights and freedoms address integral components of the right to health (General Comment No. 14, 2000).

At the same time, it is emphasized that the right to health should not be understood as the right to be healthy, instead, these rights include the right to a health care system that provides equal opportunities for people to enjoy the highest attainable level of health.

Thus, health care is a means of realizing the right to health, therefore the right to health care is a personal right—a second-generation right.

Life and health are considered merit goods that have both a private and public nature. From the economic perspective, merit goods are those for which the demand

from private individuals lags behind the supply desired by society, and therefore the state must stimulate them (Hrytsenko, 2017, p. 54). Therefore, a person's right to health is provided through the health care system.

Historically, this system developed as a set of measures carried out with the aim of ensuring public health (health of the population in general) and only after the concept of human rights and human priority was approved, the subjective (individual) right of a person to health care began to be established.

In different states, and sometimes even within the same state, access to the health care system is uneven, which is caused by both economic and social factors, different conditions of access to scientific achievements, etc. These differences, as a rule, are the result of the socio-economic policy of the state that affects the environment of human activity, i.e., the conditions of birth, development, education, work and housing of a person.

Aware of the need for the state to take certain steps for the realization of basic human rights, in particular health, the international community established in the relevant documents a number of rights related to the living conditions of each person, based on the ideas of equality and guaranteed access to basic social and economic benefits, which were later called the second-generation rights. They include the right to health care, medical care and health insurance.

In addition, a number of acts were adopted (in particular, with a recommendatory content) that establish or declare the rights of a person acquiring the status of a patient.

The main international acts regarding human rights in the field of health care and the provision of medical care to patients (human rights of patients) include the Declaration of Lisbon on the Rights of the Patient adopted by the World Medical Association (1981), the Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), European Charter of Patients' Rights (2002), and Universal Declaration on Bioethics and Human Rights (2005).

The Declaration of Lisbon on the Rights of the Patient (1981) was adopted by the 34th World Medical Assembly in Lisbon, Portugal. It was revised and amended in 1995 and 2005. The introduction states that physicians must act in the best interests of the patients in accordance with their conscience, and if legislation or government action does not recognize these rights of the patients, seek to enforce or restore them by appropriate means. The declaration affirms the basic rights that, from the point of view of the medical community, every patient has.

In 1997 in Oviedo, the Council of Europe adopted the Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. This Convention was

adopted to develop fundamental acts in the field of human rights protection, with its signatories being "Conscious of the accelerating developments in biology and medicine" (Preamble). The European Convention on Human Rights and Biomedicine outlines basic principles regarding patients' rights: equal access to medical care and protection of the right to informed consent, privacy and the right to information. These principles are binding on the states that have ratified the Convention. It was later complemented by additional protocols on the prohibition of cloning (Treaty No. 168), on organ and tissue transplantation (Treaty No. 186), and on biomedical research (Treaty No. 195).

In 2002, the European network of non-governmental organizations in the field of patient rights protection jointly developed European Charter of Patients' Rights, which clearly and comprehensively presents the rights of patients: "Despite their differences, national health systems in European Union countries place the same rights of patients, consumers, users, family members, weak populations and ordinary people at risk" (European Charter of Patients' Rights, 2002, Preamble). The document not only proclaims the fourteen rights of patients, but also interprets them to ensure basic rights, the purpose of which is to guarantee the high level of protection of human health, to ensure high quality of helath care. This document became the legal basis of a movement launched in Europe to involve patients in a more active role in the creation and implementation of health care services. Although European Charter of Patients' Rights has a recommendatory nature, it has become the basis for changing national legislations, as well as a reference point for monitoring and evaluating the functioning of health care systems in Europe.

The Universal Declaration on Bioethics and Human Rights (2005) was adopted by General Conference of UNESCO on 19 October 2005. As stated in the document, "this Declaration is to be understood in a manner consistent with domestic and international law in conformity with human rights law" (adopted by the General Conference at the 33rd session, Preamble).

By comparing international standards for the protection of human rights in the field of health care with national ones, it is possible to determine the priority directions for the development of the right to medical care and to analyze which of the practices will be the best for application in Ukraine.

Article 49 of the Constitution of Ukraine (1996) guarantees everyone the right to health care, medical assistance and medical insurance.

The constitutional guarantee realizes its development in the Fundamentals of the Legislation of Ukraine on Health Care (1992), Article 6: "Every citizen of Ukraine has the right to health care," Article 8: "The state recognizes the right of every citizen of Ukraine to health care and ensures its protection," and Article 25: "The state ensures the necessary standard of living of the population, in particular, food,

clothing, housing, medical care and social services that are necessary to maintain good health."

Despite the fact that every citizen has the right to receive free medical care in state and community health care facilities, which includes: emergency medical care; primary medical care; secondary (specialized) medical care; tertiary (highly specialized) medical care; palliative care. However, according to Part 2 of Article 8 of the Fundamentals of the Legislation of Ukraine on Health Care (1992), free secondary, tertiary, and palliative medical care is provided only according to medical indicators and in the order established by the central executive body that shapes the state policy in the field of health care.

Article 283 of the Civil Code of Ukraine (2003) defines the right to health care as a personal non-property right of a person, which ensures the systematic activity of state and other organizations, as provided for by the Constitution of Ukraine and the country's laws. The content of this right is disclosed in Article 284 of the Civil Code of Ukraine (2003) and includes the right to provide qualified medical care, the right to choose and change a doctor, to choose treatment methods in accordance with the doctor's recommendations, as well as the right to refuse treatment.

According to the Fundamentals of the Legislation of Ukraine on Health Care (1992), every citizen of Ukraine has the right to health care, which provides for:

a) standard of living, including food, clothing, housing, medical care and social services and provision that is necessary for maintaining human health;
b) safe environment for living and health;
c) sanitary-epidemic safety of the territory and the place of residence;
d) safe and healthy conditions of work, education, living and recreation;
e) quality medical care, including the free choice of a doctor, the choice of treatment methods in accordance with the doctor's recommendations and the choice of health care institution;
f) reliable and timely information about the state of one's health and the health of the population, taking into account the existing and possible risk factors and their degree (Article 6).

The appropriate definition of health care is given in Article 3 of the Fundamentals of the Legislation of Ukraine on Health Care (1992) and constitutes a system of measures aimed at maintaining and restoring physiological and psychological functions, optimal working capacity and social activity of a person for the maximum biologically possible individual duration of their life. These measures are carried out by state authorities and local self-government bodies, their officials, health care institutions; natural persons-entrepreneurs who are registered in accordance with the procedure established by law and have a license to carry out economic activities in

the field of medical practice; pharmacists, medical specialists, rehabilitators, public associations and citizens.

Scientists give similar definitions of health care. For example, Alyona Semenova, having analyzed the terms "rights protection" and "subjective rights protection," came to the conclusion that health protection should be considered as the activities of state authorities, local self-government bodies, their officials, health care institutions, health care professionals and pharmacists, as well as citizens, aimed at implementing political, legal, socio-economic, organizational-technical, scientific, cultural, medical, curative-prophylactic, sanitary-hygienic and other measures aimed at preserving and strengthening physical and mental health of each person, maintaining their ability to work, offering a long and active life, as well as preventing the factors that negatively affect health (Semenova, 2014).

Health care should be based on principles whose implementation depends on specific socio-economic conditions in different states and regions. ECOSOC calls them elements of the right to health and emphasizes that they are exemplary (a non-exhaustive catalog) and that each state can develop them.

First of all, a health care system must be available (Availability). Although the number of health care facilities and medical services and programs may vary depending on the state's level of development, at least the basic components of health must be available: safe and high-quality drinking water, appropriate sanitary and hygienic facilities, hospitals, clinics and other health-related facilities, qualified medical personnel who receive domestically competitive salaries, and basic medications available.

In addition, the health care system must be accessible (Accessibility). First of all, it should include physical accessibility for everyone, taking into account particularly vulnerable sections of the population (ethnic minorities and indigenous people, women, children, adolescents, the elderly, the disabled and people with HIV/AIDS). Health care facilities, as well as drinking water and food, should be territorially accessible, adapted for people with reduced mobility, have a convenient work schedule, etc.

Accessibility also means non-discrimination. Health care facilities must be rendered accessible by law and, in fact, without discrimination on any prohibited grounds. Equally important is economic accessibility, which means that health care facilities, goods and services are intended for all. Payment of health care services, as well as those related to the main factors of health, should be based on the principle of equity, ensuring that these services, whether private or public, are universally accessible, including socially vulnerable groups. Article 6 (clause "i") of the Fundamentals of the Legislation of Ukraine on Health Care indicates that the right to health care provides legal protection against any illegal forms of discrimination related to health.

Finally, the principle of accessibility implies the availability of information, which means the ability to search, receive and communicate information and ideas related to health issues, provided that the confidentiality of health data is ensured.

The health care system must ensure acceptability (Acceptability). All health care institutions, goods and services that health care provide must comply with the requirements of medical ethics and other ethical (cultural) norms of society, be sensitive and attentive to human needs.

An equally important element is the quality requirement (Quality). In addition to the fact that health care facilities, goods and services must be ethically (culturally) acceptable, they must also be scientifically, medically appropriate and high-quality, which includes the requirement for qualified medical personnel, scientifically approved high-quality drugs and hospital equipment, safe drinking water and proper sanitary conditions.

In Ukraine, the managing staff of medical institutions are responsible for the quality of medical care, and at the government level, this falls into the responsibilities of state executive bodies, through licensing, accreditation, attestations of medical personnel, as well as through the activities of clinical expert commissions and medical councils. The main body in the system of central executive bodies is the Ministry of Health of Ukraine, which ensures the formation and implementation of state policy in the field of health care, protection of the population from infectious diseases, combating HIV/AIDS and other socially dangerous diseases, prevention of non-infectious diseases, etc.

For the proper implementation of the personal non-property right to health, the state guarantees the creation of an extensive network of health care institutions; organization and implementation of a system of state and public measures to protect and improve health; providing all citizens with a guaranteed level of medical and sanitary care in the scope established by the Cabinet of Ministers of Ukraine; implementation of state and public control and supervision in the field of health care; organization of the state system of collection, processing and analysis of social, environmental and special medical information for statistics; establishment of responsibility for violation of the rights and legitimate interests of citizens in the field of health care.

A certain guarantee of health care is provided by Article 5 of the Fundamentals of the Legislation of Ukraine on Health Care (1992), according to which state, public or other bodies, enterprises, institutions, organizations, officials and citizens are obliged to ensure the priority of health care in their own actions, not to harm the health of the population and individuals, within one's competences to provide assistance to the sick, persons with disabilities and victims of accidents, to assist employees of health care bodies and institutions in their activities, as well as to perform

other duties stipulated by the legislation on health care. In the event of a violation of the legal rights and interests of citizens in the field of health care, relevant state, public or other bodies, enterprises, institutions and organizations, their officials and citizens are obliged to take measures to restore the violated rights to protect legal interests and compensate for the damages caused.

It is essential that health care in Ukraine is ensured by the systematic activities of state and other organizations, as provided for by the Constitution of Ukraine and the country's laws. In particular, the basis of state health care policy is formed by the Verkhovna Rada of Ukraine by consolidating the constitutional and legislative foundations of health care, defining its purpose, main tasks, directions, principles and priorities, establishing norms and volumes of budget funding, creating a system of appropriate credit and financial, tax, customs and other regulators, approval of the list of comprehensive and targeted national health care programs.

An important role in ensuring the state health care policy is played by the President of Ukraine, who is the guarantor of citizens' rights to health care, ensures the implementation of health care legislation through the system of state executive bodies, implements the state health care policy and carries out other powers provided for by the Constitution of Ukraine.

State health care policy is based on state executive bodies. Thus, in particular, in accordance with Part 2 of Article 49 of the Constitution of Ukraine (1996), in order to provide health care, relevant socio-economic, medical-sanitary and health-preventive programs are financed by the state. These comprehensive and targeted programs at the state level are developed and implemented by the Cabinet of Ministers of Ukraine.

Ministries, departments and other central bodies of the state executive power are also given certain competences in the field of health care. The Ministry of Health is the specially authorized central body of the state executive power in the field of health care. The National Health Service of Ukraine is the central body of executive power that implements state policy in the field of state financial guarantees of medical care for the population. For example, from 1 April 2019, the National Health Service of Ukraine administers the "Affordable Medicine" drug reimbursement program and directly reimburses pharmacies for the cost of drugs issued to patients based on electronic prescriptions. The "Affordable Medicines" program reduces the financial burden on patients and increases the availability of medicines.

Within the limits of the powers provided by the law, state policy is also implemented by local authorities and local self-government bodies. For example, the city of Kyiv has approved the municipal target program "Health of Kyivans" for 2020-2022, which is already in effect (2019).

Health protection of the population is directly provided by sanitary-prophylactic, medical-preventive, physical exercise-rehabilitation, sanatorium-resort, pharmacy, scientific-medical and other health care institutions. The procedure for the establishment and operation of health care facilities is determined by the current legislation. In addition to the extensive network of health care institutions, the state supports and encourages individual entrepreneurial activity in the field of health care.

As integral components of the right to health care, the law Fundamentals of the Legislation of Ukraine on Health Care list, in Article 6:

> The standard of living, including food, clothing, housing, medical care and social care and provision, which is necessary for maintenance of human health; natural environment safe for living and health; sanitary-epidemic well-being of the territory and place of residence; safe and healthy conditions for work, study, living and recreation; qualified medical and rehabilitation assistance, availability of free choice of doctors and rehabilitators, choice of treatment and rehabilitation methods in accordance with their recommendations, choice of health care facility; reliable and timely information about the state of one's health and the health of the population, taking into account existing and possible risk factors and their degree; informing about available medical and rehabilitation services using telemedicine and telerehabilitation, as well as a number of rights regarding public participation in the field of health care and others.

Part 2 of Article 12 of the International Covenant on Economic, Social and Cultural Rights (1973) states that in order to achieve the highest standard of health, states participating in this Covenant must take certain measures. The minimum requirements are:

a) the ensuring of the reduction of stillbirths and infant mortality, and of the healthy development of the child;
b) the improvement of all aspects of environmental hygiene and occupational hygiene in industry;
c) the prevention and treatment of epidemic, endemic, occupational and other diseases and combating them;
d) the creation of conditions that would provide everyone with medical assistance and medical care in case of illness.

Therefore, both the international act and the Ukrainian legislation consider the right to medical care and the right to a safe environment as part of the right to health care.

The field of health care, in particular in terms of providing medical care, is at a stage of transformation, and medical reform requires the improvement of legislation and practical advice from international practices. Each patient during any med-

ical intervention must be guaranteed the quality and safety of the provided medical care and the prevention of unjustified risk to life and health.

It is worth noting that the domestic legal framework contains provisions regulating the rights of citizens in the field of medical assistance. At the same time, the Concept of Renewal of the Central Committee of Ukraine (2020), which was presented to the Verkhovna Rada of Ukraine by Ruslan Stefanchuk (YURLIGA, 2001), proposes to change approaches to the legal regulation of personal non-property rights, in particular by "consolidation" of personal non-property rights (§ 2.5.) In particular, the authors of the concept, considering the personal non-property rights that ensure the physiological (natural) existence of a natural person, propose to highlight those personal non-property rights that ensure the physiological (natural) existence of a natural person: the right to life; the right to health; reproductive rights; the right to freedom (freedom of natural existence); the right to personal integrity; the right to personal security; the right to personal dignity.

Therefore, the authors of the concept deleted the right to medical care from this list and added the right to health, eliminating the right to health care.

1.3. The Right to Medical Assistance as Part of the Right to Health Care

The disclosure of the concept of the "right to medical care" should begin with the definition of medical care and its features.

In Article 3 of the Fundamentals of the Legislation of Ukraine on Health Care (1992), "medical assistance" is defined as: "Activities of professionally trained health professionals aimed at prevention, diagnosis, treatment and rehabilitation in connection with diseases, injuries, poisonings and pathological conditions, as well as in connection with pregnancy and childbirth."

The Constitutional Court of Ukraine (1998), recognizing as unconstitutional the Resolution No. 1138 of the Cabinet of Ministers of Ukraine "On approval of the list of paid services provided in state health care institutions and higher medical institutions of education" dated 17 September 1996, interprets the concepts of "medical assistance" and "medical service" and concludes that the term "medical assistance" is widely used in the national legislation of Ukraine; its definition is found in the documents of the World Health Organization, medical universities and academies. There is no comprehensive legal definition of this concept in the laws of Ukraine, therefore it requires normative regulation, which goes beyond the competences of the Constitutional Court of Ukraine.

Article 3 of the Fundamentals of the Legislation of Ukraine on Health Care (1992) defines "medical assistance" as the activity of professionally trained health

care professionals aimed at prevention, diagnosis, treatment and rehabilitation in connection with diseases, injuries, poisoning and pathological conditions, as well as in connection with pregnancy and childbirth.

As Iryna Sinyuta (2010) notes, "According to the definition of the World Health Organization, medical care is the prevention, treatment and management of disease, as well as the preservation of physical and mental health of a person through the provision of appropriate services by health care professionals and other healthcare specialists" (p. 259).

The Medical Care and Sickness Benefits Convention of the International Labor Organization of 1969 (No. 130) provides for the definition of the concept of "medical assistance":

a) general medical care, including home care;
b) assistance provided by specialists within hospital facilities to patients, or assistance by specialists that can be provided outside the hospital;
c) supplying necessary medications according to the prescription issued by a doctor or other qualified specialist;
d) hospitalization, if necessary;
e) dental care;
f) medical rehabilitation, including repair and replacement of prosthetic or orthopedic devices (Article 13).

The Declaration on the Promotion of Patients' Rights in Europe (1994) in Chapter 5 "Care and Treatment" enshrines the right of a person to receive medical care in accordance with their state of health, including preventive care (in Senyuta, 2008, p. 277).

Some scientists define medical care as any measures aimed at health protection, preservation of human life and prevention of diseases, which are carried out by employees of medical and preventive institutions of any form of ownership or by health care professionals engaged in private practice (Gladun, 2014, p. 210).

The definition of the concept of medical care is also the subject of other studies. Thus, according to R. Stefanchuk, the concepts of "medical assistance" and "medical service" are close in meaning, but not identical. The similarity is due to the fact that both concepts are types of medical activity and aim to have a positive effect on the health of an individual. At the same time, the difference between them lies in whether a certain medical activity is aimed at eliminating an imminent danger to the life and health of a physical person, or at achieving different goals (2008).

The content of the right to medical assistance is contained in Article 284 of the Civil Code of Ukraine and includes the right to provide qualified medical assistance, the right to choose and change doctors, to choose treatment methods in accordance with their recommendations, as well as the right to refuse treatment. Scientists note

that the right to medical care as a personal non-property right of the patient includes: rights related to the provision of medical care, rights related to the informed consent of the patient, rights ensuring medical confidentiality (R. Stefanchuk, 2007).

In view of the above, it is easy to notice some discrepancies. For example, the Fundamentals of the Legislation of Ukraine on Health Care (1992) reveal the concept of "medical care" more broadly, detailing the cases when a person has the right to receive medical care (poisoning, pathological conditions, pregnancy and childbirth), while the definition provided by the World Health Organization health specifies that the provision of medical assistance is aimed not only at improving the physical condition of a person, but also the mental one, which is correlated with the content of the right to medical assistance and defined in the Civil Code of Ukraine.

Common to all definitions is the indication that medical care is provided by special entities. Also, the Fundamentals of the Legislation of Ukraine on Health Care (1992) indicate the possibility of providing medical care by "medical workers" while the definition of the World Health Organization allows the possibility of providing medical care by "other health care specialists." Drawing a parallel between the national definition of the professions of health care workers—"medical workers" as specified in the definition of the World Health Organization belong to the professional group of "Professionals"—including doctors of various fields and pharmacists. "Other health care professionals" are midwives, laboratory assistants, instructors, nurses, etc., who belong to the professional group "Specialists" (Handbook of qualification characteristics of workers' professions Issue 78 Health care, 2002).

Obviously, the most successful definition is: medical care is the activity of entities providing medical services to the population, aimed at prevention, diagnosis, treatment and rehabilitation of a person in order to preserve their physical and mental health through the provision of appropriate medical services.

The definition of the concept of a person's right to medical care is not established in the national legislation of Ukraine, therefore, on the basis of international legislation and doctrines, we offer the following definition of this concept. The right to medical assistance is the ability of every person to demand from the subjects providing medical services to the population to take a set of measures aimed at prevention, diagnosis, treatment and rehabilitation of the physical and mental state of their health.

The right to medical care as a personal non-property right of the patient includes: the rights related to the provision of medical care; the rights related to the patient's informed consent; the rights ensuring medical confidentiality. Therefore, the right to medical assistance has certain components that define its essence and together contribute to the protection of the highest attainable level of human health. The protection of human dignity is important during the provision of medical care, so it is a defining right in the field of health care. The Declaration of Lisbon on the

Rights of the Patient (1981) states that "The patient's dignity and right to privacy shall be respected at all times in medical care and teaching, as shall his/her culture and values" (Principle 10.a). The Universal Declaration on Bioethics and Human Rights (2005) provides in Article 3 that human dignity, human rights and fundamental freedoms must be fully respected (Article 3.1), and Article 10 states that "the fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably" (Article 10).

The Convention on Human Rights and Biomedicine (1997) outlines the right to the protection of human dignity as its goal, stating that the "Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine" (Article 1).

Ukrainian legislation enshrines the right to respect for human dignity in the Constitution of Ukraine (1996) and the Civil Code of Ukraine (2003). Thus, the Constitution of Ukraine (1996) raised the issue of medical coercion and the need for free consent: "no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. No person shall be subjected to medical, scientific or other experiments without their free consent" (Article 28).

As a rule, the European Court of Human Rights considers violations of the right to human dignity in the context of violations of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950). So, in the case of Nevmerzhitsky v. Ukraine (2005), the Court "found that the lack of adequate medical treatment of Mr. Nevmerzhitsky amounted to a degrading treatment in violation of Article 3 of the Convention" (Nevmerzhitsky v. Ukraine, 2005, § 106).

Exercising the rights of a person who is a patient should be done without discrimination. The Universal Declaration on Bioethics and Human Rights (2005) states that "No individual or group should be discriminated against or stigmatized on any grounds, in violation of human dignity, human rights and fundamental freedoms (Article 11). Likewise, in the Declaration of Lisbon on the Rights of the Patient (1981), everyone has the right to appropriate health care without discrimination (Principle 1). At the same time, the Convention on Human Rights and Biomedicine (1997) and the European Charter of Patients' Rights (2002) specify which restrictions are considered discriminatory. In the Convention, any form of discrimination against a person based on his or her genetic heredity is prohibited (Convention on Human Rights and Biomedicine, 1997, Article 11), in the Charter, medical services must be available to all without any discrimination regarding financial situation, place of residence, type of illness or time of access to services (European Charter of Patients' Rights, 2002, Article 2).

National legislation establishes that every citizen of Ukraine has the right to health care, which is provided by means of legal protection against any illegal forms of discrimination related to health status (Fundamentals of the Legislation of Ukraine on Health Care, 1992, Article 6.I).

However, this norm needs clarification. In order to bring national legislation to international standards, it is necessary to expand the content of such a norm, indicating that receiving medical assistance is carried out regardless of other discriminatory features: financial situation, place of residence, the period in which a person applied for assistance, etc.

The priority of the patient's rights in the Universal Declaration on Bioethics and Human Rights (2005) and the Convention on Human Rights and Biomedicine (1997) was formulated identically—the interests and well-being of a person should take precedence over the interests of science or the society (Universal Declaration on Bioethics and Human Rights, 2005, Article 3; Convention on Human Rights and Biomedicine, 1997, Article 2). The Declaration of Lisbon on the Rights of the Patient (1981) provides that the treatment of any patient takes place only in the interests of their health (Preamble).

After analyzing the current domestic legislation, I could not find a clear confirmation of this right. However, the draft Law of Ukraine on the Protection of Patients' Rights (2007) stipulates that medical professionals are obliged to act in the interests of the patient at any time, taking into account the principle of the precedence of the interests and well-being of an individual over the interests of the society or science (Article 28).

Since human rights are the most valuable benefit, it is necessary to supplement the current medical legislation of Ukraine with a provision that obliges medical professionals to act to improve the human condition and save lives, without discrimination and possible abuse. At the same time, the interests of society cannot prevail over the interests of the individual in the activities of medical professionals.

Violation of this right is discussed, in particular, in the case of Glass v. the United Kingdom (2004), where a mother whose son was given morphine by doctors who deemed it necessary to alleviate the suffering of a terminally ill patient complained that "the decisions to administer diamorphine to the first applicant against the second applicant's wishes and to place a DNR notice in his notes without the second applicant's knowledge interfered with the first applicant's right to physical and moral integrity" (§ 61).

No less important is the availability of medical services. The Universal Declaration on Bioethics and Human Rights (2005) in Article 14 enshrines the principle of social responsibility in the field of health care. Progress in science and technology should contribute to "access to quality health care and essential medicines, espe-

cially for the health of women and children, because health is essential to life itself and must be considered to be a social and human good" (Article 14.a).

The Convention on Human Rights and Biomedicine (1997) obliges its parties, taking into account medical needs and available resources, to take "appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality" (Article 3).

The European Charter of Patients' Rights (2002) states in Article 8 that the right to compliance with quality standards is expressed in the fact that every person has the right to access high-quality medical services under conditions of compliance with quality standards of treatment.

The analysis of the domestic legislation shows that the right to accessibility is provided for by the Constitution of Ukraine (1996): "Everyone has the right to health care, medical care and medical insurance" (Part 1 of Article 49) and "The state creates conditions for effective medical care accessible for all citizens" (Part 3 of Article 49).

Therefore, it is worth noting that the national legislation describes the right to accessibility rather broadly, but does not specify the scope in which it should be extended, and therefore it is necessary to establish the principle of accessibility for necessary medicines and services for all segments of the population.

Regarding the quality of health care provision, the Declaration of Lisbon on the Rights of the Patient (1981) provides for the right to high-quality health care: "quality assurance must always be part of health care." Doctors must take responsibility, act as guardians of the quality of medical care (Article 1.d).

The European Charter of Patients' Rights (2002) states that "Each individual has the right of access to high quality health services on the basis of the specification and observance of precise standards" and further indicates that the right to quality health care requires the health care institutions and professional to provide an appropriate level of services, comfort and human relations (Part 2 (8)).

The other above-mentioned documents do not contain this provision, but mention the need for efficiency of the provision of medical services, which can be considered as the equivalent of quality services.

In Ukraine, in accordance with the Fundamentals of the Legislation of Ukraine on Health Care (1992), the quality of medical care is ensured by a system of standards and control. The procedure for monitoring the quality of medical care was approved by the Order of the Ministry of Health of Ukraine on the Procedure for Monitoring the Quality of Medical Care (2012). It defines the concept of high-quality medical care and the fact that the Procedure was developed for the purpose of implementing and organizing work on the quality management of medical care, its focus on ensuring that patients receive medical care of appropriate quality (Item 1).

Therefore, it can be stated that in Ukraine, the principle of the quality of medical care is clearly declared, since the quality of medical care is controlled by the management of the relevant medical institutions and, at the government level, by state bodies of executive power, through licensing, accreditation, attestations of medical personnel, etc.

The right to freedom of choice (individual autonomy, self-determination), according to the Declaration of Lisbon on the Rights of the Patient (1981, Principle 3) and the European Charter of Patients' Rights (2002, Part 2 (5)), implies that the patient has the right to make independent decisions about himself/herself. The doctor must inform the patient about the consequences of his/her decision, and each person has the right to freely choose different treatments, procedures and doctors based on adequate information. The patient has the right to choose the method of diagnosis and treatment, to choose which doctor or hospital to contact.

The national legislation of Ukraine enshrines the right to freedom of choice in the Fundamentals of the Legislation of Ukraine on Health Care (1992, Article 38), where every patient who has reached the age of fourteen and applied for medical assistance has the right to freely choose a doctor if the latter can offer his/her services and a choice of treatments according to his/her recommendations. Every patient has the right, where justified by his/her condition, to choose any health care institution that offers appropriate treatment.

The Civil Code of Ukraine (2003) ensures the right of an individual to receive medical care on the basis of free choice. Therefore, "a natural person who has reached the age of 14 and applied for medical assistance has the right to choose a doctor and choose treatment methods in accordance with his/her recommendations" (Article 284).

The mechanism for realizing the right of a person (patient) to freely choose or change a doctor who will provide primary medical care (family doctor, district therapist or pediatrician) is defined in the Procedure for choosing a doctor who will provide this care and the declaration form on the choice of a doctor who will provide primary medical care, approved by the order of the Ministry of Health of Ukraine of 2018. The Procedure for choosing a doctor provides that the patient (or his legal representative) has the right to choose a doctor who provides primary medical care, regardless of the registered place of residence of such a patient (Part 2 Clause 1). Also, the latter has the right to change the doctor (Part 2 Clause 5).

This right is important for the patients, as it gives them the opportunity to be treated by a specialist chosen and trusted by the patient or in an institution that offers modern and effective equipment, diagnostic methods and the most qualified medical personnel.

In the case of Tysiąc v. Poland (2007), the applicant complained about the restriction of the rights to medical abortion and significant harm to the mother's health after the birth of the child. Doctors' refusal to perform an abortion put the applicant's health at risk, which meant a violation of her privacy rights. Taking into account the particular circumstances of the case and the nature of the decisions taken, it is necessary to establish whether the applicant was involved in the decision-making process considered to the extent that would ensure the necessary protection of her interests.

"The right to self-determination, as defined by the Lisbon Declaration on the Rights of Patients (1981, Principle 3), cannot be realized without proper information." Information is a component of the right to informed consent and the right to information, as one cannot make a conscious choice without being properly informed about all aspects of the healthcare process.

The right to information is closely related to the right to informed consent, therefore Principle 7 of the Lisbon Declaration on the Rights of Patients (1981) and Article 10 of the Convention on Human Rights and Biomedicine (1997) enshrine the patient's right to receive information about his/her state of health, get acquainted with medical records, in particular with medical facts concerning her/his condition, to choose whom to inform. However, the European Charter of Patients' Rights (2002) in Article 3 also provides for the right to information about health services and their use, in particular scientific research and available technological innovations. Article 7 includes the obligation of doctors to devote enough time to their patients, even to allocate time dedicated to providing information.

In the national legislation of Ukraine, the patient's right to receive information about his/her state of health is regulated by Article 285 of the Civil Code of Ukraine (2003) and Article 39 of the Fundamentals of the Legislation of Ukraine on Health Care (1992). A patient who has reached the age of majority has the right to receive reliable and complete information about his/her state of health, in particular, to familiarize himself/herself with relevant medical documents related to his health.

It is worth emphasizing that the legislator enshrines the right to receive information from the moment of reaching the age of majority, and the right to give consent to treatment and choose a doctor from the age of 14. The following question arises: how should a minor exercise the right to medical assistance without the possibility of obtaining the necessary information about his/her health? There should be a corresponding change in the legislation on this issue, since inadequate awareness of a minor patient will prevent him/her from making a conscious choice and properly exercising the right to freedom of choice (individual autonomy).

The issue of obtaining necessary information by the patient was highlighted in Roche v. United Kingdom (2005). The applicant, a military serviceman, complained

about inadequate access to information regarding the tests in which he participated at a military institution. The military institution conducted research on the effects of chemical weapons on the British armed forces, including tests using gas on humans and animals. The Court found that the lack of an effective and accessible procedure for access to medical records in the British Army constituted a breach of the right to information from the perspective of the right to privacy.

> Court considers that the State has not fulfilled the positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information that would allow him to assess any risk to which he had been exposed during his participation in the tests…. In conclusion, there has been a violation of Article 8 of the Convention (ECHR, §§ 167, 169).

Consent for any medical intervention is a condition for the legality of these measures, therefore, both international and national acts of Ukraine give importance to the patient's informed consent. Informed consent is a voluntary and informed decision that protects the patient's right to participate in the process of providing medical care, assigning certain duties of health care professionals. The right to informed consent is an integral part of the set of rights to medical care.

In the Universal Declaration on Bioethics and Human Rights (2005), Article 6.1, it is declared that any medical intervention with a preventive, diagnostic or therapeutic purpose should be carried out only with the prior, free and informed consent of the person concerned, based on adequate information. This agreement may be expressed and revoked by the applicable person at any time and for any reason without adverse consequences or damages.

The Declaration of Lisbon on the Rights of the Patient (1981) states in Principle 3 that a mentally healthy adult patient has the right not to consent to any diagnostic procedure or therapy. At the same time, the declaration emphasizes that in order to provide such consent/disagreement, the patient has the right to the information necessary to make his/her decisions, and must also clearly understand the purpose of any test or treatment, what the results mean, and what the consequences of refusal are.

Among the fourteen right of patients, the European Charter of Patients' Rights (2002) defines the fourth one, as the "Right to Consent" and declares the duty of medical professionals and specialists to provide the patient with all information about the treatment, including the associated risks and discomforts, side effects and alternatives. Such information must be provided in advance (at least 24 hours in advance).

Regarding the national legislation of Ukraine, the Constitution of Ukraine (1996) guarantees that no person can be subjected to medical, scientific or other experi-

ments without his/her free consent (Part 3 of Article 28), and also guarantees that every person has the right to personal integrity (Part 1 of Article 29).

Parts 3, 4, 5 of Article 284 of the Civil Code of Ukraine stipulate that the provision of medical assistance to an individual who has reached the age of 14 is carried out with his consent. An adult with legal capacity, who is aware of the importance of his actions and can control them, has the right to refuse treatment. In urgent cases, in the presence of a real threat to the life of an individual, medical assistance is provided without the consent of the individual or his parents (adoptive parents), guardian, custodian.

The Fundamentals of the Legislation of Ukraine on Health Care (1992) also indicate that the patient's informed consent, in accordance with Article 39 of this law, is necessary for the use of methods of diagnosis, prevention and treatment.

Thus, the issue of the patient's free and informed consent or refusal of treatment is properly enshrined in the normative legal acts of Ukraine and they fully correspond to international practices, which is a positive point.

In this context, it is worth paying attention to one of the decisions of the European Court of Human Rights, namely the decision in the case of Arskaya v. Ukraine (2014), where the European Court of Human Rights notes:

> The freedom to accept or refuse specific medical treatment is vital to the principles of self-determination and personal autonomy (see Jehovah's Witnesses of Moscow v. Russia, no. 302/02, § 136, 10 June 2010). In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8 § 1 of the Convention (see Pretty v. the United Kingdom, no. 2346/02, § 63, ECHR 2002-III). However, Article 2 of the Convention enshrines the principle of sanctity of life, which is especially evident in the case of a doctor, who exercises his or her skills to save lives and should act in the best interests of his or her patients. The Court has therefore held that this Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved (see Haas v. Switzerland, no. 31322/07, § 54, ECHR 2011). It follows that one of the central issues in determining the validity of a refusal to undergo medical treatment by a patient is the issue of his or her decision-making capacity *(§ 69).*

It is clearly demonstrated here that legal relations in the field of medical care arise on the basis of the patient's consent (free expression of will), which must always be taken into account.

Regarding persons who are unable to give informed consent, the Universal Declaration of Bioethics and Human Rights (2005) states in Article 7 that they should be afforded special protection. Therefore, permission to conduct research and medical practice should be obtained taking into account the interests of a certain person and in accordance with domestic legislation. However, it is necessary to involve the patient as much as possible in the consent/refusal decision-making process.

The Declaration of Lisbon on the Rights of the Patient (1981) also indicates the peculiar nature of the decision-making process in the case of the unconscious patient (Principle 4), which eliminates his/her ability to give informed consent. In the event that the patient is unconscious, or due to other circumstances cannot inform about the choice, it is necessary to obtain informed consent from the legal representative, and in his/her absence, take into account the patient's previous statements or convictions. In the case of an incapacitated or minor patient (Principle 5), the consent of his/her legal representative must be obtained. However, the patient should participate as much as possible in the decision-making process.

The Convention on Human Rights and Biomedicine (1997) contains a special provision on protection that defines the possibility of protection of persons who cannot give consent (Article 6). Intervention with regard to these persons may be carried out on the condition that it will have a direct benefit for this person, and with the permission of his/her representative or authority, or a person or institution defined by law. In view of this, it will be decisive that the opinion of the person will be taken into account, the importance of which increases in proportion to the age and degree of maturity of this person, or their capacity to participate in the decision-making process.

Article 7 of the Convention on Human Rights and Biomedicine (1997), defining the issue of protection of persons with mental disorders, indicates that a person with a serious mental disorder can receive treatment without his/her permission only if without such treatment his/her health could be seriously damaged, subject to compliance with statutory protection requirements, including supervision, control and appeals procedures. The Convention, as an exception, allows medically necessary intervention in the presence of an emergency situation without consent, but it must be carried out for the benefit of the health of the person concerned.

Similarly, the European Charter of Patients' Rights (2002) states that the patient should be involved as much as possible in the decision-making process concerning his/her health. (Section 2(4), Right to Consent).

As for Ukrainian legislation, Article 43 of the Fundamentals of the Legislation of Ukraine on Health Care (1992) indicates that consent to medical intervention for a patient under the age of 14 (minor patient), as well as a patient recognized as incapacitated in accordance with the procedure established by law, is given by his/

her legal representative. The consent of the patient or his/her legal representative for medical intervention is not required only if there are signs of a direct threat to the patient's life, provided that it is impossible to obtain consent for such intervention from the patient or his/her legal representatives for objective reasons.

It is also worth paying special attention to the observance of the right to informed consent among persons with disabilities and persons suffering from mental illness—these are two categories of persons whose rights are often violated. Thus, in the case of H.L. v. the United Kingdom (2004), The European Court of Human Rights found that the applicant diagnosed with autism admitted to hospital as an "informal patient" between 22 July and 29 October 1997 was deprived of his liberty within the meaning of Article 5. The Court held that the hospital did not follow a formal patient registration procedure, as a result of which the hospital's medical staff "assumed full control of the liberty and treatment of a vulnerable individual solely on the basis of their own clinical assessments." The Court noted that the "absence of procedural safeguards failed to protect against arbitrary deprivations of liberty" and therefore the Court found a violation of Clause 1 of Article 5 of the Convention.

A separate element of the right to consent is the right to refuse (non-consent). A patient who has acquired full civil capacity and is aware of the importance of his/her actions and can control them, has the right to refuse treatment. If the refusal is submitted by the legal representative of the patient and it may have serious consequences for the patient, the doctor must notify the guardianship and custody authorities.

It is worth noting that the national legislator does not provide for unconscious patients, which also eliminates their ability to give consent or refusal to receive medical assistance. However, this consent can be given by the legal representatives of the patient, or in some cases medical assistance is provided without the consent. Therefore, it is impossible to clearly define when this consent is mandatory, which leads to legal uncertainty. In this part, the national legislation of Ukraine needs improvement.

In the case of M.A.K. and R.K. v. the United Kingdom (European Court of Human Rights, 2010), the applicants complained about a medical examination of a nine-year-old girl without her parents' consent. Taking into account the fact that the national legislation and the practice of its application clearly required obtaining the consent of parents or persons who performed parental duties for the implementation of any medical intervention, the European Court of Human Rights did not find any justification for the decision to perform a blood test and take pictures of a nine-year-old girl, against the clearly expressed will of both her parents, while she was alone in the hospital, and confirmed that there was a violation of Art. 8 of the Convention (§ 75).

A similar conclusion regarding the need for parental consent for medical intervention was made by the European Court of Human Rights in the case of Glass v. United Kingdom (2004), indicating that "the regulatory framework … prioritises the requirement of parental consent and, save in emergency situations, requires doctors to seek the intervention of the courts in the event of parental objection" (§ 75).

The applicant complained about forced (without consent) hospitalization and treatment in a psychiatric institution in the case of "Akopyan v. Ukraine" (2014), because her long-term detention in a psychiatric hospital was arbitrary and during the entire period of that stay no effective review of her mental health was carried out. Her detention in the psychiatric hospital was accompanied by forced treatment, which caused her severe suffering and damage to her private and family life, due to the duration of the national proceedings and the lack of an opportunity to effectively challenge her forced treatment. The European Court of Human Rights came to the conclusion that the unjustified deprivation of the applicant's liberty at the time became possible due to the lack of fair and proper means that could provide adequate legal protection against arbitrariness (§ 75).

The right to privacy and confidentiality is extremely important, since data about a person's health are "sensitive data" and the possibility of their distribution must be clearly established by law.

Most of the analyzed international acts proclaim respect for the privacy of personal life. The Universal Declaration on Bioethics and Human Rights (2005) states that the privacy of individuals and the confidentiality of their personal information must be respected. Therefore, this information should not be used or disclosed except for the purpose for which it was collected and consented to (Article 9). Likewise, everyone's right to respect for private life based on information about his/her health is guaranteed in the Convention on Human Rights and Biomedicine (1997) (Article 10).

The Declaration of Lisbon on the Rights of the Patient (1981) in Principle 8 states that information relating to a patient's health, medical conditions, diagnosis, prognosis or treatment and other private information must be kept confidential even after death. Descendants may access the information provided that it informs the descendants of the risks to their health.

The European Charter of Patients' Rights (2002) in Article 6 specifies in detail what "medical" information is considered as confidential: personal data, in particular information about his/her state of health and potential diagnostic or therapeutic procedures, data obtained during his/her diagnosis, tests, specialist visits and medical/surgical interventions.

In national legislation, such information falls under the definition of "medical secrecy" and is protected. The list of protected information is defined in the

following legal acts: Fundamentals of the Legislation of Ukraine on Health Care (1992), the Law of Ukraine on Protection of the Population from Infectious Diseases (2000), the Law of Ukraine on Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV (1991), the Law of Ukraine on the Application of Transplantation of Anatomical Materials to Humans (2018), and the Law of Ukraine on Psychiatric Care (2000). In general, this is information about diseases, medical examinations and their results, about the intimate and family aspects of a person's life, etc. that became known to health care professionals and other persons in connection with the performance of their professional or official duties.

In the case of M.S. v. Sweden (1997), The European Court of Human Rights concluded that the applicant's medical records had been sent from the clinic where she was being examined to the social services without her permission and knowledge. The court ruled that the disclosure of medical information does not violate Article 8 and confirmed that the applicant did not "unequivocally" waive her right to respect for private life regarding medical records in the clinic when filing a claim for compensation. However, the disclosure had a legal basis and was foreseeable because there was a legitimate purpose (to protect the economic well-being of the country) and it was necessary in a democratic society and proportionate. Also, the protection of personal information, and even more so of medical information, is important for satisfying the human rights to respect for his/her private and family life. Respect for confidential health information is an important principle not only for protecting patients' personal lives, but also for maintaining their trust in health services in general.

> The Court reiterates that the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general *(§ 41).*

The patient's rights disclosed in this part of the study are the components of the right to medical care, which collectively contribute to the protection of the highest level of human health.

1.4. The Right to a Safe Environment as a Component of the Right to Health Care

It was said earlier that the right to health care also includes the right to a safe environment. The Economic and Social Council of the United Nations, commenting on Article 12 of the International Covenant on Economic, Social and Cultural Rights (1973), states:

> The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment. Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances (General Comment 14, 2000).

These factors belong to the content of the right to a safe environment. A person's right to an environment safe for living and health demonstrates the legal possibility to live in an environment that does not harm his/her health and life and is safe. The content of this right as a subjective civil right includes, firstly, the right to live (stay) in a favorable environment, safe for human living and health; secondly, the right to demand from other persons the elimination of any dangers (obstacles) during the exercise of this right in accordance with the procedure established by law; thirdly, the right to defense includes the possibility of applying for protection to relevant state bodies and persons, as well as the possibility of self-defense.

Article 50 of the Constitution of Ukraine (1996) indicates that everyone has the right to an environment safe for living and health and to compensation for damage caused by the violation of this right. The content of this personal non-property right is disclosed in Article 239 of the Civil Code of Ukraine (2003) and includes: the right to safe environment and information about the state of the natural environment; the right to consumer products (food and household items) that are safe for an individual and information about their quality; the right to proper, safe conditions of work, residence, education, etc.; the right to protection and compensation in case of violation of such rights.

Thus, international acts and the basic law emphasize that the realization of the right to life depends on a favorable environment. Man, as a biological and social

being, cannot exist in life-threatening conditions. Also, the human right to a safe environment includes the right to consumer products that are safe for humans.

According to Articles 3, 14 and 15 of the Law of Ukraine on Protection of Consumer Rights (1991), the consumer has the right to be guaranteed that the products, under normal conditions of use, storage and transportation, are safe for his/her life, health and the environment, and shall not cause damage to his/her property. The consumer also has the right to information on the content of substances harmful to health, the list of which is determined by law, and warnings on the use of certain products, if they are required by regulatory acts.

Article 1 of the same law defines product safety as the absence of any risk to the life, health, property of the consumer and the environment under normal conditions of use, storage, transportation, manufacturing and disposal of products.

The Law of Ukraine on the General Safety of Non-Food Products (2010) contains a general requirement that manufacturers are obliged to introduce only safe products on the market (Article 4) and that any product that, under normal or reasonably foreseeable conditions, is safe for use, in particular within its service life, and if the requirements for installation and maintenance have been met, does not pose any or only minimal risk connected with the use of such a product. Such risks are considered acceptable and do not pose a threat to the public interest, depending on the following factors: product characteristics, including its composition, packaging, installation and maintenance requirements; the product's impact on other products; warnings on the product label, instructions for use and destruction and other information in this regard; warnings regarding the consumption or use of products by certain categories of the population (children, pregnant women, the elderly, etc.).

According to Clause 7 of Part 1 of Article 1 of the Law of Ukraine on Basic Principles and Requirements for the Safety and Quality of Food Products (1997), a safe food product is one that does not have a harmful effect on human health and is suitable for consumption.

Special laws in the field of consumer rights protection indicate that products that are safe for humans and the environment are products that do not pose a danger to either humans or the natural environment. Also, the natural environment will be safe if all product manufacturers comply with the requirements of the law and place only safe products on the market.

In 2019, in order to improve the state of the natural environment, Ukraine approved the Basic Principles of the State Environmental Policy of Ukraine for the Period until 2030 (2019), where, among other strategic goals and objectives of the national environmental policy, the following was defined: reducing environmental risks in order to minimize their impact on ecosystems, socio-economic development and population health. The legislator demonstrates an understanding of the

interdependence of a state of the environment that is safe for human health and the improvement of the ecological situation with the increase in the general requirements for the safety of goods produced in Ukraine.

Therefore, the right to health care is a second-generation human right, which includes the right to demand from the state a high-quality health care system, the right to medical care and a safe living environment, as well as the right to protection and compensation in the case of violation of such rights.

Also, the essence and meaning of the right to health and the right to health care are different, and the right to health care is a broader category that includes the right to medical care.

1.5. The Most Recent Human Rights in the Field of Health Care

The development of humanity is unceasing and we see how the fundamental right to health is realized through a second-generation right, the right to health care, which in turn correlates with the collective right to safety. In addition, the progress of science and technology presented new challenges to man, in particular in the field of health care, so the emergence of new rights, also called the fourth-generation rights, became inevitable.

Sandra Boldizhar (2020) includes in this category the right to euthanasia, artificial insemination, cloning, the use of virtual reality, same-sex marriage, etc., and proposes to distinguish three stages in the development and formation of the fourth generation of human rights in the field of health care, namely: stage formation of the rights system of the fourth generation of human rights in the field of health care in Ukraine; the stage of constitutional recognition and further consolidation of the fourth generation of human rights in the field of health care in Ukraine; the latest stage of the evolution of the fourth generation of human rights in the field of health care in Ukraine (p. 111).

Tereziya Popovych and Andriy Shavarin understand the fourth generation of human rights as a set of rights that were formed at the turn of the 20th-21st centuries and arose as a result of scientific and technical progress, discoveries in medicine, biology, genetics, space, etc., which are not yet fully recognized by the international community and need proper normative regulation (p. 266).

The Sustainable Development Goals (3.7) call for universal access to sexual and reproductive health services by 2030, including family planning services, information and education, and the integration of reproductive health into national strategies and programs.

The Economic and Social Council of the United Nations, commenting on Article 12 of the International Covenant on Economic, Social and Cultural Rights (2000), states that

> the right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health… The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

Reproductive and sexual rights, the right to participate in medical research and information about it, transplantation rights, the right to a dignified death, and informational rights in the field of health care should be included in the most recent rights (fourth generation of human rights of) in the field of health care.

Further development of human individuality enables researchers to single out somatic rights as a separate group of human rights (Shebanits, 2015; Zavalniuk, 2011; Turyanskyi, 2020), which include reproductive rights, sexual rights, the right to change sex, and the rights of a person regarding his/her organs and tissues.

Yuriy Turyanskyi (2020) notes that the subject of the legal claim of somatic rights is the corporeality of man, which refers to the personal characteristics of an individual and can cover not only the existing essence, but also hypothetical changes caused by modernization, improvement, and modification of one's corporeality. This group of rights includes the following opportunities:

1) to determine the features of the functioning and external expression of the whole body as a human organism;
2) to perform such actions in relation to a certain organ (organs) or tissues;
3) to dispose of those biological components that are already separated from the body, such as parts of tissues, DNA, blood, reproductive material, etc.

The author also singles out sexual rights that are

> fundamental to the manifestation of a person's individuality and directly relate to his physicality: the right to sexual health as a state of physical, emotional, mental

> and social well-being in relation to a person's sexuality; the right to sexual life, which provides for the possibility of individual choice of sexual life, its presence or absence; the right to protection from sexual exploitation, violence and depravity; the right to protection against mutilation of genital organs, which is carried out for non-medical reasons; the right to non-discrimination based on sexual orientation; access to information and education related to sexuality and sexual health (Turyanskyi, 2020, p. 6).

Access to sex reassignment surgery and other treatments for transsexuals is an important issue. Although the European Court of Human Rights has not recognized a general right of access to such a procedure, it has found that the fact that such procedures for these treatments are not being covered by an insurance company may violate Article 8 (Schlumpf v. Switzerland; Van Kuck v. Germany).

Similarly, the Court has found a violation where the absence of a law regulating sex reassignment surgery prevents medical facilities from providing access to such procedures (L. v. Lithuania, § 57). In many countries, the issue of gender identity is raised at the level of legislative acts (Spain, Argentina) or the Constitutional Court (Germany). On the other hand, in Ukraine, the problem of access to gender change operations raises more questions than answers. On the one hand, it is allowed and recognized by the state to change the sex of a person, however, only in relation to persons who have undergone surgical intervention. Gender change also concerns reproductive function and may concern the interests of other persons, such as the spouses.

The issue of birth and death is most pressing one in bioethics and law. Therefore, the need to protect human rights in the process of applying reproductive technologies was the result of the selection of a group of rights that are collectively called reproductive rights (Dutko and Zabolotna, 2016; Kyrychenko and Starikova, 2015) and are included in the fourth generation of human rights.

It is worth adding a person's right to freely make decisions about his/her reproductive health, birth or refusal to give birth to a child, as well as the opportunity to receive help and access to innovative technologies in this area to the reproductive rights.

In the case of R. and S. v. Poland, the European Court of Human Rights reiterated that the concept of private life within the meaning of Article 8 extends to both the decision to become parents and the decision not to be parents. In the case of R.R. v. Poland, the Court recalled that "private life" is a broad concept that includes, inter alia, the right to personal autonomy and personal development. The Court held that the concept of personal autonomy is an important principle underlying its guarantees. The concept of private life refers to such subjects as gender identification, sexual orientation and sex life, as well as physical and psychological integrity of

a person. The court decided that the concept of private life applies to decisions both to have and not to have a child, as well as to become parents (§ 180).

Nataliya Plahotniuk and Maryna Grigorenko (2018) point out that "human rights of a patient during organ and tissue transplantation belong to those human rights in the field of biomedicine that make them specialized and arise only in the field of application of biomedical technologies on humans" and, since "human rights are the only means of protecting human dignity" (p. 174), the allocation of specialized human rights in the new sphere of relations—biomedicine—will allow for proper protection of a person during medical intervention in the integrity of human biology.

The Convention on Human Rights and Biomedicine (1997) in Article 19 establishes a general rule that the removal of organs and tissues from a living donor for the purpose of transplantation may be carried out only for the purpose of treating the patient and in the absence of a necessary organ or tissue recovered from a deceased person or another alternative method of treatment of comparative efficiency. In addition, Article 21 defines the main principle of transplantation, according to which the human body and its parts as such should not be a source of financial gain. Ukraine has not ratified the Convention on Human Rights and Biomedicine (1997), which generally does not contribute to the effective implementation of international standards in the field of transplantation.

Article 11 of the European Social Charter (1996) calls on countries that have ratified it to ensure the operation of advisory and educational services that would contribute to the improvement of health and increase personal responsibility in health matters, as well as to prevent epidemic and other diseases, as well as accidents.

Educational work in the field of health care is extremely important for children and adolescents, since their health is often affected by the environment. Among the newest problems in the field of adolescent health in recent decades, issues of a healthy lifestyle, proper nutrition (prevention of bulimia nervosa and obesity), as well as smoking, alcoholism and drug addiction have been raised. The work of civil society institutions, particularly youth clubs and organizations, is important in order to educate young people about healthy lifestyle. It is also important to educate young people in a responsible attitude to the health of future mothers and to their reproductive health in general, including by conducting regular examinations, appropriate medical and genetic counseling, as well as popularizing a healthy lifestyle in the mass media.

The right to information and the opportunity to share ideas and views has become especially important in the digital age and the Internet. Information about factors that can affect health, as well as about available health services and programs, must be not only accessible, but also reliable.

Regarding the realization of the right to health of the elderly, the Economic and Social Council of the United Nations, in its General Comment No. 14 to the International Covenant on Economic, Social and Cultural Rights (2000), emphasizes the importance of a comprehensive approach that combines elements of preventive, curative and rehabilitation health treatment. These measures should be based on periodic check-ups for both sexes; physical and psychological rehabilitation measures aimed at supporting the functionality and autonomy of the elderly; as well as attention and care for chronically and terminally ill people, sparing them unbearable pain, and allowing them to die with dignity.

The question of a person's right to a dignified death (euthanasia) is debatable in the field of law and bioethics. In Ukraine, in accordance with Part 4 of Article 281 of the Civil Code of Ukraine, it is prohibited to give consent to a request of an individual to end his/her life. However, as of 2021, euthanasia in some form is officially permitted in only a few countries: Belgium, Luxembourg, the Netherlands, Portugal, Switzerland, Germany, Canada, Colombia, parts of Australia, some US states, and soon in Spain.

According to the definition of Y. Turyanskyi (2020), a person's right to a dignified death is in "the possibility of implementing a passive type of euthanasia, which is characterized by the disconnection of a terminally ill person from the devices that artificially support his/her vital activity, according to the independent and conscious will of the person, and is based on a humane attitude towards the person and respect for his/her autonomous will" (p. 28).

In the case of Pretty v. The United Kingdom (2002), The European Court of Human Rights for the first time concluded that the right to choose the manner of one's death is an element of private life under Article 8 (§ 67). Later, in its case law, the European Court of Human Rights indicated that the right of an individual to decide how and when his/her life should end, provided that he/she is able to freely express his wishes in this regard and to act in consequence, is one of the aspects of the right to respect for private life under Article 8 of the Convention (Haas v. Switzerland, 2011, § 51).

No less important in recent times is the right of to participate in the decision-making process concerning health.

Recommendation No. R (2000) 5 of the Committee of Ministers of the Council of Europe to the participating states on the development of forms of participation of citizens and patients in the decision-making process affecting medical care (2000), "recognizing the fundamental right of citizens in a free and democratic society to determine the goals and targets of the health care sector" (Preamble), recommends that member state governments ensure that citizen participation extends to all aspects of health care systems at national, regional and local levels and that it should

be followed by all operators of health care systems, including professionals, insurers and the authorities. In paragraph 1(1) of the Appendix, the Committee of Ministers notes that the right of citizens and patients to participate in the decision-making process concerning health care, if they wish to do so, should be considered as a fundamental and integral part of any democratic society (Guidelines).

Further, specific recommendations are given to the governments of the participating states. In particular, it is necessary to develop policies and strategies that promote patients' rights and citizen participation in health care decision-making, as well as ensure their spreading, monitoring and updating. In addition, patient participation must be an integral part of health care systems and a mandatory component of ongoing health care reforms. Decision-making should be more democratic, ensuring:

– clear distribution of responsibilities for decision-making in the field of health care;
– appropriate influence of all interest groups, including public associations dealing with health issues, and not only some stakeholders (professionals, insurers, etc.);
– public access to political debates on these issues;
– where possible, participation of citizens at the stages of problem identification and policy development; participation should not be limited to solving problems and simply choosing solutions that have already been developed.

In addition, it is recommended to use public hearings wherever possible.

In Ukraine, the right to participate is realized through the obligation of state bodies and health care institutions to promote the realization of the right of citizens to participate in the management of health care (Article 24 of the Fundamentals of the Legislation of Ukraine on Health Care (1992)), as well as through the possibility of public representatives' involvement in the work of supervisory boards in state and community health care institutions that provide secondary and tertiary medical care, with which contracts for medical care services for the population have been concluded as main managers of the budgetary funds.

Supervisory councils consider issues, in particular, regarding the observance of the rights and ensuring the safety of patients, compliance with the requirements of the legislation during the provision of medical services to the population by a health care institution, and the financial and economic activities of a health care institution.

According to Article 24(4) of the Fundamentals of the Legislation of Ukraine on Health Care (1992), the supervisory board of a healthcare institution, in addition to representatives of the owner of the healthcare institution (authorized body) and relevant executive and/or local self-government bodies, includes (with their consent) deputies of local councils, representatives of the public and public associations

whose activities are aimed at protecting rights in the field of healthcare, organizations of professional self-government in the field of healthcare.

Another form of public participation in health decision-making is the participation of philanthropists, representatives of the community and public associations, charitable and religious organizations, as well as volunteers in the work of boards of trustees in health care institutions.

In addition, organizations that carry out professional self-governance in the field of health care, and other public associations whose activities are aimed at protecting rights in the field of health care, foreign non-governmental organizations can participate in determining the content and ways of implementing state objectives and local programs in the field of health care, implementing relevant measures, solving personnel-related, scientific and other issues of state policy.

The issue of protecting human health during epidemics and pandemics is becoming increasingly relevant today, when humanity is fighting the COVID-19 pandemic caused by the SARS-CoV-2 coronavirus. Ukraine, like other states of the world, implements measures to contain the spread of the disease that not always comply with constitutional norms or guarantee the observance of human rights (Blashchuk, Balatska & Orlovska, 2021).

Individual human rights in the field of health care were historically preceded by measures to ensure public health. For example, restriction of the right of movement as a means of preventing the spread of infections was successfully used at the beginning of the 20th century.

Analyzing the periods of outbreaks of epidemics and pandemics at the end of the 19th and the beginning of the 20th century, we can conclude that it was during those times that the first discoveries were made that formed the basis for further mechanisms in the fight against pandemics, in particular, isolation, clearing the environment from the virus, developing individual means of protection and fight against the source of diseases. The Spanish flu pandemic is marked by the specificity of quarantine measures, in particular, it was forbidden to visit public places (courts, schools, churches, theaters, cinemas), and also some entrepreneurs in the field of trade personally prohibited people from visiting their establishments (Bentivoglio & Pacini, 1995), thus creating the first contactless food deliveries for city dwellers.

Article 9 of the Fundamentals of the Legislation of Ukraine on Health Care (1992) defines the restriction of the rights of citizens related to their health and allows the restriction of the rights of other citizens in connection with the establishment of quarantine exclusively on the grounds provided for by law. The Law of Ukraine on Amendments to the Law of Ukraine "On the Protection of the Population from Infectious Diseases" aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19) (2020), in addition to quarantine, introduced two

new measures of restricting movement: observation, the placing of a patient at risk of spreading infectious disease in an observation unit for the purpose of examining the patient and carrying out medical supervision, and self-isolation, the stay of a person in respect of whom there are good reasons to suspect infection or the risk of spreading an infectious disease in a place (premises) designated by them in order to comply with anti-epidemic measures at person's own will. In practice, self-isolation turned out to be the most effective means of limiting patients' contacts, as it allowed to ensure the most individual approach.

The COVID-19 pandemic has led to the adoption by most countries of the world of a number of restrictive measures aimed at minimizing contacts between people, a legal assessment of which still needs to be made, but the conclusion that the catalog of human rights in the field of health care needs to be further reviewed is becoming more obvious. Public interests are put first—maintaining the population's good health.

According Article 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the right to respect for private life may be limited if it is exercised "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 the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." (Article 8.2).

It is possible to achieve the Sustainable Development Goals, in particular to "Ensure healthy lives and promote well-being for all at all ages" at the national level, in particular thanks to a properly established and developed public health system functioning thanks to the efforts of public actors (state authorities, local self-government bodies) and the non-public sector entities (international organizations, individuals and legal entities) that carry out a number of measures aimed at strengthening the health of the population, preventing diseases and increasing life expectancy.

The Law of Ukraine on the Public Health System (2022) defines the legal, organizational, economic and social principles for the functioning of the public health system in Ukraine. The main purpose of this act is to improve the legislation on the sanitary and epidemic welfare of the population and on the protection of the population from infectious diseases, which is outdated and "does not correspond to the current level of scientific development, new relations between business entities, state authorities and local self-government."

In the discussed law, public health is defined as a field of knowledge and organized activity of subjects of the public health system to promote health, prevent diseases, improve quality of life and increase life expectancy. In addition, the Law of Ukraine on the Public Health System (2022) grants to everyone (any person) certain rights in the field of public health (Article 15), which include: the right to safe food

products, drinking water, conditions of work, education, upbringing, living, leisure, recreation and the natural environment (the right to safety); the right to participate in the development, discussion and public examination of draft programs and plans for the development of the public health system and ensuring the sanitary and epidemiological well-being of the population, making proposals on these issues to the relevant bodies (the right to participate); the right to compensation for damages caused to his/her health as a result of violation of the requirements of sanitary legislation by natural or legal persons, members of executive authorities, local self-government bodies (the right to protection); the right to reliable and timely information about one's health, as well as about existing and potential health risk factors and their degree (the right to information). Separately, patients suffering from infectious diseases and carriers of bacteria have the right to be examined and treated at the expense of the state within the framework of medical guarantee programs.

However, the preliminary conclusion that the right to health is inseparable from the right to security requires that the public health system should include measures to protect the health of everyone, not just the population as a whole. It also requires determining the ratio of human rights (individual) and collective rights to ensure public health.

III. The Peculiarities of Realization of Personal Non-Property Rights in the Field of Health Care of Certain Croups of Patients

3.1. The Peculiarities of the Implementation of Personal Non-Property Rights in the Field of Health Care for Children

Exercising the right to medical assistance has certain peculiarities regarding minor patients (children), since the child, due to his/her physical and mental immaturity, needs special protection and care. The state has undertaken to protect childhood, in particular in the field of health care. The Law of Ukraine on Childhood Protection (2001) defines that childhood protection is a system of state and public measures aimed at ensuring a fulfilled life, comprehensive education and development of the child and protection of his/her rights (Article 1).

One of the most acute social problems in Ukraine is the health of children. Koblyanska and Sklyarenko (2016) emphasize that the unsatisfactory state of health in childhood leads to health disorders throughout a person's life, which results in social and financial problems, and negatively affects the level of socio-economic development of the country (p. 68).

Statistics indicate a 20-percent increase in diseases among Ukrainian children in recent years. The most common are diseases of the endocrine system, blood and blood-forming organs, and the nervous system. In Ukraine, the number of children with genetic disorders and congenital malformations is increasing. Genetic diseases and gross abnormalities of fetal development cause up to 60 percent of spontaneous miscarriages in the first trimester of pregnancy. Hereditary pathology remains with a person for life (Department of Education and Science of the Kyiv Regional State Administration, 2022).

The issue of the exercise of the right to medical assistance by minor patients has been studied by many scientists (Buletsa, 2012; Myronova, 2014; Senyuta, 2018). Peculiarities of the civil law protection of informed consent to medical intervention were studied by Alla Dvornichenko (Shevchenko) (2017). A separate paragraph in her dissertation was devoted to the study of informed consent to intervention in the child. In addition, Maryana Shchyrba (2017) pointed out problems in the legal regulation of a child's informed consent to medical intervention. However, the issue of exercising the right to medical care by minor patients requires further research.

According to the current legislation of Ukraine, a patient is an individual who has applied for medical care and/or to whom this care is provided, however, each patient, as a participant in legal relations in the medical field, has his/her own legal status, i.e., he/she is endowed with a number of rights, has certain obligations and may be prosecuted for health violations. The Declaration on the Rights of the Child (1959) states that the child shall enjoy special protection and shall have the opportunity for normal, healthy development in conditions of freedom and dignity. Therefore, the exercise of the right to medical assistance by minor patients has its own characteristics, which are determined by the age-related needs of the child's body, psychological characteristics and the scope of legal capacity.

Most international documents have evolved to define the age of childhood as under 18 years, rather than under 15. The Convention on the Rights of the Child (1989) defines a child as any human being up to the age of 18, unless, under the law applicable to that person, he or she reaches majority earlier (Article 1). The Convention links the status of a child to the occurrence of one of two facts: reaching the age of 18 or coming of age.

In Ukraine, according to the Family Code of Ukraine (2002), a person has the legal status of a child until reaching the age of majority. A child between the ages of 14 and 18 is considered a juvenile, and before reaching the age of 14 is considered a minor (Article 6). Unfortunately, the legislator does not define the concept of majority, but the systematic interpretation of Article 6 of the Family Code of Ukraine (2002) and Article 34 of the Civil Code of Ukraine (2003) allows to define majority as reaching the age of eighteen by a natural person. At the same time,

coming of age does not always coincide with the acquisition of full legal capacity by a natural person.

Ukrainian legislation links the status of a child with the coming of age (turning eighteen). However, the right to receive medical assistance and the specifics of its implementation depend not only on the age of majority, but also on the extent of an individual's legal capacity.

According to Article 34 of the Civil Code of Ukraine (2003), a natural person who has reached eighteen years of age (legal age) has full civil legal capacity. In the case of a registration of marriage by an individual who has not reached the age of majority, he/she acquires full civil legal capacity from the moment of the registration of the marriage. Full civil legal capacity can be granted to an individual who has reached the age of sixteen and works under an employment contract, as well as to a minor registered by the child's mother or father. Full civil legal capacity can be granted to an individual who has reached the age of sixteen and who wishes to engage in entrepreneurial activity (Article 35 of the Civil Code of Ukraine). In this case, a natural person acquires full civil legal capacity from the moment of his/her official registration as an entrepreneur. Full civil legal capacity is preserved regardless of the termination of the marriage by a minor, or its recognition as invalid for reasons not related to the illegal behavior of a minor, an employment contract, or entrepreneurial activity.

Article 281 of the Civil Code of Ukraine (2003) stipulates that medical, scientific and other experiments can be conducted only with respect to an adult natural person with legal capacity, with his/her free consent. Sterilization can take place only at the request of an adult natural person. An adult woman or man has the right, based on medical indications, to undergo assisted reproductive treatments.

The issue of providing medical care to juvenile patients (14-18 years old) requires careful attention, since the legality of providing this care directly depends on the presence or absence of informed consent of juvenile patients or their legal representatives.

The main provisions regarding the rights of a patient who is a child, in particular, regarding the provision of informed consent for medical intervention, are contained in Article 284 and Article 285 of the Civil Code of Ukraine (2003) and Article 38 and Article 39 of the Fundamentals of the Legislation of Ukraine on Health Care (1992). However, according to the provisions of these articles, minors do not have the right to take legal actions related to their medical care. In particular, they do not have the right to choose a doctor or methods of treatment, or to refuse medical care. Children over the age of 14 have the right to apply for medical assistance, to choose a doctor and the methods of treatment recommended by them, and to give their consent for the provision of medical assistance. Thus, according to the national legislation

of Ukraine, all minors (children) are not among the individuals who have the right to medical information about their health. According to paragraph 2 of Article 285 of the Civil Code of Ukraine (2003) and paragraph 2 of Article 39 of the Fundamentals of the Legislation of Ukraine on Health Care (1992), the right to receive information about the state of health of a child of any age is only available to adults who have legal custody over the child, meaning the parents, adoptive parents, legal guardians.

An adult with legal capacity, who is aware of the significance of his/her actions and can control them, has the right to refuse treatment. In urgent cases, in the presence of a real threat to the life of an individual, medical assistance is provided without the consent of the individual or his/her parents (adoptive parents), guardian, custodian (Article 284 of the Civil Code of Ukraine).

According to 43 Fundamentals of the Legislation of Ukraine on Health Care (1992), "Informed consent of the patient in accordance with the Fundamentals is necessary for the use of diagnosis, prevention and treatment. Regarding patients under the age of 14 (minor patients), as well as patients recognized as incompetent in accordance with the procedure established by law, medical intervention will be carried out with the consent of their legal representatives. The patients who have acquired full civil legal capacity and are aware of the importance of their actions and can control them, have the right to refuse treatment" (Article 39).

Thus, in contrast to the Civil Code of Ukraine, the Fundamentals of the Legislation of Ukraine on Health Care do not link the right to refuse treatment to the age of majority. Persons who are capable of action, but have not reached the age of majority (emancipated) have the right to refuse treatment in accordance with the norms of the Fundamentals of the Legislation of Ukraine on Health Care, but do not have this right according to the norms of the Civil Code of Ukraine. This legislative conflict needs to be resolved.

According to the legislation of Ukraine, no minors have the right to medical information about their health. However, Article 285 of the Civil Code of Ukraine stipulates that an adult natural person has the right to reliable and complete information about their health, in particular, to review relevant medical documents related to their health. Parents, adoptive parents or legal guardians have the right to information about the health of their child or ward. The foundations of the legislation on health care of Ukraine provide that the patients who have reached the age of majority have the right to receive reliable and complete information about their health, in particular, to familiarize themselves with relevant medical documents related to their health.

Only legal representatives of a child have the right to receive information about the health of the child at any age. The grounds of authority, rights and obligations of persons who are legal representatives of orphans and children deprived of parental

care are defined in the Family Code of Ukraine. In particular, these representatives in legal relations with the medical institution and medical personnel are:

a) formal educators;
b) adoptive parents;
c) parents-educators of a family-style orphanage.

These persons have the right to make decisions about the medical care of the child in their care, because they are responsible for the consequences of their refusal to treat the child. Under these circumstances, a minor must express his/her opinion about the possibility of being provided with medical assistance, without having the opportunity to obtain sufficient information about his/her health to make a decision.

The analysis of the legislation on the patient's informed consent demonstrates that the legal structure of the child's voluntary informed consent in the legal relationship of providing him/her with medical assistance in the legislation of Ukraine consists of the following provisions: informed voluntary consent for medical assistance to a child under the age of 14 should be provided only by the child's legal representatives; upon reaching the age of 14, a minor receives, among others, the right to informed consent for medical intervention. The corresponding written consent must be signed by the child; a person who has reached the age of 18 acquires all civil rights and obligations, including in the field of obtaining medical assistance. The same applies to minors who acquired civil legal capacity earlier, on the grounds provided for in Articles 34 and 35 of the Civil Code of Ukraine.

As we can see, the legal regulation of the provision of informed consent for medical intervention by a minor over the age of 14 in the civil legislation of Ukraine contains a number of contradictions. On the one hand, the legislator gave these persons the right to consent to medical intervention, on the other hand, deprived them of the right to information about their health and the right to refuse medical intervention.

Scientists generally support the idea of lowering the age of giving informed consent to medical intervention (Shchyrba, 2017, p. 214), but it is difficult to agree with the proposal of A. Dvornichenko (2017), who suggested that the age of a child to provide informed consent to medical intervention should be set at the age of 16 (p. 8), as this would contradict the general norm of civil legislation, according to which a person is not of legal age from the age of 14, and a person is a minor before the age of 14.

It is necessary to eliminate the conflict of legislation and legally determine that: medical intervention must be carried out with the consent of a person who has reached the age of 14; a person who has reached the age of 14 has the right to information about his/her health; an adult natural person with legal capacity has the right to refuse medical intervention. In addition, it is worth giving a person who has reached the age of 14 the right to independently conclude a contract for the provision of medical services, however, this issue still requires a separate study.

Also, the legal regulations concerning abortion by minors, testing for HIV infection, vaccinations and the provision of psychiatric care are worthy of attention.

Despite the fact that adolescence is a period of experimentation, most teenagers grow up in good health during this period, however, they face many problems every day and it is worth finding ways to solve them. According to the World Health Organization, almost 25 percent of 15-year-olds have had sex, but more than 30 percent of teenagers in some countries do not use condoms or any other form of contraception, leading to the spreading of sexually transmitted diseases and unwanted pregnancies (WHO, 2020).

In Ukraine, the possibility of termination of pregnancy for minors and people under age is regulated by the norms of the Civil Code of Ukraine, the Fundamentals of the Legislation of Ukraine on Health Care, and the orders of the Ministry of Health.

According to Part 6 of Article 281 of the Civil Code of Ukraine (2003), artificial termination of pregnancy, if it does not exceed 12 weeks, may be performed at the woman's request. At the same time, part 3 of Article 284 of the Civil Code of Ukraine specifies that the provision of medical assistance to an individual who has reached 14 years of age is carried out with his/her consent.

In accordance with the Procedure for Providing Comprehensive Medical Care to a Pregnant Woman Curing an Unwanted Pregnancy (2013), operations (procedures) for the artificial termination of an unwanted pregnancy in a woman under the age of 14 or in an incapacitated person are carried out at the request of her legal representatives. Artificial termination of pregnancy in a woman who has reached the age of 14 is carried out with her consent in accordance with Article 284 of the Civil Code of Ukraine (Clause 1.8).

As for the legal regulation of testing for HIV infection, the Law of Ukraine on Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV (1991) stipulates that "testing of persons aged 14 and more is carried out voluntarily, in the presence of the person's conscious informed consent, obtained after providing him/her with a preliminary consultation on the specifics of the test, its results and possible consequences, in compliance with the provisions regarding the confidentiality of personal data, in particular, on the health of the person" (Article 6).

Testing of children under the age of 14 and persons recognized as not having legal capacity is carried out at the request of their parents or legal representatives and in the presence of informed consent. Parents and legal representatives of the mentioned persons have the right to be present during such testing and informed about the results, and they are obliged to ensure the preservation of confidentiality of data on the HIV status of the persons whose interests they represent.

The testing of children under the age of 14, who are deprived of parental care and are under the care of foster-care or educational institutions with full state funding, is carried out if they are aware of the consequences and benefits of such an examination at the request of their legal representatives and on the condition that such persons have given their informed consent only for the purpose of prescribing treatment, medical care and support for children in connection with HIV infection. The legal representatives of such minors have the right to be informed of the results of the said testing and are obliged to ensure the confidentiality of data on the HIV status of the persons whose interests they represent.

In accordance with the requirements of the Law of Ukraine on Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV (1991), post-test counseling of a person who has been diagnosed with HIV (Article 7), provided by qualified staff, is a mandatory condition of this testing. In particular, health care professionals are obliged to inform this person (from the age of 14) about: the preventive measures necessary to maintain the health of an HIV-infected person and prevent the further spread of HIV; guarantees of compliance with the rights and freedoms of people living with HIV on the territory of Ukraine; criminal liability for knowingly putting another person at risk of HIV infection.

In the case of detection of HIV in children under the age of 14 and persons recognized as having no legal capacity, in accordance with the procedure established by law, the authorized health care professional shall notify the parents or other legal representatives of the said persons. Parents or other legal representatives of such HIV-infected persons should then be provided with appropriate counseling aimed at ensuring that they make well-informed decisions regarding the treatment, care and support of their children or wards, and that their legal rights and interests are adequately protected.

A person who has been diagnosed with HIV as a result of testing and parents or authorized representatives of children under the age of 14 who have been diagnosed with HIV as a result of testing are required to provide an authorized employee of the institution that conducted the test with a written confirmation in any form with their own signature to receive the information on preventive measures necessary to maintain the health of an HIV-infected person, prevent the further spread of HIV, on guarantees of compliance with the rights and freedoms of people living with HIV, as well as on criminal liability for knowingly putting another person at risk of contracting HIV or for knowingly infecting that person with HIV.

Thus, in the mentioned legal acts, the legal regulation of the special procedure for testing for HIV infection and termination of unwanted pregnancy in Ukraine includes the requirement of an informed consent of a minor over 14 years of age who

is the subject of the relevant legal relationship or the consent of the minor's legal representatives.

The provision of psychiatric care to minors is defined in detail by the Law of Ukraine on Psychiatric Care (2020), which stipulates that methods of diagnosis and treatment and medicinal products that pose an increased risk to the health of a person who has been provided psychiatric care, are used as prescribed and under the control of a team of psychiatrists: with the informed written consent of a person who has reached the age of 14; with the written consent of his/her parents or other legal representative for a person under the age of 14 (an underage person); in relation to a person recognized as incapacitated in accordance with the procedure established by law, with the written consent of his/her legal representative if the said person is unable to give informed written consent due to his/her state of health (Article 7).

In general, a psychiatric examination is conducted in order to find out: the presence or absence of a mental disorder in a person, the need to provide the patient with psychiatric help, as well as to establish the appropriate type of such help and the procedure for its provision. This examination is conducted by a psychiatrist for a person who has reached the age of 14, at his/her request or with his/her informed written consent, and for a person under the age of 14 (an underage person) at the request or with the written consent of his/her parents or other legal representative.

In the case of a person recognized as incapacitated in accordance with the procedure established by law, if due to the health condition he/she is unable to express a request or give informed written consent, such an examination is carried out at the request or with the written consent of his/her legal representative. In the case of one of the parent's lack of agreement or in the absence of the parents, the psychiatric examination of a person under the age of 14 (an underage person) is carried out with the decision (consent) of the entity providing legal guardianship and care. Such a decision must by made no later than within 24 hours after the application of another legal representative of the specified person submitted to the said entity and may be challenged in accordance with law. The legal representative of a person recognized as incapacitated in accordance with the procedure established by law shall notify the entity providing legal guardianship and care at the ward's place of residence about his/her consent to psychiatric examination of the ward no later than within one day of giving such consent.

The legislator assigns the function of monitoring the provision of psychiatric care to the entity providing legal guardianship and care at the ward's place of residence. In practice, this creates difficulties, since the long-term decentralization reform makes it difficult to determine the jurisdiction of an entity over a territory. However, local self-government bodies' control is not a generally accepted practice, and judicial control is more effective.

During the pandemic of the acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus, the issue of prevention of infectious diseases, in particular vaccination, is especially relevant.

WHO (2020) states that children still die from preventable causes, including pneumonia and diarrhea, as well as from diseases that were previously under control, such as diphtheria and tuberculosis. In Ukraine, an ambiguous situation has developed: there is a large number of vaccination refusals, and at the same time, an increase in the number of infectious disease cases is recorded.

According to the Law of Ukraine on the Protection of the Population from Infectious Diseases (2020), preventive vaccinations are given after a medical examination of a person, in the absence of medical contraindications. Adult citizens with legal capacity are given preventive vaccinations with their consent after being provided with objective information about vaccinations, the consequences of refusing them and possible post-vaccination complications (Article 12).

Persons who have not reached the age of fifteen or who are recognized as incapacitated in accordance with the procedure established by law, are given preventive vaccinations with the consent of their objectively informed parents or other legal representatives. Persons between 15 and 18 years of age or those recognized by the court as having limited legal capacity are given preventive vaccinations with their consent after being provided objective information and with the consent of objectively informed parents or other legal representatives of these persons. If a person and/or his/her legal representatives refuse mandatory preventive vaccinations, the doctor has the right to obtain a corresponding written confirmation from them, and in the case of their refusal to give such confirmation, to certify it in writing in the presence of witnesses.

The Law of Ukraine on the Protection of the Population from Infectious Diseases (2020) needs to be clarified in the scope of determining the age at which an underage patient has the right to independently express consent for the provision of medical assistance. It is necessary to amend the specified law by lowering the age for providing informed consent for vaccination to 14 years. Previously, it was accepted that the general norms allow independent consent to medical intervention starting from the age of 14.

No less relevant today is the issue of the right to education of unvaccinated children. In Ukraine, by virtue of the provisions of Article 15 of the Law of Ukraine on the Protection of the Population from Infectious Diseases (2020), a child cannot be admitted to an educational institution without an appropriate medical examination and an opinion of a medical and advisory commission (in the event that the child does not have mandatory vaccinations) about the possibility of attending a preschool educational institution. A significant number of parents refuse vaccination. Accord-

ing to the data of the Center of Public Health of Ukraine, the level of vaccination coverage for children under 1 year in 2021 is at the level of 80-90 percent (Center of Public Health of Ukraine, 2022). At the same time, the reasons for refusing vaccination are often fictitious.

An important task of the state is to ensure a proper balance between the realization of the child's right to preschool education and the interests of other children. The Supreme Court's Civil Court of Cassation, in the case No. 682/1692/17 on the claim about the obligation to avoid obstacles in the acquisition of preschool education, noted:

> In the case under review, the individual right (interest) to refuse vaccination by the child's mother while preserving the scope of the child's rights to education, in particular in preschool educational institutions, is opposed to the general right (interest) of society, other parents and their children who have done vaccination according to the procedure established by the state, in particular before sending children to an educational institution. As a result of establishing such a balance, the goal was achieved: the common good in the form of the right to safety and health care, which is guaranteed by Articles 3, 27 and 49 of the Constitution of Ukraine. The demand for mandatory vaccination of the population against particularly dangerous diseases is justified in view of the need to protect public health, as well as the health of interested persons. That is, in this matter, the principle of the importance of public interests prevails over personal interests, but only in the case when such intervention has objective grounds, that is, it was justified (Civil Court of Cassation of the Supreme Court, 2019).

Later, the Civil Court of Cassation of the Supreme Court confirmed that the refusal to admit a child to a preschool without vaccinations meets the requirements of the law (Decision dated 8 February 2021 in the case No. 630/554/19). The court also noted that the child's right to education was not violated. Regarding children who cannot attend an educational institution, there are established alternative methods of obtaining and continuing education, including in an educational institution.

The European Court of Human Rights has repeatedly considered the issue of compulsory (forced) vaccination, in particular of children. According to its precedent practice, the physical integrity of a person is covered by the concept of "private life," which is protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), regarding forced medical intervention (forced vaccination):

> In the Court's opinion the interference with the applicant's physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region. Furthermore, according to the domes-

> tic court's findings, the medical staff had checked his suitability for vaccination prior to carrying out the vaccination, which suggest that necessary precautions had been taken to ensure that the medical intervention would not be to the applicant's detriment to the extent that would upset the balance of interests between the applicant's personal integrity and the public interest of protection health of the population (Solomakhin v. Ukraine, 2012).

Thus, according to the European Court of Human Rights, mandatory vaccination is an interference in private life, but it is justified and does not constitute a violation of Article 8, follows a legitimate purpose and is necessary in a democratic society.

The COVID-19 pandemic brought back relevance to the issue of mandatory vaccination, but in 2021, the European Court of Human Rights ruled on several applications for mandatory vaccination according to the vaccination schedule (against nine diseases). The case concerns the standard and regular vaccination of children against various diseases that are well known to medical science, and the mandatory nature of the relevant vaccinations in the Czech Republic (Vavřička and others v. the Czech Republic, 2021). Since the case is one of the most recent to be considered regarding mandatory vaccination, more attention will be paid to it.

The peculiarity of this case is that the Court heard the arguments of third parties, namely the governments of France, Germany, Poland, Slovakia, as well as the Association of Patients Injured by Vaccines, the European Center for Law and Justice (ECLJ) and others. Third parties were involved because the case "concerns respect for the physical and moral welfare of the human being, as guaranteed by the principles that such welfare must prevail over the sole interest of society or science and that an intervention in the health field may be carried out only with the free and informed consent of those concerned, as established in Articles 2 and 5 of the Oviedo Convention" (§ 235). The court heard the opinions of various stakeholders.

It was recognized that the applicant children (in five applications) bore the direct consequences of non-compliance with the vaccination obligation in that they were not admitted to preschool. As regards the applicant Mr Vavřička, although it was about the vaccination of his children, he was personally obliged under national law to vaccinate his children; the consequences of non-compliance with this requirement, namely the imposition of a fine, he bore as a person directly responsible for their well-being. Therefore, each of the applicants suffered an interference with their right to respect for private life. The ECHR concluded that the challenged intervention had a proper basis in national law, as it was based on a combination of primary and secondary legislation, which had already been recognized by the relevant courts as meeting the requirements of Czech constitutional law.

The court recalled the well-established position that "in all decisions concerning children, their best interests are of paramount importance." This means that "there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development." (Vavřička and others v. the Czech Republic, 2021, §§ 287, 288). The policy of voluntary vaccination was not sufficient to ensure and maintain immunity.

The court concluded that the contested measures could be considered as "necessary in a democratic society." Therefore, there was no violation of Article 8 of the Convention.

The COVID-19 pandemic forced many states, in particular Ukraine, to strengthen measures to prevent the spread of the disease. The Law of Ukraine on Ensuring the Sanitary and Epidemiological Welfare of the Population (1994) was amended and imposed upon enterprises, institutions and organizations the obligation to remove from workplaces, schools, and preschools, at the request of relevant staff of the state sanitary and epidemiological service, the carriers of COVID, patients with infectious diseases dangerous to other people, or persons who were in contact with patients (accompanied by payment of social insurance benefits in accordance with the established procedure), as well as persons who evade mandatory medical examination or vaccination against infections, the list of which is established by the central body of the executive power that ensures the formation of state policy in the field of health care (Clause 5 of Part 1 of Article 7).

The minimum restriction of human rights in the form of mandatory vaccination, provided there are no contraindications, is acceptable, as it aims to protect the public interest and the rights of other citizens to life.

Article 38.4 of the Convention on the Rights of the Child (1989) provides that "in accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

Ukraine, after ratifying the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000), confirmed its readiness to confront such conflicts' harmful and large-scale impact on children, condemned infringements on such rights in the context of hostilities and attacks on locations where children are usually present (in particular schools and hospitals) and protected by international law. Ukraine recognized the need to strengthen the protection of children from being involved in armed conflicts.

Children, remaining a particularly vulnerable category of the population, despite the efforts of most countries of the world, remain the main victims of systemic discrimination, which is especially intensified in crisis situations, in particular during armed conflicts.

3.2. The Peculiarities of the Realization of Personal Non-Property Rights in the Field of Health Care by Persons in Need of Special Assistance (vulnerable social groups)

People in difficult life circumstances need special attention, in particular, when exercising their personal non-property rights in the field of health care. The group of persons in need of special assistance includes families with children (as already mentioned above), as well as people with disabilities, persons in need of psychiatric assistance, those suffering from orphan diseases, as well as those in need of palliative care, and the elderly. Ukraine also has a group of internally displaced persons and migrants, as well as military personnel.

In this part of the study, we will consider those problems that occur in vulnerable social groups in the field of health care, as special medical and social-medical services are needed for high-risk groups, given their behavior, risks associated with it, accompanying infections, etc.

The Law of Ukraine on Social Services (2019) defines vulnerable population as groups of individuals/families that have the highest risk of falling into difficult life circumstances due to the influence of adverse external and/or internal factors. Social and medical services are provided to these segments of the population by both state and public organizations, as well as religious communities. The main types of services provided by these organizations to their target audience are psychological, medical, economic, legal and social services.

In the modern democratic world, which is built on humanistic ideas and values of society and which has reached a high level of spiritual and cultural development, "disability" is considered as a social and medical phenomenon. According to its biomedical definition, "disability" is a disease or defect directly related to a medical condition. This medical condition affects only the person in question, and instead of being discriminated against because of this condition, he/she needs the support of the society.

The Convention on the Rights of Persons with Disabilities (2006), which Ukraine ratified in 2010, requires that member states "take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation" (Article 25).

People with disabilities face many barriers to health care in their daily lives, such as cost, accessibility, stigma and discrimination, and lack or scarcity of resources and services.

We previously considered that in General Comment 14 (2000) the components of the right to health are defined as non-discrimination, physical and economic accessibility and access to information. They are extremely important for people with disabilities.

Non-discrimination means equal access to medical care. Non-discrimination is a fundamental principle of the Convention on the Rights of Persons with Disabilities (2006) and a necessary condition for ensuring equal access to medical care for persons with disabilities. "'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation" (Convention on the Rights of Persons with Disabilities, 2006, Article 2).

Also, the Convention on the Rights of Persons with Disabilities (2006) defines accessibility as the ability to "live independently and participate fully in all aspects of life" and states that " States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas" (Article 9). These measures include identifying and removing barriers to accessibility. Buildings, roads, transport, other internal and external facilities, including schools, residential buildings, medical facilities and workplaces, as well as information, should be accessible to persons with disabilities.

Physical accessibility is an important component in ensuring access to health care for people with disabilities. Physical barriers to this access include environmental and infrastructural barriers, as well as geographic barriers such as access to rural health centers.

General Comment 14 (2000) described and defined the right to health in an accessible environment in the context of physical accessibility and defines it as follows:

> Health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities (paragraph 12 (b)).

It should be noted that the experience of European countries in creating an accessible environment for people with disabilities is much greater than in Ukraine, however, our society has also begun to feel the need for inclusion and actively works

on the development of methods and ways of adapting the environment to the needs of its members with disabilities. On the path of integration into the European and world community, Ukraine ratified a number of international legal acts, which had a certain influence on the formation of national state policy and practice regarding the provision of equal opportunities for all citizens, the implementation of the principles of accessibility in various spheres of life of persons with disabilities. International legal acts ratified by Ukraine are directly applicable and binding.

Persons with disabilities are provided with social, household and medical services, technical and other means of rehabilitation (mobility aids, prosthetic devices, hearing aids, mobile phones for written communication, etc.,), medical devices, free of charge or on preferential terms based on an individual rehabilitation program (individual devices, prosthetic eyes, teeth, and jaws, glasses, hearing aids and voice prostheses, urinary drainage bags, etc.), as well as vehicles for disabled people and electric wheelchairs—upon an appropriate medical opinion (Law of Ukraine on the Fundamentals of Social Security of the Disabled in Ukraine, 1991, part one of Article 38).

In the case of Price v. United Kingdom (2001), the European Court of Human Rights concluded that the imprisonment of a severely disabled person in conditions where she was feeling cold and there was a high probability of injury caused by the hardness of the bed and the inability to access it, as well as the inability to use the toilet or wash herself, is a degrading treatment. Therefore, there was a violation of Article 3 of the Convention. The court also emphasized:

> The applicant's disabilities are not hidden or easily overlooked. It requires no special qualification, only a minimum of ordinary human empathy, to appreciate her situation and to understand that to avoid unnecessary hardship—that is, hardship not implicit in the imprisonment of an able-bodied person—she has to be treated differently from other people because their situation is significantly different (Price v. the United Kingdom, 2001).

Due to the impact of various social and economic factors, the quality of providing medical care to the population, particularly rural, differs significantly from the quality of providing medical care to residents of urban settlements.

According to the Law of Ukraine on Improving the Accessibility and Quality of Medical Care in Rural Areas (2017), it is the state that is responsible for ensuring the implementation of measures to improve the accessibility and quality of medical care in rural areas, in particular, bringing quality medical care closer to the population by improving the network of institutions of health care, in particular centers of primary medical (and sanitary) care and the material and technical base of such institutions, etc. Therefore, in Ukrainian legislation, the state is obliged to ensure equal access to medical care for all residents. (Clause 1 of the first part of Article 4).

Also, the issue of providing the opportunity to receive free medical services for this category of social groups is extremely relevant. The issue of providing free medical services to vulnerable groups of the population is regulated by various national acts of Ukraine, among which we can single out the resolutions of the Cabinet of Ministers of Ukraine: On Regulation of Free and Subsidized Dispensing of Medicinal Products on Medical Prescriptions in Outpatient Treatment of Certain Population Groups and Certain Categories of Diseases (1998) No. 1303, On the Approval of the Program for the Provision of State-Guaranteed Free Medical Care to Citizens (2002) No. 955, and others. At the same time, ensuring the implementation of the above-mentioned normative acts directly depends on the estimates of the state and, to a greater extent, local budgets.

In particular, in the case of outpatient treatment of persons with disabilities, including children with disabilities, medicines prescribed by doctors are dispensed free of charge.

For the marginalized, in particular, drug addicts, the timely provision of medical assistance is extremely important (in terms of removing or preventing the withdrawal syndrome, which is associated with extremely strong physical and psychological suffering, which in turn can be considered tantamount to torture). Disclosure of medical information about the status of patients with drug addiction or HIV/AIDS in Ukraine is also an urgent problem. There is an illegal practice of forcing doctors to disclose medical and confidential information about patients with drug addiction undergoing treatment to law enforcement agencies. As a result of serious pressures on health care institutions, medical institutions and individual doctors, law enforcement officers succeed in receiving such data, despite the fact that such actions are a gross violation of the norms of the current legislation of Ukraine in terms of the protection of personal data.

The consequences can be quite tragic to representatives of vulnerable groups: imprisonment, health deterioration and even death, as a result of not providing timely medical assistance.

Regarding the direct legal status of the subjects of medical legal relations during the provision of psychiatric care, there are hardly any definitions of the status of these subjects, with certain exceptions in the international legislation, in the national legislation of Ukraine, and in the literature.

Regarding international legislation, the UN Resolution 46/119 The Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1992) defines a patient under these circumstances as a person receiving psychiatric care, as well as every person admitted to a psychiatric institution. All persons have the right to the best available psychiatric care as part of the health and social care system, and all persons suffering or perceived to be suffering from a mental illness should

be treated humanely and with respect for the inherent dignity of the human person. These principles must be applied without any discrimination based on disability, race, color, sex, language, religion, political or other views, national, ethnic or social origin, legal or social status, age, property or wealth.

The main legislative act in the field of determining the legal status of subjects of medical legal relations during the provision of psychiatric care is the Law of Ukraine on Psychiatric Care (2000). It defines the organizational and legal principles of providing people with psychiatric care, based on the priorities of rights and freedoms, establishes the obligations of the specified entities, regulates rights and obligations, etc. The law defines psychiatric care as a complex of special measures aimed at examining the state of mental health of the relevant patients on legal grounds, at the prevention and diagnosis of mental disorders, at treatment, care, supervision, and rehabilitation of the patients in question. Psychiatric care is provided on the basis of the principles of legality, humanity, respect for human and citizen rights, voluntariness, accessibility and, in accordance with the modern level of scientific knowledge, the necessity and sufficiency of treatment measures, medical, psychological and social rehabilitation, provision of educational and social services.

In every state there are people who suffer from such diseases which have a severe, chronic, progressive course, threaten human life and require vital and, as a rule, expensive treatment. For such patients, additional state guarantees (social, medical, financial, etc.) should be offered that should provide them with vitally necessary medical services and goods, in particular, pharmaceuticals, medical devices and special medical nutrition products, without which the lives and health of such patients would be in danger. Patients suffering from rare (orphan) diseases belong to a particularly vulnerable category of people, as their treatment is lifelong, vital and expensive.

In accordance with the Recommendation of the Council of the EU of 8 June 2009 on actions in the field of rare (orphan) diseases No. 2009/C 151/02, a rare disease is defined as a disease that poses a threat to human life or is characterized by a severe, progressive chronic course, the prevalence of which among the population is no more than 5 per 10,000 persons.

In 2021, the Order of the Cabinet of Ministers of Ukraine No. 1235-p on the approval of the plan of measures for the implementation of the Concept of the development of the system of providing medical care to patients suffering from rare (orphan) diseases for the years 2021-2026 (2021) entered into force. It provides for access of patients suffering from rare (orphan) diseases to methods of early detection of such diseases.

People suffering from rare (orphan) diseases are provided with medicines and appropriate food products for special dietary consumption. In order to plan and cal-

culate the volumes of pharmaceuticals, medical food products and medical devices necessary to support these population groups and to increase the level of availability of pharmaceuticals, methodological recommendations (2019) were approved for planning and calculating the demand for pharmaceuticals, special food products and medical devices that are financed from the national and local budgets.

Scientists emphasize that in the legal status of persons who receive palliative care in Ukraine, it is important to implement an integrated approach to the "transition" of patients from one type of care to another after a comprehensive interdisciplinary assessment of their condition, the presence of complications that impair the quality of life, disorders of vital functions, psycho-emotional, cognitive and cultural characteristics, etc. (Kurnytska, 2018).

There is also an opinion that in Ukraine we can talk about the formation of a new type of legal culture regarding persons who need palliative care (Belov and Gromovchuk, 2020). The general deterioration of the economic situation in Ukraine in recent years, inflation, political and social instability caused by the aggression of the Russian Federation, and other factors lead to the fact that the various benefits, pensions, and other benefits for persons receiving palliative care in Ukraine turned out to be rather insufficient.

The concept of palliative care is posted on the website of the World Health Organization, it was proposed by experts and evoked at the meeting of the Parliamentary Assembly of the Council of Europe during the discussion of innovative approaches to palliative care and the adoption of the corresponding resolution. Palliative care is interpreted as a comprehensive approach, whose purpose is to ensure the maximum quality of life of a patient with an incurable (fatal) disease and his/her family members, by preventing and alleviating suffering due to early detection and accurate diagnosis (assessment) of emerging problems, and the implementation of adequate treatments (for pain and life-threatening illnesses), as well as providing psychosocial and moral support (WHO. Palliative care, 2022).

The main principles on the basis of which medical care is provided to the terminally ill are the following: availability (palliative care should be provided to all terminal patients in such a way that they have equal opportunities), high quality (providing palliative care in accordance with national and international quality standards for the provision of such care), continuity (assistance to the terminally ill must be provided throughout the patient's illness and, if necessary, in various health care facilities, whose choice is determined by his/her condition), as well as ethical and humane attitude (entities who provide palliative care must follow moral and ethical rules).

The full-scale invasion of Ukraine by the Russian Federation caused mass mobilization, therefore, the number of persons with the status of military personnel

increased several times. The exercising of the rights of such persons in the field of health care is addressed in detail by a number of normative acts.

The Law of Ukraine on Social and Legal Protection of Military Personnel and Their Family Members (1991) provides guarantees for the exercise of the service members' right to health care. According to Viktor Zahovskyi and Volodymyr Livinskyi, in order to solve this problem, it would be expedient to determine the issue of medical support for the servicemen.

On October 31, 2018, the Cabinet of Ministers of Ukraine approved the Military Medical Doctrine to resolve the issue of regulating the medical care for servicemen. The doctrine lays the foundation for building a modern system of health care for the military, because all legislative acts regulating the medical support of the Armed Forces of Ukraine must be adopted on its basis. It also defines the tasks, principles, organizational structure and financing of the military health care system, as well as the responsibility of state authorities for regulating the implementation of the right of military personnel to medical assistance.

This normative legal act defines the concept of the Unified Medical Space, which consists in the unification of all state resources in the field of medical care under unified management and financing. In particular, the cooperation of the military medical services and the civilian health care system with the aim of providing medical support to the military personnel was emphasized.

According to the Law of Ukraine on the Status of War Veterans and Guarantees of Their Social Protection, 1993, combatants (Articles 5, 6) have the right to receive free of charge pharmaceuticals, medicinal products, immunobiological preparations and medical devices according to doctors' prescriptions; free basic dental prosthetic devices (with the exception of those made of precious metals); free health resort services in a state-run facility or compensation for the cost of private health resort services (Article 12).

Military personnel have the right to free professional medical care in military health care facilities. In the case of unavailability of military medical health care institutions, relevant wards or special medical equipment, as well as in urgent cases, medical assistance is provided by state or community health care institutions at the expense of the Ministry of Defense of Ukraine, or other institutions established in accordance with the laws of Ukraine, military formations and law enforcement agencies.

In the face of the full-scale invasion of Ukraine by the Russian Federation, it has been necessary to remodel the system of providing medical assistance to military personnel. Pursuant to the Decree of the President of Ukraine No. 64/2022 on the imposition of martial law in Ukraine dated 24 February 2022 and taking into account the operational situation of the presence of the wounded in the country as

of 25 February 2022, the Ministry of Health of Ukraine issued an order regarding the provision of medical assistance during martial law to military personnel participating in the operation of the United Forces dated 25 February 2022 No. 379. According to it, medical assistance is provided to all victims and wounded 24 hours a day without exception, hospitalization of the victims and wounded is carried out in the nearest health care facilities that are able to provide help, according to the type of injuries.

The government changed the systemic approach, namely, the treatment of the wounded is carried out not by specially defined entities, but by the entire system of health care institutions. Therefore, typical hospitalization measures in specialized health care institutions will return after the stabilization of the situation and a separate order of the Ministry of Health.

In connection with the need for treatment of the wounded abroad and psychological rehabilitation, the Law of Ukraine on Social and Legal Protection of Military Personnel and Their Family Members (1991) was amended in order to normalize the relevant processes. Thus, in April 2022, the Law of Ukraine on Amendments to Article 11 of the Law of Ukraine On Social and Legal Protection of Military Personnel and Their Family Members was adopted regarding the improvement of the procedure for providing medical assistance to servicemen under martial law (2022).

> During the period of martial law, military personnel who directly participate in the implementation of measures necessary to ensure the defense of Ukraine, protect the safety of the population and the interests of the state in connection with the military aggression of the Russian Federation against Ukraine, being directly in the areas of implementation of the specified measures, may be sent, in accordance with the recommendation of the military medical commission, to medical institutions located outside of Ukraine for further medical care or medical and psychological rehabilitation. The specified military personnel and their accompanying medical personnel are not subject to restrictions on Ukrainian citizens' travel outside Ukraine (Chapter 1).

The Cabinet of Ministers of Ukraine shall establish the procedure for providing military personnel with medical aid or medical and psychological rehabilitation in medical institutions outside of Ukraine and for payments for such medical aid services. The cost of travel and relevant medical assistance or medical and psychological rehabilitation will be covered by the state budget, except for the cases of providing the aforementioned assistance at the expense of the receiving party.

Another law dated 24 March 2022 amended, in particular, Article 11 of the Law of Ukraine on Social and Legal Protection of Military Personnel and Their Family Members (1991), introducing the right to free psychological assistance to servicemen. Psychological assistance is organized by the psychological services of military

units (subunits), and if necessary, it is provided in military medical health care institutions in accordance with the procedures approved by the central bodies of the executive power that have military formations and law enforcement agencies established in accordance with the laws of Ukraine under their command.

The analysis of the current state of medical services provided to the ATO/JFO ex-combatants in Ukraine (2022), carried out by the LLC "Ukrainian Center for Health Care" showed that the ATO/JFO ex-combatants are active consumers of medical services: after returning from military service, they often need access to mental health services, rehabilitation and other types of medical care. Failure to take into account the needs of the ATO/JFO ex-combatants in terms of medical care during the development of policies creates significant obstacles in the process of reintegration of the ex-servicemen into the civilian environment and affects the quality of their lives and the lives of their families. The authors of the study indicated that: "The right of the ATO/JFO ex-combatants to receive high-quality reintegration services (medical, medical, psychological and social) is violated, and the existing programs and benefits do not solve the main problems of this vulnerable group" (p. 1). The researchers also emphasized the lack of a clear definition of the concept of "ex-combatant" at the national level, as well as a simple and clear mechanism for the criteria for entering the system and determining the scope of services.

The martial law in Ukraine, the increase in the number of participants in the hostilities create an urgent need to develop a comprehensive program of medical care, rehabilitation and transition to civilian life at the state level. However, until the end of the active phase of the hostilities, the health care system is under stress, so it needs support rather than reform.

IV. The State of Ensuring Human Rights in the Field of Health Care in Ukraine Under the Martial Law

"The Russian Federation violates the rights of the residents of Ukraine to life and medical care guaranteed by the Geneva Conventions. Such actions pose a direct threat to the life and health of the civilian population, contradict the provisions of Article 14 of the Additional Protocol to the Geneva Conventions of 8 June 1977" emphasizes the Ombudsman Lyudmila Denisova (2 May 2022).

The unprovoked full-scale invasion by the Russian Federation in February 2022 aggravated the problems in the field of health care that had been occurring in Ukraine since 2014 in the temporarily occupied territories. The full-scale invasion by the Russian Federation on the territory of Ukraine triggered mass migration of

people, both within the borders of Ukraine and outside of the country. The number of those who have acquired the status of internally displaced persons has increased, and problems in the medical field have worsened.

In Resolution 75/192 Situation of human rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine (2020), the UN General Assembly expressed serious concern about the inadequate conditions in penitentiary institutions, given the overcrowding and lack of follow-up medical care, which exposes persons held in detention to the risk of spreading diseases, in particular, COVID-19 (Preamble).

The population's access to medical care is limited in the temporarily occupied territories. The Human Rights Commissioner of the Verkhovna Rada of Ukraine (2022) lists the cases where the invaders expelled patients from hospitals, appropriated medical equipment, instead, they were forced to provide medical services to the Russian military.

Also, Viktor Lyashko, the Minister of Health of Ukraine, stated during a briefing on 6 July: "Russia has never opened a humanitarian corridor for the delivery of medicines to the occupied territories" (2022).

Health care facilities, doctors, and ambulances are also the targets of attacks, which is a direct violation of the norms and customs concerning war established by international humanitarian law. Hospitals are looted or closed for various reasons during conflict; there is a severe shortage of medical equipment and medicines; cases of attacks on health care professionals and patients, as well as of cruel treatment of them, especially the wounded, were recorded.

Doctors and nurses providing care to the sick have taken shelter from shelling attacks in basements for many days. Even the advanced means of remote medical care, successfully implemented at the beginning of the pandemic, have not always worked, because a connection with a doctor can be easily lost.

The population of those territories that were quickly captured, found themselves without access to medical services. One of the common ways of communication between the patient and the doctor became the Telegram bots, which have provided free online consultations of a pediatrician, otolaryngologist, orthopedic traumatologist, neurologist, dermatologist, psychologist, cardiologist, gastroenterologist, etc.

It is indicative that regional military-civilian administrations (in peacetime regional state administrations) quickly mobilized doctors, and also informed the population about actions that can be taken when in the need of medical assistance.

Here are some recommendations in case of such a situation, where medical assistance would be necessary:

1. Learn the address and route to the nearest healthcare facility. Remember that you can leave the house or shelter only if it safe for you.

2. Have a first-aid kit nearby with everything you need and a supply of medicines that you take regularly. Do not go long distances without a first-aid kit.
3. Know how to provide first aid. Please remember, here we explain how to help a person in an emergency situation and keep him/her alive before the arrival of medics.
4. Read the life-saving instructions.
5. Follow the messages and recommendations regarding the provision of medical assistance to the civilian population from the military-civilian administration of your region in official channels. Check with your local authorities for alternative telephone numbers in the case the '103' number cannot be reached.

Keep calm, don't panic, check the news and be ready for any situation! (Cherkaska OMCA, 2022)

Despite all efforts, the number of people with psychosomatic diseases, which often occur or worsen due to stress, chronic fatigue and emotional overload, is increasing.

According to the system that was formed as a result of the medical care reform, the primary health care provider for the population today is the family doctor, who makes an electronic referral for a medical examination, and, if necessary, refers to secondary or tertiary medical care. Accordingly, in order to receive medical assistance, a person must be registered with a health care institution (a family doctor). Also, in the case of persons who, due to various reasons, are in a difficult situation or homeless and, accordingly, not registered with a health care institution, medical assistance is provided without the necessity to sign a suitable declaration.

Problems that may arise include: the presence of obstacles in making an electronic appointment with a doctor, lack of appointment slots for the nearest time in the doctor's schedule, long queues at the office/clinic, architectural obstacles in health care facilities and inaccessible transportation. They all limit access to primary medical care, in particular, the availability of family doctor services.

These problems can be addressed by increasing digitalization in health care and education, and by educating both medical staff and patients about the basics of working with digital tools to improve quality of life.

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Chapter 2

Particular Aspects of International Cooperation of Ukrainian Forensic Science Institutions with Foreign Specialists in Collecting, Studying and Processing Human Genomic Information and Conducting Molecular Genetic Analysis During Military Aggression Against Ukraine

ABSTRACT

The monograph deals with issues of organization and examination of physical evidence of biological origin (molecular genetic testing), which is becoming an increasingly relevant element in criminal proceedings.

The authors stress that the studying and processing of human genomic information, as well as molecular genetic testing performed in forensic science institutions both in Ukraine and abroad, can be considered from two interrelated perspectives: of the relevant issues of appointing and conducting molecular genetic testing in present legal conditions, and of the moral and ethical aspects of ensuring that human rights are respected in the use of genomic information and human biomaterial.

Also, an analysis of the practice of the European Court of Human Rights in the field of using genomic information and human biological material was carried out. The need for the legislative introduction of international standards in the process of molecular genetic testing has been identified and substantiated.

Keywords: forensic examination, forensic science institutions, protection of human rights, European Court of Human Rights, national and international legislation, genome, genomic information, human biological material, DNA forensics, DNA identification, molecular genetic testing

1. Introduction

Forensic examination as a criminal procedure has long been firmly embedded in the practice of criminal justice. The development of modern justice is almost impossible without the use of special knowledge, skills and abilities possessed by forensic experts and specialists—specialized competencies applicable in crime investigation (Juodkaitė-Granskienė, 2014, pp. 168-201). Developing and improving on the basis of the latest scientific and technical achievements, forensic examinations appear more and more often in criminal proceedings, helping to determine factual circumstances of a case.

Traditional forensic examinations are quite well developed and publicized (understood and used). However, today's challenges necessitate the development of new forensic areas (types). As a result, the issues of considering innovative forensic examinations are at the core of the scientific discourse, and they include collecting, studying and processing human genomic information as well as conducting molecular genetic testing.

At present, the following purposes of genetic databases have been defined in the course of their application:

– databases are repositories of genetic information;
– databases allow to link different episodes of criminal offenses in one criminal case or connect crimes committed at different points in time (sometimes quite distant);
– databases help establish the identity of a perpetrator, victim of a crime or identify unrecognized corpse.

The collection, study and processing of human genomic information as well molecular genetic testing in conditions of the present legal reality (wars, terrorism acts, etc.) are of particular relevance. Every year, criminals try to use more sophisticated ways to commit illegal acts and conceal evidence. It should be highlighted

that due to the changes in the modern world, various areas of illegal activity are also evolving, but thanks to the use of modern technologies, law enforcement agencies, with an active assistance of forensic science institutions, manage to effectively solve crimes. One of these methods is molecular genetic testing.

In the practice of law enforcement agencies of the Ministry of Internal Affairs of Ukraine, the main method of identifying a person is the study of papillary patterns of fingers. Thus, when committing a crime, perpetrators use gloves to avoid leaving fingerprints, so alternative methods of perpetrator identification are required. Dactyloscopy (fingerprint identification) is being replaced by molecular genetic testing, i.e., DNA research. As stated in Article 1 of the Law of Ukraine *About the state registration of human genomic information*, human genomic information consists of human genetic traits and data about them; molecular genetic research (testing) for the state-managed registration of genomic information consists in research on biological material to obtain genetic traits of a person. All data received by authorized entities will be stored in a database of human genomic information—a collection of organized data on genomic information in electronic form (About the state registration of human genomic information. Law of Ukraine, 2022).

By using 1/100 percent of person-specific DNA, scientists can make specific findings that have significant forensic value to the prosecution in a case. First, they can determine the genetic profile drawn from biological evidence found at a crime scene and compare it with the genetic profile of a suspect, thus allowing to connect the suspect with the crime. Then, a scientist can calculate the statistical probability that a random unrelated person within the human population could coincidentally have the same genetic profile as the one from the crime scene evidence. Such a determination helps the prosecutor prove that the person in question committed the crime. When performing forensic DNA testing, analysts first compare the profile generated from the crime scene evidence sample to the profile generated from the suspect's sample. To this end, the analyst examines 13 locations along the chromosome, known as loci, which the relevant international scientific community has identified as suitable for comparison purposes. Each locus contains two alleles, one from each parent.

When the STRs from a crime scene profile match the suspect's profile, it means that there is a match at each and every one of the 26 alleles (genes) that comprise the 13 loci. (The 13 core loci used for STR comparisons are: TPOX, D3S1358, FGA, D5S818, CSF1PO, D7S820, D8S1179, TH01, VWA, D13S317, D18S51, D21S11, and D16S539. Profiles are also developed at the amelogenin locus for sex determination. Currently, Profiler Plus ID and CoFiler typing systems are the kits predominantly used for analysis. MtDNA analysis only investigates a single locus, in comparison with the 13 used in nuclear DNA analysis.) The specificity of this forensic

identification is one of the most significant strengths of DNA. When scientists compare the crime scene evidence profile and the suspect's profile, they look for a 100-percent match of the two profiles at the 13 loci. This comparison is not a statistical determination, but rather a scientific one. DNA analysts, however, do speak in terms of statistical probability when describing the frequency of finding a certain profile among human populations. There are approximately six billion people on Earth. Comparing DNA at 13 loci can generate a random match probability greater than six billion. In other words, the analyst may testify that there is no likelihood that anyone else, other than the suspect, can have the same genetic profile as the profile generated from both the crime scene evidence and the suspect. By calculating the random match probability, scientists can conclude from whom the DNA originated, a method called DNA source attribution. In other words, these statistical formulae allow the analyst to demonstrate, using 13 loci in STR testing, that an individual profile matching the profile generated from the crime evidence will not be found in any other unrelated person on earth (Kreeger and Danielle, 2003).

Ukrainian law enforcement structures have been using certain types of genomic analysis in their practice for a long time. But now, in the context of the armed aggression, this issue reaches a new level of development and use. After all, right now molecular and genetic testing allows solving a number of urgent needs for identification of people who committed a criminal offense or are missing; identification of unrecognizable human corpses, their remains and human body parts (this especially applies to our defenders who died on the battlefield or civilians who were in the temporarily occupied territories). Thus, for example, only with the help of collecting and processing human genomic information, as well as carrying out molecular genetic testing, it was possible to identify the Ukrainians who died in Bucha (Kyiv Region). Approximately two hundred people have not been identified yet. Their relatives cannot recognize them, a fact that demonstrates the extent to which their bodies have been mutilated by the Russians. That is why DNA testing is the only solution. It is carried out by French forensic experts along with our experts (*The Body Is Completely Burnt…*, 2022).

In the four months of the war, more than 6,000 identification examinations have already been scheduled, of which about 40 percent have already been completed. That is why the creation of a tool for accumulating and systematizing this information, providing a legal status that allows to use it as an evidentiary basis in the process of proving Russian crimes against Ukraine, is extremely urgent today.

2. Literature Review

Particular issues of collecting, studying, and processing human genomic information, as well as molecular genetic testing in forensic science institutions were studied in research papers by such domestic and foreign scientists as O. M. Bandurka, Z. Bernachek, R. K. Bichurin, T. V. Hanzha N. M. Diachenko, A. Ivanovich, M. P. Klymchuk, O. M. Kliuiev, S. M. Lozova, O. V. Matarykina, H. V. Mudretska, V. V. Nevhad, M. V. Nechyporuk, E. B. Simakova-Yefremian, A. Solash, H. O. Spytsyna, N. Ye. Filipenko, O. V. Tsykova, K. Shpindler, M. H. Shcherbakovskyi, G. Juodkaitė and others.

The problems of improving expert activity, the issues of collecting, studying and processing human genomic information as well as conducting molecular genetic testing in forensic science institutions can be studied from various viewpoints: for example, by analyzing an issue's history, researching legal matters from a proper perspective, etc. Each of the indicated research areas is fairly interesting and seems to be promising. However, the mentioned areas are very comprehensive and at the same time research a phenomenon only from one angle, so let us focus on the issues of applying the systemic approach to the indicated issue as a method allowing us to carry out a systemic and structural analysis of the phenomenon being studied, considering it in an integrated manner. The range of scientific developments on this issue is quite wide, but not all problematic issues of forensic examination application have been resolved: some of them have only been identified, while some are still debatable and almost undeveloped. But the main issue of such activity is an almost complete lack of legislative framework. Therefore, in no way detracting from the scientific and practical value of the published research papers on the issue under consideration, let us stress that the issue of collecting, studying and processing human genomic information, as well as conducting molecular genetic tests, necessitates comprehensive coverage to take into account provisions of current Ukrainian and foreign legislation, professional theoretical research, problems of practice and implementation of international experience. The problems of moral and ethical collection and application of such information constitute a separate important issue.

For this reason, the topic that will be examined in this monograph turns out to be highly relevant for Ukrainian science and law enforcement practice.

3. Main Content Presentation

The History of Development

The shift in the EU policy towards a common forensic science area is not only a significant step in the development of forensic science, but it also highlighs the previously unidentified need for forensic harmonization and its role in ensuring human security. It is now recognized that only the harmonization of forensic science and law in general can guarantee the existence of the fundamental values of a democratic society: freedom and security (Kurapka, Malevski and Matulienė, 2016, p. 354). And this is a highly important postulate, especially when it comes to protection of an individual in the process of collecting, studying and processing human genomic information as well as conducting molecular genetic analysis.

Molecular analysis answers the question: what does the substance under study consist of? It is performed using gas chromatography and chromatography of high pressure fluids, chromatography spectrometry and molecular mass spectrometry, molecular spectral analysis (Didyk, 2003, pp. 34-36). DNA analysis is a promising modern method widely applied by Interpol and forensic laboratories around the world. There are two directions in DNA profiling: one is the matching of the biological samples found at a crime scene and those collected from the suspect; the other is the determination of kinship by DNA (routinely used in civil cases to establish paternity) (Mullis and Faloona, 1987).

In the case of performing a retrospective analysis of the origin and development of molecular genetic analysis (also called DNA fingerprinting) and creation of specific databases, it can be stated that in fact the first forensic DNA database was established in 1986-1987 in England when searching for a serial rapist and murderer (after two teenage girls had been raped and killed in Leicestershire within three years). In a short time, in two neighboring towns the police collected blood samples of the whole male population in the corresponding age group (about 5,000 people) who agreed to give it voluntarily. This was the first case of DNA fingerprinting performed to identify the perpetrator. Unfortunately, the undertaken activities did not produce a positive result as the killer replaced his own blood with another person's biological material. This manipulation was exposed a few years later. The entire case, which is considered to be the first application of DNA analysis in criminal investigations, is described in the book *Blooding* by Joseph Wambaugh (Wambaugh, 1989).

Given the significance of such information to law enforcement, DNA databases based primarily on the so-called single-locus VNTR polymorphism that can be conditionally viewed as the first generation of commonly used markers for DNA profil-

ing. Step by step, information on DNA polymorphism of criminals was accumulated at crime scenes, and a number of laboratories stored DNA profiles based on VNTR loci for a total of more than 5,700 individuals in the United Kingdom until 1995. In April of the same year, the National DNA Database (NDNAD) of England and Wales was launched, becoming the world's first nationwide DNA database based on the second generation of STR locus markers. The launch of such a database was preceded by the Criminal Justice and Public Order Act passed in 1994 by the British Parliament which became the legal basis for the NDNAD. This law allowed the police take DNA samples without the consent of any person accused of committing an offense classified as "registered," as well as search for information in a database of relevant DNA profiles. By December 1995, NDNAD had already stored 19,000 DNA profiles and exposed more than 100 criminals while searching the database, due to matching polymorphism data of their DNA with the ones stored in this database. The experience of using the British national forensic DNA database shows an average increase in detection by 60 percent and 3-4 times (National DNA Database Strategy Board Annual Report, 2017) increase in detection of petty offenses.

Considering the cutting-edge experience of England in detection of criminal offenses and felonies, similar forensic DNA databases were launched in the European Union and other countries. To date, forensic DNA databases are already used in 69 countries of the world, and in 34 countries similar databases are at different stages of development (Machado and Granja, 2020). For example, some of the first such databases were launched in 1996 in Northern Ireland, Scotland and New Zealand. In 1997, they were launched in the Netherlands and Austria, in 1998 in Germany and Slovenia, in 1999 in Finland and Norway, in 2000 in Denmark, Switzerland, Sweden, Croatia, and Bulgaria, in 2001 in France and the Czech Republic, in 2002 in Belgium, Estonia, Lithuania, and Slovakia, in 2003 in Hungary and Latvia (Santos, Machado and Silva, 2013).

Interpol has its own automated genetic database, the DNA Gateway, which contains DNA profiles provided by member countries. DNA Gateway was launched in 2002 and stores more than 242,000 DNA profiles from 85 member countries (INTERPOL Official website). Unlike other databases, the DNA Gateway is used only to compare and share information and does not allow to identify a particular person because it does not contain personally identifiable information. It functions as a stand-alone database and is not linked to other Interpol databases.

In the late 1980s, a number of US states decided to launch similar DNA databases and when some other states followed their example, the FBI developed the Combined DNA Index System (CODIS) which allowed to exchange data and their use by other states. It was first applied in court in 1991, in Minnesota. In 1992, the US Armed Forces Institute of Pathology launched a DNA bank designed to identify

the military personnel killed in Iraq during Operation *Desert Storm* of 1991. The peculiarity of this repository is that it stores blood samples of servicemen but not their DNA data that are obtained as unidentified remains found during military operations become available.

The analysis of the CODIS system that was launched as a pilot program in 1990 showed that as of October 1993, a total of 141,870 DNA samples of criminals analyzed on the basis of VNTR polymorphism had been collected in several states involved in this tested system. The best such work has been done in California and Virginia (37,000 and 70,000 DNA profiles, respectively). By 31 December 1993, legislative decisions on the operation of DNA databases had been adopted in 19 US states. A prominent role in further development of such DNA databases and their dissemination throughout the United States was played by the DNA Identification Act of 1994. By the end of 1997, the CODIS database had increased by another 85,000 samples presented as VNTR loci. And at the time of the transition of the CODIS system into another type of polymorphism in the form of STR-loci in different US states, an aggregate of more than 230,000 records of VNTR polymorphism were available as of July 1998.

As a result, DNA databases based on STR polymorphism started to emerge in the USA. The basis for operation of the new national DNA database in the USA is the DNA Identification Act of 1994 (42 USC § 14132), which enshrined the creation of the National DNA Index System (NDIS) covering convicted offenders, arrestees, detainees, forensic casework samples, unidentified human remains, missing persons, and relatives of missing persons. Similar databases have been launched at the local level (Local DNA Index System: LDIS) and the state level (State DNA Index System: SDIS) in compliance with state laws. All of them make up a single system called the Combined DNA Index System: CODIS (CODIS and NDIS Fact Sheet – FBI). Since July 2004, CODIS has been operating in the United States, in all 50 states and the District of Columbia, although in October 1998, when the system was first launched based on 13 STR loci, it was applied for forensic purposes in only nine states but already stored about 119,000 DNA profiles, some of which were received from previously available DNA samples, analyzed on the basis of DQA1/PM- and VNTR-loci.

CODIS was designed to compare a target DNA record against the DNA records contained in the database. Once a match is identified by the CODIS software, the laboratories involved in the match exchange information to verify the match and establish coordination between their two agencies. The match of the forensic DNA record against the DNA record in the database may be used to establish plausible grounds to obtain an evidentiary DNA sample from the suspect. The law enforcement agency can use this documentation to obtain a warrant authorizing the collection of a known biological reference sample from the suspect. The casework labora-

tory can then perform a DNA analysis on the known biological sample so that this analysis can be presented as evidence in the court.

Following the USA, the CODIS system based on 13 STR-loci was adopted in Canada in December 1998 and an analogue DNA database, *National DNA Data Bank of Canada* (NDDB) was launched, but its first practical application took place in mid-2000. At the same time, the NDDB is very similar to the three-tier CODIS system in the USA.

European countries also do not stand aside from collection, study, classification and use of personal genomic information. ENFSI members include 73 organizations (forensic science institutions, forensic laboratories) from 39 European countries (Official website ENFSI). It is the world's largest international organization of forensic science institutions that has gained international recognition. Among the countries which institutions belong to the European network are Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Great Britain, Hungary, Greece, Georgia, Denmark, Spain, Ireland, Italy, Lithuania, Latvia, Montenegro, the Netherlands, Norway, Poland, Romania, Russia,[1] Serbia, Slovakia, Slovenia, Turkey, Ukraine, Sweden, Switzerland, etc. (Linnyk and Omelchuk, 2017, pp. 236-241).

The ENFSI Purpose declared in its Constitution is to be at the forefront of the world in terms of the quality, development and delivery of forensic science across Europe. A core ENFSI activity is the organization's strive to earn credibility in the field of forensic science in Europe and the world by enhancing the quality of forensic services at all stages of court proceedings: from the crime scene to the court (Official website ENFSI).

The 31st ENFSI Annual Meeting organized by the Italian Forensic Science Police Service was held on 29-31 May 2018 in Rome (Italy); it was attended by

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[1] The Council of the European Network of Forensic Institutions (ENFSI) made a decision to suspend the membership of the Russian Federal Forensic Center (Moscow) and the North-West Regional Forensic Center (St. Petersburg). The decision was taken at the initiative of the leadership of the Kyiv Research Institute of Forensic Expertise of the Ministry of Justice of Ukraine (KNDISE). In addition to the exclusion of forensic expert institutions of the Ministry of Justice of the Russian Federation, the ENFSI Council also made a decision to exclude all Russian scientists from the European Academy of Forensic Science (EAFS), as reported by Pinelopi Miniati, Chairperson of ENFSI, in a letter sent to KNDISE. "NFSI´s thoughts are with Ukraine and especially the four Ukrainian ENFSI member institutes. We hope for this pointless war to cease without any more victims on any side," Pinelopi Miniati said in the letter. Victories on the scientific front: forensic expert institutions of the Russian Federation are excluded from international specialized organizations. Publication date: 20.03.2022. URL: https://lexinform.com.ua/v-ukraini/noviny-kompaniy/peremogy-na-naukovomu-fronti-sudovo-ekspertni-ustanovy-rosijskoyi-federatsiyi-vyklyucheni-z-mizhnarodnyh-profilnyh-organizatsij/

representatives of 55 forensic science institutions from 31 European countries. Attention was drawn to exchanging experience and the latest R&D projects in the following areas: DNA analysis, drug analysis, document verification, tools identification, ballistics and forensic visualization (face recognition, photogrammetry, portraiture). When we mention the ENFSI network, it is important to state that ENFSI is a monopoly organization in the European Union in the field of development of forensics in the member states of the European Union and the states that intend to become members. In 2009, the European Commission decided to grant ENFSI the monopoly status concerning forensic science in Europe (European Forensic Initiatives Centre—EFIC Foundation). The Commission tends to turn to ENFSI in situations when information or advice on forensic science is needed. Also, as a result of this decision, the Commission has allocated some funds for ENFSI to spend on various projects executed through specific action grants. As a monopoly organization in the European Union in the field of forensic sciences, ENFSI started the EFSA 2030 project at the beginning of 2022 (Vision of the European Forensic Science Area 2030). Through this project, entitled "Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies," ENFSI has a vision to ensure the quality, development and presentation of forensic science with the imperative of foresight to recognize scientific and technological trends that will concern the forensic community in the years to come. The vision of EFSA 2030 aims to include the upcoming trends in forensic science in the application of new methods for solving (so far) unsolvable forensic issues, as well as the challenges brought by the application of new methods, techniques and technologies. The purpose of the vision is to harmonize and balance the development of forensic sciences, which will contribute to a more effective administration of justice in Europe. Important for this paper is Article 2.2 of the Vision which regulates the handling of forensic databases, and therefore the DNA profile database:

> 2.2. Forensic data sharing across agencies and jurisdictions is ongoing and is predicted to increase in the future. Where relevant, the forensic community should study the differences in data collection methods and file formats which hinder the exchange of information, vital to maximizing the use of forensic analysis and comparison. ENFSI supports the harmonization of formats in datasets and offers tools to share reference data.

Further study of professional literature helped find out that apart from ENFSI there are other international organizations in the world today. They address the issue of the development and enhancement of forensic science activities, and international cooperation in this field:

1. The International Association for Identification (IAI) is one of the largest and most authoritative professional forensic associations. Currently, IAI, which has become one of the most prestigious professional associations in the world, has more than 5,000 members from 69 countries. It is chaired by a 15-member Board of Directors headed by the President. The IAI has 29 standing committees. In addition, credible commissions for certification of forensic experts in seven specializations have been established. The association has 45 branches in various US states and other countries (Nechyporuk et al., 2021, p. 836).
2. The International Society for Forensic Genetics was created in 1989 in Germany to advance achievements of genetics in forensic science and justice. The Society has assumed the role of a leading organization in the field of forensic genetics and coordinates research on genetic markers for criminal justice purposes. It was expected that the opening of European borders within the EU could lead to an increase in international crime rate, and forensic geneticists would need standard techniques of research and documenting results. At present, the list of members of the Society includes the main laboratories of forensic genetics of leading forensic institutions in European countries, such as Austria, Belgium, Denmark, Great Britain, Finland, France, Greece, Ireland, Italy, Netherlands Norway, Portugal, Scotland, Spain, Sweden and Switzerland. This group implements a significant project: creation of a DNA database of different populations (Nechyporuk et al., 2021, p. 65).
3. The International Crime Scene Investigators Association was established to assist individuals and organizations specialized in crime scene investigation. Scene investigation is a complex field and requires knowledge and skills in almost all forensic disciplines.
4. The Association for Crime Scene Reconstruction started to operate as an association of a group of experts in the states of Oklahoma and Texas (USA). These experts realized the necessity for a multidisciplinary investigation of an entire crime scene with the aim to recreate many elements of a criminal event and to detect and preserve physical evidence. The Association members include representatives of law enforcement agencies responsible for crime investigation, forensic experts and teachers. Currently, the association has more than 550 members. Among other things, the objectives of the Association's activity are as follows: encouraging exchange of information and procedures (techniques) vital for reconstruction of crime scenes; encouraging research of the existing and development of new improved methods of crime scene investigation for reconstruction; promotion of educational programs designed to raise qualifications of forensic experts-practitioners in the field of crime scene reconstruction; provide the Association members with the opportunity of consultation with colleagues in

particular cases; publication of a newsletter; enhancing cooperation and relations between agencies and representatives of different forensic science institutions; ensuring that the Association members can interact with forensic experts of various expert specializations within the Association and disseminate information about themselves (Nechyporuk et al., 2020, p. 218).

5. In 2015, Forensic Science Ireland adopted a strategic plan for 2015-2018. Apart from the improvement of forensic support of the criminal justice system, the plan called for the creation of a DNA database and initiation of a number of organizational measures, and further international cooperation in the field of forensic science (FSI Strategic Plan 2015-2018).

A significant aspect of the international cooperation of Ukrainian forensic science organizations with foreign experts in collecting, studying and processing human genomic information as well as conducting molecular genetic analysis is the establishing of international and regional reference-information databases of databases international forensic science companies, foreign forensic science institutions (Filipenko, Bublikov and Obolientseva-Krasyvska, 2021, pp. 10-16).

These problems could be tackled and the full potential of point-of-care and mobile forensic analyses could be realized if measurement devices could be operated in an integral forensic network. Through the network, the necessary calibration and quality control measures could be applied that would enable reliable forensic instrumentation for assuring further usage of findings as admissible and reliable evidence. The network would allow forensic experts to assess data generated outside the forensic laboratory and to provide direct assistance to the investigators on location (crime scene). From these activities, it also becomes apparent for which samples a more detailed follow-up examination is required at the forensic laboratory. The forensic expert force is thus used more effectively and findings can be fed into the platform creating a continuous cycle of platform and data development. This approach would combine central data collection allowing forensic intelligence and knowledge management with rapid and efficient decentralized forensic analysis. This novel concept, although technologically challenging, could lead to a step change in the efficiency and efficacy of the forensic information gathering process. It could also cause a paradigm shift in the role of forensic institutes and forensic experts in the criminal justice system: a shift towards a new role for forensic institutes and laboratories as custodians of the forensic platforms and point-of-care and portable equipment and methods. It would also allow forensic institutes to develop powerful forensic intelligence tools to discover potential case and evidence connections, to better understand criminal activities, to monitor and optimize policing, to improve the efficiency of forensic investigations and to assist in crime prevention and disruption (Kloosterman et al., 2015).

For the effective usage of forensic databases, not only proper legal bases are necessary but also bilateral agreements among states are vital. In order to combat terrorism in the most efficient way, seven countries of the European Union (Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain) signed a convention on 27 May 2005, in the city of Prüm in the Federal Republic of Germany, which ensures, in particular, the exchange of DNA profiles and fingerprints. The Council of the European Union accepted this initiative by adopting the Decision of the European Union Council 2008/615/JHA dated 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The convention ensures exchange of forensic data between EU member states in the field of DNA profiles, fingerprints and vehicle registration data.

Given the significance of that document, we would like to cite specific provisions of the convention, in particular those related to forensic databases. For example, Chapter 2 *DNA profiles, fingerprint material and other data*, Article 2 *Establishment of national DNA analysis files* stresses: Member States shall open and keep national DNA analysis files for the investigation of criminal offences. Processing of data kept in those files, under this Decision, shall be carried out in accordance with this Decision, in compliance with the national law applicable to the processing. For the purpose of implementing this Decision, the Member States shall ensure the availability of reference data from their national DNA analysis files. Reference data shall only include DNA profiles established from the non-coding part of DNA and a reference number. Reference data shall not contain any data from which the data subject can be directly identified. Reference data which is not attributed to any individual (unidentified DNA profiles) shall be recognizable as such.

Article 3 *Automated searching of DNA profiles:*

1. For the investigation of criminal offences, Member States shall allow other Member States' national contact points access to the reference data in their DNA analysis files, with the power to conduct automated searches by comparing DNA profiles. Searches may be conducted only in individual cases and in compliance with the requesting Member State's national law.
2. Should an automated search show that a DNA profile supplied matches DNA profiles entered in the receiving Member State's searched file, the national contact point of the searching Member State shall receive in an automated way the reference data with which a match has been found. If no match can be found, automated notification of this shall be given.

Article 4 *Automated comparison of DNA profiles:*

1. For the investigation of criminal offences, the Member States shall, by mutual consent, via their national contact points, compare the DNA profiles of their unidentified DNA profiles with all DNA profiles from other national DNA analysis

files' reference data. Profiles shall be supplied and compared in automated form. Unidentified DNA profiles shall be supplied for comparison only where provided for under the requesting Member State's national law.

2. Should a Member State find that any DNA profiles supplied match any of those in its DNA analysis files, it shall, without delay, supply the other Member State's national contact point with the reference data with which a match has been found.

Article 7 *Collection of cellular material and supply of DNA profiles*

Where, in ongoing investigations or criminal proceedings, there is no DNA profile available for a particular individual present within a requested Member State's territory, the requested Member State shall provide legal assistance by collecting and examining cellular material from that individual and by supplying the DNA profile obtained, if: 1) the requesting Member State specifies the purpose for which this is required; 2) the requesting Member State produces an investigation warrant or statement issued by the competent authority, as required under that Member State's law, showing that the requirements for collecting and examining cellular material would be fulfilled if the individual concerned were present within the requesting Member State's territory. 3) under the requested Member State's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled (Ivanović and Merike, 2011).

Meanwhile, it should be stressed that this convention is open for accession by any member state of the European Union. After accession, all states will also be obliged to implement it into their national legislations. According to the convention, only member states have access to forensic databases (in the scope of DNA profiles and fingerprints). However, EU candidate countries must thoroughly prepare to join the forensic database through the Prüm Convention. That is particularly true for accreditation of forensic laboratories in the field of DNA profiles and fingerprint analysis in compliance with the ISO 17025 international standard.

If we consider domestic experience of processing human genomic material and conducting molecular genetic testing, the widest network of forensic genetics laboratories is owned by forensic science institutions of the Ministry of Internal Affairs of Ukraine. In particular, molecular genetic analysis is performed at the State Scientific Research Forensic Center of the Ministry of Internal Affairs of Ukraine, forensic science centers of the Ministry of Internal Affairs of Ukraine in the Kyiv, Kharkiv, Vinnytsia, Zaporizhzhia, Lviv, Mykolaiv, and Ivano-Frankivsk regions. The functions of keeping automated forensic records of human genetic traits are also fulfilled by the divisions of Expert Service of the Ministry of Internal Affairs of Ukraine (Stepanyuk, 2019, p. 175).

The main object of forensic molecular genetic analysis is human DNA, i.e., molecules contained in the nucleus (nuclear DNA) and in the cell mitochondria (mito-

chondrial DNA). At the same time, it is worth noting that nuclear DNA, which is the basis of a chromosome, contains the majority of information necessary to determine individual genetic traits of a person, that is why it is of key importance in solving identification tasks. During forensic investigation, human cells with nuclei from which it is possible to isolate DNA can be found in traces of blood, saliva, semen, hair, particles of epithelium, and also parts of organs and corpse tissues. When identifying, seizing and storing objects of biological origin during an investigation of the crime scene and other investigative (search) actions, the investigator, prosecutor, specialists and all other participants must observe measures aimed at preventing destruction or contamination of the trace evidence (Peculiarities of Collecting…, 2016, p. 35).

Despite a well-established practice of conducting this forensic examination and working with personal genomic information, in the legislative field, statutory provisions of such activity appeared relatively recently. As we noted earlier, the provisions of the Draft Law of Ukraine On State Registration of Human Genomic Information were adopted on 14 April 2022 [27], immediately stirring broad response of both scientists and lawyers.

Let's look at some of the most controversial provisions of this Draft Law.

1. Availability of a huge number of corruption risks.

According to Article 3 of the Draft Law, one of the principles which state registration of genomic information must comply with is a combination of voluntarism and obligation. In this regard, the Draft Law clarifies the categories of persons whose genomic information is subject to obligatory state registration (Article 5). In addition, Article 6 of the Draft Law also stipulates that citizens of Ukraine, as well as foreigners and stateless persons, have the right to voluntary state registration of genomic information upon their written statement or a written statement of a person specified in Parts 3 and 4 of Article 6 of the Draft Law. Meanwhile, Part 1 of Article 8 of the Draft Law stipulates the obtaining of biological material from persons who voluntarily join or are called up for military service and from military personnel by a person designated by a military medical commission. At the same time, persons who voluntarily join or are called up for military service and servicemen are not specified in Article 5 of the Draft Law containing an exhaustive list of individuals who are subject to compulsory state registration of genomic information. This category of people is not specified in Article 6 of the Draft Law that defines grounds, procedure and circle of persons who can undergo the procedure of voluntary state registration of genomic information. On the other hand, the requirement laid down in Part 2 of Article 8 of the Draft Law on the need to obtain biological material from servicemen every eight years, though does not contain a clear regulation that obligates military personnel to undergo this procedure, it nevertheless demonstrates its biding nature for the indicated category of people.

Furthermore, Article 8 of the Draft Law does not directly stipulate that such obtaining of biological material from persons who voluntarily join or are called up for military service and from military personnel is carried out specifically for state registration of genomic information of these people. It is only mentioned that such obtaining will be managed by a responsible person of the military medical commission for the purpose provided for in paragraphs 3-5, Part 1, Article 4 of the Draft Law, i.e., for searching for missing persons, identification of unrecognized bodies (remains), identification of individuals who cannot provide information about themselves due to their health or age. At the same time, the purpose specified in Article 8 of the Draft Law for obtaining biological material from persons who voluntarily join or are called up for military service and from military personnel does not in any way disclose the manner of its further use. It has not been clarified, in particular, whether the molecular genetic analysis (testing) will be performed on the biological material of all servicemen without exception for further state registration of their genomic information, or whether the material will only be obtained for the purpose of storing it, and a corresponding forensic examination will be conducted optionally, only with regard to certain individuals from the pool of military personnel to fulfill the purpose specified in paragraphs 3-5, Part 1, Article 4 of the Draft Law. At the same time, the provisions of the Draft Law do not directly specify whether state registration of genomic information will be compulsory for them or not. Meanwhile, given the imperative nature of the provisions of Article 8 of the Draft Law, the indicated doubts may allow abuse of authority among the authorized persons in military medical commissions and may result in violation of rights of persons who voluntarily join or are called up for military service and of military personnel.

In addition, the Draft Law does not define sources of financing the cost of molecular genetic analysis (testing) of biological material obtained from such individuals for state registration of genomic information. The Draft only stipulates that the procedure of obtaining biological material from persons who voluntarily join or are called up for military service and from military personnel is financed from the state budget.

Meanwhile, Article 9 of the Draft Law stipulates that molecular genetic analysis (testing) for implementation of compulsory state registration of genomic information is financed from the state budget, and the same forensic examination for implementation of voluntary state registration of genomic information is conducted on paid basis, in compliance with the procedure governed by the Cabinet of Ministers of Ukraine.

The legal doubts concerning the procedure for acquiring biological material from persons who voluntarily join or are called up for military service and from military personnel, the procedure for state registration of genomic information, the sources

of funding for molecular genetic analysis of their biological material, as well as the procedure for registration of genomic information of the indicated category of persons, constitute corruption-fostering factors, and in the case of realization of the specified provisions of the Draft Law in the proposed version, they may lead to mismanagement of public budget funds or unjustified charging payments for molecular genetic analysis from persons who voluntarily join or are called up for military service and from military personnel (On the adoption of the draft Law of Ukraine on State Registration of Human Genomic Information).

2. Inconsistency between the provisions of the Draft Law and current Ukrainian legislation.

The acquired genomic information will be stored in a special database whose operation and administration is entrusted to the Ministry of Internal Affairs. At the same time, the procedure for processing genomic information and accessing it will be established separately by the Cabinet of Ministers of Ukraine (paragraph 5 of Article 5). This widely discredit government officials on adopting the regulation that, among other things, do not meet the requirements of Article 6 of the Council of Europe Convention 108+ and EU Directive 2016/680 (as concluded in the course of the anti-corruption examination of the Draft Law of Ukraine On State Registration of Human Genomic Information) on the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences. These documents require that the procedure for processing corresponding categories of data is stipulated by law. In particular, the rules of data pseudonymization, its protection, and unauthorized transfer of responsibilities by information holders are the fields that call for further improvement. The body responsible for the collection of genomic information will be the one that is often responsible for investigation conducted by the Ministry of Internal Affairs. This results in a conflict of interest that may give rise to abuse. In the opinion of the authors of this article, the resolution of the dilemma of whether abuse can occur in such cases is prevented by the accreditation of forensic laboratories according to the international standard ISO 17025. Accreditation according to the ISO 17025 standard implies impartiality in the work of the laboratory.

The draft law also provides for the regulation of relations in accordance with the criminal procedure norms, but currently does not presuppose corresponding amendments to the Criminal Procedure Code. The rules proposed by the Draft Law, which regulate the process of acquisition, storage and destruction of biological material, include reference rules to the criminal procedural legislation. Such a proposal is somewhat inaccurate, as the criminal procedural legislation of Ukraine includes provisions on acquisition of biological samples from a suspect, witness or victim, provided that forensic medical examination is not required for that purpose

(Articles 241, 245 of the Criminal Procedure Code). In other cases, if necessary, a forensic examination may be ordered by the decision of the investigator. Obligatory involvement of a person in forensic medical examination is implemented by the decision of the investigating judge or court (Part 3, Article 242 of the Criminal Procedure Code). However, such issues as storage and destruction of biological material obtained for state registration of genomic information fall outside the scope of legal regulation of the Criminal Procedure Code. Consequently, it will be impossible to put in practice a number of the above reference standards of the Draft Law, and therefore they need to be further adjusted.

3. Major gaps in the moral and ethical issues.

Ethical issues arising in relation to the establishing and application of genomic information database can be summarized as follows: 1) issues related to the collection and storage of DNA samples and information drawn from them; 2) issues associated with the use of genetic information obtained as a result of such analysis; 3) issues related to access to stored information.

As mentioned above, genetic data is a special type of personal information about a person, considerably different from other types of personal data. Misuse of genetic information is such a serious problem that all laws of EU countries on data protection have been amended to limit the use of data collected by the police to the purpose for which the evidence was collected (Wallace et al., 2014, pp. 57-63). The legislation of many countries (e.g., countries of the European Union, Republic of Korea, USA, etc.) stipulates sanctions for unauthorized access to information stored in DNA databases, violation of its integrity, destruction and disclosure of data or their misuse. Inclusion of similar guarantees into Ukrainian legislation will boost public confidence that genomic information will be used legally and in a way that does not limit human rights.

The right to collect information based merely on suspecting a crime provides ground for abuse. An innocent person can be accused of committing a crime only for the purpose of obtaining biological material from him/her.

Genomic information will be collected, in particular, from people who committed suicide, as well as from those involved in violating the rights of patient or duty to rescue, forced marriage, children exploitation, etc. These are crimes of minor or moderate severity. It is not feasible to justify the need to collect genomic information in such cases.

1. Genomic information is included in the category of "sensitive" personal data (What is wrong with the processing of genomic information in the bill № 4265?) whose processing is prohibited. The Law On Protection of Personal Data provides an exhaustive list of grounds for processing such sensitive categories of individual personal data. Indeed, paragraphs 1 and 7 of the second part of Article 7 allow

such processing, provided that: it is conducted on the condition that the subject of personal data provides explicit consent to such data processing (which covers cases of voluntary registration), or, concerns convictions, fulfillment of the tasks of crime detection and investigation, counterintelligence activities or counteracting terrorism, and is carried out by a state body within the bounds of its authority determined by law. At the same time, the purposes of genomic information processing set out by the Draft Law do not comply with the purposes established by the Law On Protection of Personal Data, and thus the Ministry of Internal Affairs will be able to collect much more information.

Issues related to research on genetic contributions to antisocial behavior and victimization necessitate individual legal regulations. In this regard, the possibility of using information stored in a database for research should also be stipulated by law (Filipenko and Spitsyna, 2022).

Law Enforcement Practice

Law enforcement practice shows that organization and conduct of forensic examination of physical evidence of biological origin (molecular genetic testing) are becoming an increasingly important element in criminal proceedings.

Having analyzed relevant professional literature and practice of collecting, studying and processing human genomic information, as well as peculiarities of conducting molecular genetic testing in forensic science institutions of Ukraine and abroad, we believe that this issue can be viewed in two interrelated perspectives:

– current issues of appointing and conducting molecular genetic testing in current legal reality;
– moral and ethical aspects of ensuring human rights in the use of genomic information and human biomaterial.

Let us consider them in more detail.

Addressing the *first perspective*, we would like to emphasize that one of the most significant elements of the system of forensic support for collection, study and processing of human genomic information, as well as conducting molecular genetic testing, are the organizational principles of performance for a specific type of forensic examination. Professional and competent organization of the process of ordering and performing forensic examination is one of the basic conditions for efficient pretrial investigation, especially in the cases related to human genomic material. In our opinion, legal scholars do not always address this perspective properly. Meanwhile, expert activity on the study of human genomic information, as well as performing

molecular genetic testing, is very difficult and requires qualified use of modern technical means and methods (Galan and Chornyi, 2017).

The issues connected with organizing this area of expert activity are quite comprehensive. For example, Article 4 of the Law of Ukraine on Judicial Examination states: guarantees regarding independence of the forensic expert and accuracy of his/her conclusions are ensured by the procedure for appointing a forensic expert specified by law; the prohibition to interfere with the process of conducting forensic examination under the pressure of legal liability; the existence of forensic science institutions, independent from bodies responsible for crime detection and investigation activities, pre-trial investigation bodies and the courts; creation of necessary conditions for the activity of forensic experts, providing them with material support; criminal liability of a forensic expert for knowingly providing a false testimony and refusing to perform duties without valid reasons; the possibility of re-examination; the presence of process participants in the cases provided by law during forensic examination (About forensic examination. Law of Ukraine). In practice, forensic experts who conduct analysis of human genomic samples on behalf of organizations involved in crime detection and investigation, as well as inquest, can structurally be part of law enforcement agencies (for example, the Ministry of Internal Affairs of Ukraine). On the one hand, it facilitates work of expert departments (for example, the efficiency of expert responsiveness increases). On the other hand, it results in certain complications, since a forensic expert is officially dependent on the head of the particular law enforcement agency, is subject to various conditions of employment in relevant bodies, statutes, etc. An expert who is an employee of a law enforcement structure, by the very fact of his/her position in this body, even unintentionally, may be somehow psychologically affected. If an expert gives preference to a sense of corporate solidarity rather than scientific truth, it may affect the content of his/her expert conclusions. Nevertheless the "dependence" factor is mitigated by the above-mentioned ISO 17025 standard. Also, the independence issues may be solved by means of using different sample marking methods that hide direct information about the case, requesting institution, etc. Another possibility for assuring proper application of legal regulation regarding expert independence would be allocation of expert services into a separate non-departmental structure, which can be called, for example, an expert committee. The issue of technical and forensic support of investigative actions and preliminary investigation on the crime scene should be addressed by the investigation service, which is in the structure of law enforcement agencies, and forensic activities (specialists and expert examination) should be carried out by the experts of such an expert committee.

It should also be stressed that in the theory of criminalistics there is an opinion that identification of a person who committed a crime, a victim or an unrecognized

corpse is one of the principal tasks of criminalistics (Udovenko, 2016). Currently, there are many methods for identifying a person: reconstruction of appearance from the skull, dactyloscopy and others, but we should clarify that the priority is DNA research or molecular genetic testing. The tried-and-tested method of genome research based on existing test systems is effective. But it is not always possible to identify a person, as the database of genomic information is still at the development stage. As forensic experts note, due to the development of genetics, the sex of a person and presence of hereditary diseases can be accurately identified; the color of the skin, eyes, and hair may be approximately determined (see for example: Demidov et al., 2012; Peculiarities of Collecting…, 2016, etc.).

In academic circles, certain viewpoints have been formed as to which identification tasks molecular genetic testing can solve. Thus, in the course of serious crime investigation, it is advisable to conduct biomaterial research to identify a person in the following aspects:

1) determining whether or not a given biomaterial belongs to a specific person;
2) determining gender from biological traces and objects;
3) establishing whether persons involved in infanticide (especially of a newborn) are the child's parents;
4) determining whether remains or parts of a corpse are the remains of one person, and identifying the victim based on examination of samples from close relatives;
5) identifying relationships between different crimes: determining that traces of biological material found at the scenes of different crimes were left by the same person;
6) comparing the genetic profile of a biological material with genetic data stored in a computer database, and if there is a match, guide investigation in searching for a identifying the victim, etc. (Lozova and Lozovyi, 2016).

As for sampling, it should be performed in compliance with certain requirements. Thus, in practice, the most widespread method is the collection of buccal epithelial cells. This method is safe, it is carried out using sterile cotton swabs and brushes (Kanava, 2019). Before collecting biological material, a person must follow certain rules:

1. An hour before collecting, you need to refrain from smoking and consuming meals and fluids.
2. Before collecting samples of the buccal epithelium, rinse the oral cavity several times with clean water without using toothpaste or other oral hygiene products.
3. If the child cannot rinse the oral cavity independently, give him/her some water to drink (if the child does not drink water, the sample is collected from the child no earlier than two hours after breastfeeding or one hour after feeding with infant formulas).

4. To directly collect samples of the buccal epithelium, a person from whom biological samples should be obtained (or the parent of a minor) places a brush (or a sterile cotton swab) in the oral cavity and takes at least 10 samples (oral swabs) from the inner surfaces of the right and left cheek (slightly pressing and turning the brush or cotton swab). For each person, the sampling process is repeated twice (using another brush or cotton swab).
5. After completion of the procedure for taking samples of the buccal epithelium, a corresponding confirmation is drawn up (provided that an employee of the expert service of the Ministry of Internal Affairs takes part in the process, except for a person who provided a sample) or a sample collection protocol drawn up by the investigator (Methodological Recommendations for Organizing…, 2016).

Correct sample collection, proper storage and transportation are necessary to delay DNA degradation, i.e., changes in DNA. Degradation of DNA in samples and occurs due to external factors or intracellular mechanisms, namely: hydrolytic decomposition, chemical oxidation and enzymatic degradation. The mentioned processes result in segmentation of DNA into smaller fragments (Surat, 2018).

It should be emphasized that the main external factors affecting DNA degradation include: temperature, exposure to light, high humidity. These factors contribute to the emergence and rapid reproduction of bacteria, as well as further decay of biological traces (Afanasyeva, 2019). At the same time, we must take into account that in any case natural processes occurring after death of a person lead to DNA degradation (Mc Cord et al., 2011).

Therefore, identified and collected biological samples, as well as physical evidence, should be dried, packed in paper packaging and stored in a cool and dry place away from direct sunlight. If samples are frozen, repeated thawing should be avoided. In order to preserve DNA, the investigator must ensure their correct collection and packaging, providing and maintaining appropriate storage conditions, and, in certain cases, performing examination as soon as possible.

Awareness of the indicated identification tasks, which molecular genetic testing helps to solve, will to some extent ensure the correctness of the actions of investigators at the initial stage of investigation. An important condition for successful solution of expert tasks is to correctly select the sequence of various types of forensic examinations. In particular, it must not be forgotten that, on the one hand, the methods of molecular genetic research are destructive, so after its completion, it is impossible to determine, for example, the papillary pattern in handprints. On the other hand, collecting fingerprints and conducting dactyloscopy examination for further molecular genetic testing require the use of technical means and methods ensuring DNA preservation. In addition, in each case of forensic molecular genetic

testing, a forensic expert must be granted permission to destroy the material. Otherwise, the examination is impossible.

Quite common mistakes that occur in investigative procedures in the course of forensic examinations concern investigative materials, the number of forensic examinations, and also the sequence of their application. The main mistake is the application of one molecular genetic testing for considerable number of objects, which prolongs the forensic examination, and therefore the time necessary for solving urgent issues, significantly increases the cost of consumables and the probability of making an error due to excessive length and laboriousness of the research process (Vuyma, 2020, pp. 79-85).

Another issue is an unjustified application of many molecular genetic tests based on a significant amount of physical evidence, although there is a small probability to find relevant DNA on it (Stepanyuk, 2019, pp. 174-178).

The problem of defining questions that the forensic expert will address requires special attention. Analysis of professional sources, law enforcement and judicial practice also shows instances where questions regarding determination of genetic traits of objects are formulated without asking about any overlap in these traits or lack thereof.

While agreeing with the researchers (Didyk, 2003), we would like to emphasize that in order to avoid the mentioned mistakes, it is vital to involve in criminal proceedings specialists who are qualified in the field of molecular genetics. Upon studying case materials, they can provide clear guidelines on the required number of examinations and objects that should be obtained for testing, and help clearly formulate questions that a forensic expert should address and resolve.

Specific questions will help forensic experts provide clear and unambiguous answers. Therefore, such conclusions will meet the necessary requirements: clarity, unambiguity, and validity, whose understanding will not require specific expertise (Stepaniuk et al., 2019, p. 160).

The need for a preliminary involvement of a specialist is also justified by the fact that, after receiving his/her advice, the investigator is able to predict what additional materials a forensic expert may need to examine, consideration and responses to which may prolong the forensic examination, and also, perhaps, eliminates the need for additional examinations on the same object.

There is one more problem. Refusal of the suspect to provide biological material for comparative research. The Law of Ukraine On State Registration of Human Genomic Information defines persons who are obliged to provide biological material for mandatory state genomic registration in a uniform database of genomic information. The following genomic information is subject to mandatory state registration (On State Registration of Human Genomic Information, 2022):

1) persons convicted of intentional crimes against life, health, sexual freedom, sexual integrity of a person;
2) persons who have committed socially harmful acts against life, health, sexual freedom, sexual integrity of a person, in respect of whom medical coercive measures have been applied by a court decision;
3) persons convicted of intentional crimes against life, health, sexual freedom, sexual integrity of a person;
4) found in biological material recovered during investigative actions from crime scenes, or obtained during pre-trial investigation, and unidentified;
5) unidentified corpses of people and their remains, provided that the information about their discovery has been entered into the Unified Register of Pre-trial Investigations, and the investigation has been initiated;
6) information about missing persons that, according to the court decision, can be determined by conducting a molecular genetic testing of previously collected biological samples or biological material recovered from personal belongings of the missing person.

It should be stressed that the existing difficulties at the stage of molecular genetic testing are primarily related to active opposition from the suspect in commission of a criminal offense, consisting in his/her refusal to submit biological material for examination. This opposition from the suspect or the accused is expressed in the form of a written refusal to submit biological material for research. In this refusal, the suspect or the accused (his/her attorney, legal representative) refers to the fact that as a result of collecting biological material, he/she may become infected. However, it should be emphasized that in the majority of cases this "fear" is an imaginary reason, used in the interests of the suspect or the accused. Samples for comparative research are recovered on a voluntary basis, with the written consent of the person, since collection of biological material is carried out by means of a medical procedure (blood sampling from a peripheral vein or finger, histological samples, etc.). Thus, obtaining biological material for molecular genetic testing against a person's will can be considered as a violation of constitutional rights and freedoms. Therefore, this circumstance is taken into account by attorneys when defending the suspect or the accused, as well as by employees of laboratories or law enforcement agencies implementing the procedure of supplying evidence against the suspect or the accused (i.e., specialists in forensic science institutions of the Ministry of Justice of Ukraine, forensic medical institutions and agencies of the Ministry of Health of Ukraine; experts of the Ministry of Internal Affairs of Ukraine, the Ministry of Defense of Ukraine, the Security Service of Ukraine and the State Border Guard Service of Ukraine; the National Police of Ukraine may be involved in collecting biological material) (On State Registration of Human Genomic Information, 2022). The norm regulating the

procedure for obtaining samples for comparative research is defined by the legislator in Section 3 of Article 245 of the Criminal Procedure Code of Ukraine, where it is stated that collection of biological samples from a person is carried out according to the rules enshrined in Article 241 of the Criminal Procedure Code, which, in turn, states that actions that degrade honor and dignity of a person or are dangerous for their health are not allowed during examination (Clause 4) (Criminal Procedure Code of Ukraine, 2013). However, Article 245 underlines that in the case when a person refuses to voluntarily provide biological samples, the investigating judge or court, upon the motion of a party to criminal proceedings, considered in accordance with the procedure established in Articles 160-166 of the present Code, shall have the right to give permission to investigator, public prosecutor (or to oblige them if the motion was filed by the defendant) to take biological samples in a coercive manner (emphasis added). Therefore, the legal framework in Ukraine has a broad interpretation. In this regard, for accurate and effective work of law enforcement officers and forensic experts in such situations, it is necessary to amend methodological guidelines or create new ones that would regulate the appropriate interpretation of actions when appointing and conducting molecular genetic testing to link an individual with traces recovered from a crime scene. The implementation of the above changes will make it possible to use this norm as efficiently as possible, as a result of which the inevitability of punishment for committing a criminal offense will be strengthened in the minds of the public, which, in turn, will reduce the public harm resulting from illegal acts.

We would also like to note that insufficient research on this issue, the level of its development, as well as the state of the personnel training system do not allow timely identification and objective evaluation of a number of factors that negatively affect the main indicators of both law enforcement agencies and expert work of molecular genetic units in state forensic science institutions.

Current research activity of a forensic expert is characterized by its complex nature and use of experts in various fields. For example, when studying biological material, it is often interesting to solve the issue of its packaging, which is a task of trace evidence analysis that lies beyond the competence of a medical examiner. In addition, it is impractical to distract specialists conducting tests by requiring them to do such work. In connection to this problem, the issue arises about coordination of actions of specialists, integration of different knowledge, therefore, we believe that introduction of *expert integrators (coordinators)* into the staff of expert forensic units is a highly urgent task.

In our opinion, insufficient attention is drawn to general theoretical support of research activity in scientific institutions. Very often, in pursuit of empiricism, criminalistics follows practice, although… it should be ahead of practice and supply

it with new ideas (Teslyuk, 2017). Indeed, it is vital to pay more attention to fundamental research in criminalistics and forensic science, in particular, on issues of integration of knowledge from various sciences. In this regard, the development of areas related to the application of the theories of information, algorithmization automation, modeling in criminalistics and forensic science seems interesting. We consider further development of legal issues related to application of specific expertise to be an important direction of scientific activity. For example, work in the field of evaluation of expert conclusion and effective use of examination results is of interest.

Intellectual and qualification resources of forensic expert forming intellectual resources of the country in general.

Undoubtedly, forensic activity has its own peculiarities and further study of the experts' personality is a relevant direction. Regarding the organizational aspect of this issue, we note that, as practice shows, not every person is able to work in expert units related to collection, study and processing of human genomic information or to conduct molecular genetic testing. Some individuals have no inclination to research and analytical work, some have problems with writing style (which is important when drawing up an expert conclusion), others find it difficult to withstand monotonous nature of the work (everyday activities of an expert are often very similar), and some others, having mastered basic labor skills and having made several examinations, lose interest in further professional growth. The solution seems to be in implementation of the following provisions:

1) to conduct a thorough psychological testing of a person's propensity for conducting research;
2) to check the candidate's written language style upon admission to the expert units;
3) to organize additional, ongoing training courses for specialists, also abroad, as well as seminars and conferences for exchange of experience, and in this respect to make wider use of the potential of computer networking;
4) no less than once in 3-4 years, to rotate personnel in related areas of expert work, if experts are granted corresponding access rights.

The *second perspective* concerns the moral and ethical aspects of ensuring human rights in the use of genomic information and human biomaterial.

The shift in EU policy towards a common forensic science has not only a decisive step in the development of forensic science, but has also highlighted the previously unidentified need for forensic harmonization and its role in ensuring human security. It is now recognized that only the harmonization of forensic science and law in general can guarantee the existence of the fundamental values of a democratic society—freedom and security (Kurapka, Malevski and Matulienė, 2016). And this is a very important postulate, especially when it comes to a person's protection in the

course of collecting, testing and processing human genomic information, as well as conducting molecular genetic testing.

Innovations in the field of organ and tissue transplantation, and achievements in genetic engineering, give rise to controversies in the field of balancing the interests of various participants in these procedures, legal and ethical norms (in connection with the emergence of these issues, a new field of science—bioethics—has emerged).

Mandatory and universally recognized ethical beginning of the implementation of any operations to obtain and use genomic information, as legally enshrined in international legal acts and in national legislations (including Ukrainian), is the coordination of their performing with the interested person (persons). In particular, the International Declaration on Human Genetic Data (hereinafter – The Declaration), adopted by the General Conference of UNESCO on 16 October 2003, stresses the fact that collection, processing, use and storage of genetic data (both by public and private structures) require prior, free, informed and clearly expressed consent (e.g., Articles 2, 9, 14, 21, etc.) (International Declaration on Human Genetic Data).

The aforementioned issues became quite widely manifested in standardization of *national genomic registration* (hereinafter – NGR), and more precisely, the voluntary registration (because under compulsory NGR, the effect of the principle of consent is largely reduced to naught). Citizens of Ukraine, as well as foreigners and stateless persons, have the right to voluntary registration of genomic information. Voluntary national registration of genomic information is carried out on the basis of a written application of a person for collecting biological material from them, conducting molecular genetic testing and entering genomic information into the Database. Voluntary national registration of genomic information of minors is carried out on the basis of a written statement of their legal representatives. Obtaining biological material from minors is performed in the presence of their legal representatives. Voluntary national registration of genomic information of Ukrainian citizens recognized as incapacitated or legally incapacitated in accordance with the procedure stipulated by law is carried out on the basis of a written statement of their legal representatives. Obtaining biological material from persons recognized as incapacitated or deprived of civil capacity is limited in accordance with the procedure enshrined in law and carried out in the presence of their legal representatives. Voluntary national registration of genomic information of certain categories of people (for example, minors) is carried out on a fee basis (Article 6 of the Law of Ukraine: On State Registration of Human Genomic Information).

In fact, it is justified to talk about the emergence of a contractual relationship of a special kind (with a strong predominance of the public element) in relation to the processing of personal genomic information. Legislation authorizes the destruction of genomic information (e.g., Article 13 of the Law). Biological material selected

for national registration of genomic information is destroyed in the event that the Database Administrator receives a court decision to stop the imposition of coercive measures of a medical nature to relevant persons, and in the event that the Database Administrator receives information that such persons serve a sentence within eight years after the collection, but not later than within 10 years. Biological material collected for national registration of genomic information is destroyed in accordance with the procedure enshrined in the Criminal Procedure Code of Ukraine, after expiration of a storage period determined by the manufacturer of systems for collection of biological samples.

Unfortunately, a significant disadvantage of this legislative act is the lack of a provision concerning a written statement of a relevant person submitted at any time before the expiration of a specified storage periods.

The lack of this provision significantly limits the rights of individuals and contradicts international legal acts, for example, the International Declaration on Human Genetic Data. The provisions of Article 21 of the Declaration emphasize that it is appropriate to provide a person's genetic data for forensic medical purposes or for the purposes of civil proceedings only for the period for which it is necessary and for specified purposes (regarding the institution of voluntary HGR, it means an unconditional obligation to destroy genomic information at the request of the interested person). In addition, we would like to emphasize that a person submitting an application for destruction of genomic information, first of all, should not specify in it any motives or grounds for the decision, i.e., the reasons for withdrawing consent are legally irrelevant. Secondly, submitting an application as a legitimate way to terminate relevant legal relationship should not result in any negative consequences (NB, this issue was explicitly specified in Article 9 of the Declaration)[2].

If Ukraine fails to focus on this legal issue, then, most likely, it will be held accountable by the European Court of Human Rights (hereinafter referred to as the ECHR).

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[2] Article 9: Withdrawal of consent: a) In cases where human genetic data, human proteomic data or biological samples are collected for medical and scientific purposes, the person concerned may withdraw his consent, unless such data are irrevocably separated from the person who can to be identified. In accordance with the provisions of Article 6 d), the withdrawal of consent shall not entail any adverse consequences or sanctions for the person concerned. b) When an individual withdraws consent, that individual's genetic data, proteomic data and biological samples must no longer be used, unless they are irrevocably separated from the individual concerned. c) Data and biological samples, unless irreversibly separated, should be handled in accordance with the wishes of such individual. If the individual's wishes cannot be determined, cannot be implemented or are unreliable, then the data and biological samples must be irreversibly separated or destroyed.

And if we are talking about the consideration of cases at the ECHR, we would like to note that the judicial system of a particular state not always addresses such tasks in a satisfactory manner, and as a result, citizens turn to the European Court of Human Rights for protection of their rights. In recent years, the ECHR has received a large number of cases related to the collection, storage and use of human genetic material.

In this regard, it is quite useful to study individual decisions, both for the formation of standpoints in specific cases and for the sake of analyzing the considerations in this category of disputes in order to improve the content of national legislation and the activities of national judicial bodies.

Analyzing the decisions of the ECHR in the relevant category of disputes, it is appropriate to divide them into several groups related to the determination of issues associated with collection, use and storage of human biomaterials.

1. *Collection of biological materials*

When taking into account issues connected with collection of human genetic material, the ECHR puts emphasis on the legality of such a procedure in accordance with current national legislation, as well as the completeness of the content of legal regulations governing this procedure. First of all, attention is drawn to the manifestation of the will of an individual, given during his/her lifetime, in the form of consent or non-consent to the removal of organs and body tissues after his/her death, as well as consent or non-consent of a surviving spouse or other relatives to the use of the body of the deceased individual. In the case of Elberte v. Latvia, in the ECHR Resolution No. 61243/08 dated 13 January 2015, removal of organs and tissues from the body of a deceased person was considered (Case of Elberte v. Latvia; Application no. 61243/08). According to the case file, on 19 May 2011, the applicant's husband was involved in a car accident and died on the way to the hospital. On 20 May 2011, his body was taken to the Forensic Medical Center in Riga where an autopsy was performed and the cause of the man's death was determined. On 26 May 2011, during the man's funeral, his wife (the applicant) saw that his legs were tied together, and he was buried that way. Later, it was established that some organs and tissues were removed from the deceased man's body during autopsy, which were further transferred by the Latvian Forensic Center to a medical company in Germany for transforming them into bio-implants. At a later time, these bio-implants were transferred back to Latvia for transplantation purposes. The applicant found out about that two years later, during a criminal investigation into allegations of the illicit removal of body tissues and organs from her late husband. The main arguments of the applicant were reduced to the fact that before the removal she, as a wife, did not provide consent to remove organs and tissues from the body of her late husband,

and also was not informed about the removal. The Government of the Republic of Latvia stated that the Latvian law in force at that time allowed collection of organs and tissues of deceased persons in the event that the deceased did not express his/her refusal to become an organ and tissue donor during his lifetime and if no objections were raised by relatives. At the same time, the law did not require a consent of the closest relatives in such cases. In addition, the removal of organs in this case was carried out for a social purpose: saving lives of other people. During the consideration of the case, the ECHR established that the employees of the Latvian Forensic Center did not even make an attempt to check the existence of a person's consent or refusal to remove organs and tissues from the body after his death, since a relevant stamp could only be found in his identification document, and it was at his home at the time of autopsy. The analysis of the national legislation of Latvia also showed that there is a relevant law that stipulates the right of a relative to express his/her will regarding the removal of organs and tissues from the body of a deceased person. However, this law does not prescribe rules obliging relevant state bodies to seek such consent or refusal, as well as any forms of documents that would reflect the very fact of based on the expression of the will of the deceased person's relatives and its result.

When making the decision, the ECHR referred to the provisions of the Resolution of the Committee of Ministers of the Council of Europe (78) 29 On Harmonisation of Legislations of Member States Relating to Removal, Grafting and Transplantation of Human Substances of 11 May 1978, and to the national legislation of Latvia. Having considered the case, the court ruled that there was a violation of the applicant's right to respect for her personal and family life, enshrined in Article 8 of the European Convention on Human Rights dated 4 November 1950.

This case was analyzed in sufficient detail to explain the course of the ECHR's considerations in this category of cases, identified and analyzed facts and circumstances of the case, applicable acts, justification of the position of applicants and governments of states against whom the complaint was made (e.g., Annex).

2. *Collection of genomic information from persons held guilty of offenses under national law*

In these cases, as a rule, actions of state authorities regarding storage of DNA materials of a person are contested if it has been established that the applicant is guilty of a crime, motivating that there is a discrepancy between the committed act and negative consequences that may arise or follow from the storage of genomic information of applicants in databases of respective states. Among such cases, the ones of S. and Marper v. the United Kingdom are very illustrative (applications No. 30562/04 and 30566/044). These were two cases that were considered by the Grand Chamber of the European Court at the same time (Case S. and Marper v. the United

Kingdom). The judgement was issued on 4 December 2008. In the case of S., criminal prosecution was terminated with a further acquittal. He was found not guilty in the case of Marper. However, in both cases, the applicants were subjected as suspects to a coercive procedure in which DNA samples and fingerprints were taken from them. Later, this information was not deleted by police officers from databases. When researching domestic law of England and Wales, it was determined that genetic information of criminal suspects can be stored in a database for unlimited time. Although the storage of fingerprints had less impact on private life than the storage of cell samples and DNA profiles, a unique information they contain about individuals concerned and its storage without the consent of the latter cannot be viewed as neutral or insignificant and is also an interference with the right to respect for private life. It was also established that the national legislation of England and Wales in the studied aspect does not distinguish between persons whose guilt has not been proven and convicted persons. It is necessary to clearly define purposes of genomic information collection and time limit for its storage.

In this paper, we have provided only some examples of judgments by the ECHR. However, this is a very comprehensive issue, and it certainly needs a separate in-depth study.

4. Conclusions

Summarizing the above, we stress that for the development and effectiveness of measures of international cooperation of Ukrainian forensic science institutions with foreign experts in collecting, studying and processing human genomic information and conducting molecular genetic testing, the following should be undertaken:

1. It is necessary to introduce an independent system of international forensic bodies that will help identify and use internal resources of this system and all interested parties, and significantly improve its efficiency. A unified scientific and technical policy will ensure more efficient use of scientific, personnel and financial resources, minimize duplication in research planning, which, in turn, will allow directing financial and human resources to the development of new forensic technologies. Also, the efficiency of using existing opportunities relying on specialization of individual departmental, regional, state and international forensic expert groups will be enhanced.

In the general management structure of forensic science, modern high-tech, hardware-software complexes that are very expensive (e.g., equipment for DNA analysis) may be applied most effectively. And, finally, there will be a chance to

create uniform on-site sample collections for the whole system, expert data banks, identification statistics based on expert evidence for individual identification and development of modern expert technologies.

2. A comprehensive analysis of the articles of the Criminal Procedure Code of Ukraine related to forensic science indicates that the legislator has considerably enhanced the regulatory framework forensic examinations. The improvement in criminal procedural laws associated with conducting forensic examinations (and especially molecular genetic analysis) was realized in two main scopes. The first concerns the general judicial reform reflecting the entire complex of socio-economic and national political transformations (e.g., legal rules that strengthen protection of an individual's interests, including in the process of molecular genetic analysis; contribute to the implementation of the presumption of innocence principle and adversarial principle; ensure the rights of participants in proceedings when commissioning and performing forensic examination). The second is driven by the need to eliminate the shortcomings of the current legislation: a) gaps and blank spots in legislation; b) provisions interfering with the current needs of investigative and judicial practice.

3. Particular procedural shortcomings of the decision on requesting forensic examination are connected with: a) failure to grant permission to a forensic expert for complete or partial destruction of objects under study; b) failure to grant permission to use data received as a result of other forensic examinations.

It should be stressed that a permission for complete or partial destruction of objects helps a forensic expert carry out a comprehensive investigation of biological origin traces detected in the course of forensic examination. But in the case of examination of such items as clothes or wood with potential traces of blood, there is a need to make cuts and chips. If swabs taken during investigation (tampons, cotton swabs, etc.) are submitted for forensic examination, they are destroyed during the testing, since the methods of forensic DNA analysis require a destructive process. The indicated circumstances affect the actual obligation to grant permission to a forensic expert for a complete or partial destruction of investigative material.

In turn, permission to use data obtained during another examination helps a forensic expert take into account results of previous forensic examinations and, if necessary, perform a comparative analysis of the obtained data. For example, when a forensic molecular genetic analysis is ordered after immunological testing that found human blood in the tested objects, this research (establishing the presence of blood and its species) may be omitted by a geneticist referring to the conclusions of an immunologist.

4. Systematic changes in the current legislation are required, even in what has been adopted recently (we are talking about the Law of Ukraine On State Registration

of Human Genomic Information). Unfortunately, a significant disadvantage of this legislative act is that its norms lack a provision on a written statement of a relevant person submitted at any time before expiration of the specified time limits for storage of biological material. The lack of this provision significantly limits the rights of individuals and contradicts international legal acts, for example, the International Declaration on Human Genetic Data. The provisions of Article 21 of the Declaration state that it is appropriate to provide genetic data of a person for forensic medical purposes or for the purposes of civil proceedings only for the period for which it is needed for specified purposes (regarding the institution of voluntary HGR, this means an absolute necessity to destroy genomic information upon the request of an interested person). We would like to emphasize that a person submitting an application for destruction of genomic information, first of all, should not specify in it any motives or grounds for their decision, i.e., the reasons for withdrawing consent are legally irrelevant. Secondly, submitting an application as a legitimate way to terminate relevant legal relationship should not result in any negative consequences (NB, this issue was explicitly specified in Article 9 of the Declaration).

5. Analysis of the prospects for improving the legal support for molecular genetic examination, expressed in the legislative initiative, will regulate the norm on condition that participants of pre-trial investigation oppose collection of biological material. The development of legal norms reflecting the interaction of state and private forensic science institutions is a necessary direction for the development of expert activity in today's reality.

The methodological relevance of the analyzed issues is implemented both from the theoretical and the practical component. In this regard, in conditions of modern legal reality, it is vital to prioritise timely detection and objective assessment of a number of factors that negatively affect the main indicators of both law enforcement agencies and expert work in forensic science institutions of Ukraine, as well as condition of personnel training system and the development of scientific research in this field.

The practical significance of research in the field of appointment and conduct of molecular genetic examination is implementation of the developed methodology for application of specific forensic expertise while the appointment and conduct of molecular genetic examination, taking into account conditions of modern legal reality. Such an approach is aimed at creating conditions for improving the quality of the investigation of criminal offenses, will enhance work of forensic science institutions, namely will eliminate (partially or completely) negative factors associated with implementation of molecular genetic examination.

The information support of expert units is rather voluminous arrays of data, and it is inappropriate to distract specialists from research for such work. In this regard,

the question arises about coordination of specialist's actions, about integration of obtained different knowledge, therefore we believe that introduction of expert integrators (coordinators) into the staff of forensic expert units is a highly urgent task.

6. The same time, there are difficulties associated with disintegration of databases of the Ministry of Internal Affairs of Ukraine with databases of the forensic medicine bureau and forensic science institutions of the Ministry of Justice of Ukraine. Therefore, there is a pressing need to synchronize them. It is also required to improve the process of integrating genomic information of the single database of Ukrainian forensic science institutions with databases of international organizations for consolidation of information into a single DNA database, which will create conditions for enhancing the efficiency of the work of experts (minimizing the amount of work in collecting, studying and processing human genomic information and reducing terms of molecular genetic examination).

7. Studying legal regulations of the European Union and practice of the decisions of the European Court of Human Rights helps us to draw a number of conclusions about the main aspects that are important when considering cases, as well as the need for compliance with legislation and adherence to the completeness of the content of the national legislation itself in matters of collection, use and storage of genomic human information and molecular genetic examination. For this, it is crucial to observe generally recognized human rights and freedoms, ethical standards. Thus, in relation to the living, it is necessary to guarantee the prevention of unnecessary physical and mental suffering and injury during scientific research, prevention of torture, inhuman or degrading treatment or punishment. Regarding the dead: the right to inviolability of bodies of deceased persons, to respect for them. When removing organs, tissues, and using a person's body after their death, it is mandatory to define the expression of their will as a matter of consent or refusal to commit such actions given during a person's lifetime. The existence of a person's voluntary and informed consent becomes a cornerstone in cases of recognizing legality while scientific research and experiments. When collecting and storing genomic information of suspects of crimes and convicted persons, it is needed to differentiate rules for collection, storage and destruction of such information, taking into account the severity of a crime committed, distinction of measures taken in relation to persons who committed crimes and offenses, terms of storage and subsequent destruction of biological material, characteristics of the criminal's personality, etc.

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Annex 1

FOURTH SECTION
CASE OF ELBERTE v. LATVIA

(Application no. 61243/08)
JUDGMENT
STRASBOURG
13 January 2015
FINAL

13/04/2015
This judgment is final.
In the case of Elberte v. Latvia,
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Päivi Hirvelä, President,
Ineta Ziemele,
George Nicolaou,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek,
Faris Vehabović, judges,
and Fatoş Aracı, Deputy Section Registrar,
Having deliberated in private on 4 November and 2 December 2014,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 61243/08) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Dzintra Elberte ("the applicant"), on 5 December 2008.

2. The applicant was represented by Ms I. Nikuļceva, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agents, firstly Mrs I. Reine and subsequently Mrs K. Līce.

3. The applicant alleged, in particular, that the removal of tissue from her deceased husband's body had taken place without her consent or knowledge and that he had been buried with his legs tied together.

4. On 27 April 2010 notice of the application was given to the Government under Articles 3 and 8 of the Convention. On 9 July 2013 it was decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Sigulda. She is the widow of Mr Egils Elberts ("the applicant's husband"), a Latvian national who was born in 1961 and who died on 19 May 2001.

A. Events leading to the applicant knowing that tissue had been removed from her husband's body

6. On 19 May 2001 the applicant's husband was involved in a car accident in the parish of Allaži. An ambulance transported him to Sigulda Hospital but he died on the way there as a result of his injuries. He was placed in the mortuary at Sigulda Hospital. The applicant's mother-in-law, who worked at Sigulda Hospital and thereby learned about her son's death immediately, stayed with his body at Sigulda Hospital until it was transported to the State Centre for Forensic Medical Examination (Valsts tiesu medicīnas expertīžu centrs – "the Forensic Centre") in Riga.

7. At 5 a.m. on 20 May 2001 the body was delivered to the Forensic Centre in order to establish the cause of death. Between 1 p.m. and 3 p.m. an autopsy was carried out and numerous injuries were found to the deceased's head and chest, including several broken ribs and vertebrae. There were bruises on his right shoulder, thigh and knee. A forensic medical expert, N.S., classified the injuries as serious and life-threatening and established a causal link between them and his death.

8. According to the Government, after the autopsy, N.S. had verified that there was no stamp in Mr Elberts' passport denoting his objection to the use of tissue from his body and he had removed a 10 cm by 10 cm piece of dura mater (the outer layer of the meninges) from Mr Elberts' body. According to the applicant, N.S. could not have checked whether or not there was a stamp in Mr Elberts' passport because at that time it had been at their home in Sigulda. The applicant submitted that the area of tissue removed was larger than 10 cm by 10 cm and that it was not only dura mater that had been removed.

9. On 21 May 2001 the prosecutor's office issued a permit to bury the body. According to the applicant, on 21 or 22 May 2001 her sister had arrived at the Forensic Centre with a view to obtaining the certificate showing the cause of death, in rela-

tion to which she had signed the Forensic Centre's registration log. On 22 May 2001 her sister submitted that document, together with Mr Elberts' passport, to the relevant authority in Sigulda to obtain the death certificate.

10. According to the Government, on 25 May 2001 the body of Mr Elberts had been handed over to a relative. According to the applicant, his body had been handed over to another person who was merely helping with its transportation prior to the funeral.

11. On 26 May 2001 the funeral took place in Sigulda. The applicant first saw her deceased husband when his remains were transported back from the Forensic Centre for the funeral. She saw that his legs had been tied together. He was buried that way. The applicant herself was pregnant at the time with their second child.

12. The applicant was not aware that tissue had been removed from her husband's body until about two years later, when the security police (Drošības Policija) informed her that a criminal inquiry had been opened into the illegal removal of organs and tissue, and that tissue had been removed from her husband's body.

B. Criminal inquiry into the illegal removal of organs and tissue

13. On 3 March 2003 the security police opened a criminal inquiry into the illegal removal of organs and tissue for supply to a pharmaceutical company based in Germany ("the company") between 1994 and 2003. The following sequence of events was established.

14. In January 1994 the predecessor institution of the Forensic Centre concluded an agreement with the company to cooperate for the purpose of scientific research. Under the agreement, various types of tissue were to be removed from deceased persons – selected by the Forensic Centre in accordance with international standards – and sent to the company for processing. The company transformed the tissue received into bio-implants and sent them back to Latvia for transplantation purposes. The Ministry of Welfare agreed to the content of the agreement, reviewing its compliance with domestic law on several occasions. The prosecutor's office issued two opinions on the compatibility of the agreement with domestic law and, in particular, with the Law on the protection of the body of a deceased person and the use of human organs and tissue ("the Law").

15. Any qualified member of staff ("expert") of the Forensic Centre was allowed to carry out the removal of tissue on his or her own initiative. The Head of the Thanatology Department of the Forensic Centre was responsible for their training and the supervision of their work. He was also responsible for sending the tissue to Germany. The experts received remuneration for their work. Initially, the tissue removal was performed at forensic divisions located in Ventspils, Saldus, Kuldīga, Daugavpils and Rēzekne. After 1996, however, tissue removal was carried out only at the Forensic Centre in Riga and the forensic division in Rēzekne.

16. Under the agreement, experts could remove tissue from deceased persons who had been transported to the Forensic Centre for forensic examination. Each expert was to verify whether the potential donor had objected to the removal of organs or tissue during his or her lifetime by checking his or her passport to make sure that there was no stamp to that effect. If relatives objected to the removal, their wishes were respected, but the experts themselves did not attempt to contact relatives or to establish their wishes. Tissue was to be removed within twenty-four hours of the biological death of a person.

17. Experts were obliged to comply with domestic law but, according to their own testimonies, not all of them had read the Law. However, the content of it was clear to them as the Head of the Thanatology Department of the Forensic Centre had explained that removal was allowed only if there was no stamp in the passport denoting a refusal for organs or tissue to be removed and if the relatives did not object to the removal.

18. In the course of the inquiry, the investigators questioned specialists in criminal law and the removal of organs and tissue. It was concluded that, generally speaking, two legal systems exist for regulating the removal of organs and tissue – "informed consent" and "presumed consent". On the one hand, the Head of the Forensic Centre, the Head of the Thanatology Department of the Forensic Centre and the experts at the Forensic Centre were of the opinion that at the relevant time (that is to say, after the Law's entry into force on 1 January 1993) there had existed a system of "presumed consent" in Latvia. These persons were of the view that the system of presumed consent meant that "everything which is not forbidden is allowed". The investigators, on the other hand, were of the opinion that section 2 of the Law gave a clear indication that the Latvian legal system relied more on the concept of "informed consent" and, accordingly, removal was permissible only when it was (expressly) allowed, that is to say when consent had been given either by the donor during his or her lifetime or by the relatives.

19. More particularly, as regards the removal of tissue from the applicant's husband's body, on 12 May 2003 the expert N.S. was questioned. Subsequently, on 9 October 2003 the applicant was recognised as an injured party (cietušais) and she was questioned on the same date.

20. On 30 November 2005 it was decided to discontinue the criminal inquiry into the activities of the Head of the Forensic Centre, the Head of the Thanatology Department of the Forensic Centre and the Head of the Rēzekne Forensic Division in respect of the removal of tissue. The above considerations were noted down in the decision (lēmums par kriminālprocesa izbeigšanu) and differences concerning the possible interpretations of domestic law were resolved in favour of the accused. Moreover, the 2004 amendments to the Law were to be interpreted to mean that

there was a system of "presumed consent" in Latvia. It was concluded that sections 2 to 4 and 11 of the Law had not been violated and that no elements of a crime as set out in section 139 of the Criminal Law had been established.

21. On 20 December 2005 and 6 January 2006 prosecutors dismissed complaints lodged by the applicant and held that the decision to discontinue the inquiry was lawful and justified.

22. On 24 February 2006 a superior prosecutor of the Prosecutor General's Office examined the case file and concluded that the inquiry should not have been discontinued. He established that the experts at the Forensic Centre had breached provisions of the Law and that the tissue removal had been unlawful. The decision to discontinue the inquiry was quashed and the case file was sent back to the security police.

23. On 3 August 2007 the criminal inquiry, in so far as it related to the removal of tissue from the body of the applicant's deceased husband, was discontinued owing to the expiry of the statutory limitation period of five years. However, the legal ground given for this discontinuation was the absence of any elements of a crime. On 13 August 2007 the applicant was informed of that decision. On 19 September and 8 October 2007, in response to complaints lodged by the applicant, the prosecutors stated that the decision had been lawful and justified.

24. On 3 December 2007 another superior prosecutor of the Office of the Prosecutor General examined the case file and concluded that the inquiry should not have been discontinued. She established that the experts at the Forensic Centre had breached provisions of the Law and that the tissue removal had been unlawful. The decision to discontinue the inquiry was once again quashed and the case file was again sent back to the security police.

25. On 4 March 2008 a new decision to discontinue the criminal inquiry was adopted, based on the legal ground of the expiry of the statutory limitation period. On 27 March 2008, in response to a complaint from the applicant, the prosecutor once again quashed the decision.

26. A fresh investigation was carried out. During the course of that investigation it was established that in 1999 tissue had been removed from 152 people; in 2000, from 151 people; in 2001, from 127 people; and in 2002, from 65 people. In exchange for the supply of tissue to the company, the Forensic Centre had organised the purchase of different medical equipment, instruments, technology and computers for medical institutions in Latvia and the company had paid for these purchases. Within the framework of the agreement, the total monetary value of the equipment for which the company had paid exceeded the value of the removed tissue that was sent to the company. In the decision of 14 April 2008 (see paragraph 27 below) it was noted that the tissue was not removed for transplantation purposes in accordance

with section 10 of the Law but was actually removed for transformation into other products to be used for patients not only in Latvia, but also in other countries.

27. On 14 April 2008 the criminal inquiry was discontinued owing to the expiry of the statutory limitation period. In the decision it was noted that whenever an expert from the Rēzekne Forensic Division, for example, had interviewed the relatives prior to the removal of organs or tissue, he had never expressly informed them of such potential removal or indeed obtained their consent. According to the testimonies of all the relatives, they would not have consented to the removal of organs or tissue had they been informed and their wishes established. According to the experts' testimonies, they had merely checked passports for stamps and had not sought relatives' consent as they had not been in contact with them. It was also noted that with effect from 1 January 2002 information was to be sought from the population register, which the experts had failed to do. It was concluded that the experts, including N.S., had contravened section 4 of the Law and had breached the relatives' rights. However, owing to the five-year statutory limitation period (which started running on 3 March 2003), the criminal inquiry was discontinued and on 9 May and 2 June 2008 the prosecutors upheld that decision in response to complaints lodged by the applicant. The applicant lodged a further complaint.

28. In the meantime, the experts, including N.S., lodged an appeal contesting the reasons for the discontinuation of the criminal inquiry (kriminālprocesa izbeigšanas pamatojums). They contested their status as the persons against whom the criminal inquiry concerning unlawful tissue removal had been instigated because they had not at any stage been informed of this inquiry and argued that, accordingly, they had been unable to exercise their defence rights. On 26 June 2008, in a final decision, the Riga City Vidzeme District Court upheld their appeal (case no. 1840000303), quashed the 14 April 2008 decision and sent the case file back to the security police. The court found as follows.

"Notwithstanding the fact that a certain proportion of the transplants were not returned to be used for patients in Latvia, there is no evidence in the case file that they were used for processing into other products or for scientific or educational purposes. Therefore, the court considers that there is no evidence in the case file that the removed tissue was used for purposes other than transplantation …

There is no evidence in the case file demonstrating that the removal of tissue for transplantation purposes had been carried out in disregard of the deceased person's refusal, as expressed during his lifetime and recorded in accordance with the law in force at the relevant time, or in disregard of any refusal expressed by the closest relatives.

Taking into account the fact that legislative instruments do not impose any obligation on the experts who carry out the removal of tissue and organs from deceased

persons' bodies to inform persons of their right to refuse tissue or organ removal, the court considers that the experts did not have any obligation to do so; by not informing the deceased person's relatives of their intention to remove tissue, the experts did not breach the provisions of the [Law], as effective from 1994 to March 2003. Section 4 of the [Law] provides for the right of the closest relatives to refuse the removal of the deceased person's organs and/or tissue, but does not impose an obligation on the expert to explain this right to the relatives. Given that there are no legislative instruments which impose an obligation on the experts to inform relatives of their intention to remove tissue and/or organs and to explain to the relatives their right to object by refusing their consent, the court considers that a person cannot be punished for a failure to comply with an obligation which is not clearly laid down in a legislative instrument in force. Therefore, the court finds that the experts, by carrying out the tissue and organ removal from the deceased, did not breach … the [Law].

… The court finds that the experts' actions did not constitute the elements of a crime proscribed by section 139 of the Criminal Law; therefore, it is possible to discontinue the criminal proceedings for exonerating reasons – namely on the grounds of section 377(2) of the Criminal Procedure Law – owing to the absence of the elements of a crime."

29. On 2 July 2008 the superior prosecutor responded to a complaint lodged by the applicant. The superior prosecutor admitted that the inquiry had taken a long time owing to numerous complaints against the decisions. However, she did not find any particular circumstances which would indicate that it had been unduly protracted. At the same time, she informed the applicant that the court had quashed the 14 April 2008 decision upon the appeal by the experts. She further stated that a new decision to discontinue the criminal inquiry had been adopted on 27 June 2008 and that the applicant would soon be duly notified.

30. Indeed, the applicant received the 27 June 2008 decision a few days later. It was reiterated in that decision that the experts did not have any legal obligation to inform anyone about their right to consent to or refuse organ or tissue removal. Section 4 of the Law provided for the right of the closest relatives to object to the removal of the deceased person's organs and tissue, but did not impose any obligation on the expert to explain these rights to the relatives. A person could not be punished for a failure to comply with an obligation which was not clearly laid down in a legal provision; the experts had therefore not breached the Law. The applicant lodged further complaints.

31. On 15 August 2008 the prosecutor replied, inter alia, that there were no circumstances indicating the desecration of a human body. At the same time, she explained that the experts had performed actions in connection with the unlawful

tissue removal in order to use the tissue for medical purposes. After the removal of tissue, other material was commonly implanted to restore the visual integrity of dead bodies. Therefore, the criminal inquiry had concerned actions under section 139 of the Criminal Law and not under section 228, which proscribed desecration of a dead body.

32. On 10 September 2008 a superior prosecutor replied that there were no grounds for examining the actions of the persons who had proceeded with the tissue removal under section 228 of the Criminal Law as desecration of a dead body. The experts had proceeded in accordance with an instruction issued by the Ministry of Justice, implanting other material in the place of the removed tissue. According to the instruction, tissue was to be removed in such a way so as not to mutilate the body, and, if necessary, subsequent restoration was to be carried out.

33. On 23 October 2008 another superior prosecutor of the Prosecutor General's Office replied with a final negative decision.

II. RELEVANT INTERNATIONAL DOCUMENTS AND DOMESTIC LAW

A. Council of Europe documents

34. On 11 May 1978 the Committee of Ministers of the Council of Europe adopted Resolution (78) 29 on harmonisation of legislations of member States relating to removal, grafting and transplantation of human substances, which recommended that the governments of the member States ensure that their laws conform to the rules annexed to the Resolution or adopt provisions conforming to these rules when introducing new legislation.

Article 10 of this Resolution provides:

"1. No removal must take place when there is an open or presumed objection on the part of the deceased, in particular, taking into account his religious and philosophical convictions.

2. In the absence of the explicit or implicit wish of the deceased the removal may be effected. However, a state may decide that the removal must not be effected if, after such reasonable inquiry as may be practicable has been made into the views of the family of the deceased and in the case of a surviving legally incapacitated person those of his legal representative, an objection is apparent; when the deceased was a legally incapacitated person the consent of his legal representative may also be required."

35. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) is the first international treaty in the field of bioethics. It came into force on 1 December 1999 in respect of the States that had ratified it. Latvia signed the Convention on Human Rights and Biomedicine

on 4 April 1997, ratified it on 25 February 2010, and it came into force in respect of Latvia on 1 June 2010. The Convention on Human Rights and Biomedicine is not applicable to organ and tissue removal from deceased persons. It concerns organ and tissue removal from living donors for transplantation purposes (Articles 19-20).

36. In relation to organ and tissue removal from deceased persons, an Additional Protocol on Transplantation of Organs and Tissues of Human Origin was adopted (ETS No. 186), to which the Government referred. On 1 May 2006 it came into force in respect of the States that had ratified it. Latvia has neither signed nor ratified this Protocol.

37. The relevant Articles of the Additional Protocol read as follows.

Article 1 – Object

"Parties to this Protocol shall protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and fundamental freedoms with regard to transplantation of organs and tissues of human origin."

Article 16 – Certification of death

"Organs or tissues shall not be removed from the body of a deceased person unless that person has been certified dead in accordance with the law.

The doctors certifying the death of a person shall not be the same doctors who participate directly in removal of organs or tissues from the deceased person, or subsequent transplantation procedures, or having responsibilities for the care of potential organ or tissue recipients."

Article 17 – Consent and authorisation

"Organs or tissues shall not be removed from the body of a deceased person unless consent or authorisation required by law has been obtained.

The removal shall not be carried out if the deceased person had objected to it."

Article 18 – Respect for the human body

"During removal the human body must be treated with respect and all reasonable measures shall be taken to restore the appearance of the corpse."

The relevant parts of the Explanatory Report to the Additional Protocol read as follows.

Introduction

"2. The purpose of the Protocol is to define and safeguard the rights of organ and tissue donors, whether living or deceased, and those of persons receiving implants of organs and tissues of human origin."

Drafting of the Protocol

"7. This Protocol extends the provisions of the Convention on Human Rights and Biomedicine in the field of transplantation of organs, tissues and cells of human origin. The provisions of the Convention are to be applied to the Protocol. For ease of

consultation by its users, the Protocol has been drafted in such a way that they need not keep referring to the Convention in order to understand the scope of the Protocol's provisions. However, the Convention contains principles which the Protocol is intended to develop. Accordingly, systematic examination of both texts may prove helpful and sometimes indispensable."

COMMENTS ON THE PROVISIONS OF THE PROTOCOL PREAMBLE

"13. The Preamble highlights the fact that Article 1 of the Convention on Human Rights and Biomedicine protecting the dignity and the identity of all human beings and guaranteeing everyone respect for their integrity, forms a suitable basis on which to formulate additional standards for safeguarding the rights and freedoms of donors, potential donors and recipients of organs and tissues."

Article 1 – Object

"16. This article specifies that the object of the Protocol is to protect the dignity and identity of everyone and guarantee, without discrimination, respect for his or her integrity and other rights and fundamental freedoms with regard to transplantation of organs and tissues of human origin.

17. The term 'everyone' is used in Article 1 because it is seen as the most concordant with the exclusion of embryonic and foetal organs or tissues from the scope of the Protocol as stated in Article 2 … The Protocol solely concerns removal of organs and tissues from someone who has been born, whether now living or dead, and the implantation of organs and tissues of human origin into someone else who has likewise been born."

Article 16 – Certification of death

"94. According to the first paragraph, a person's death must have been established before organs or tissues may be removed 'in accordance with the law'. It is the responsibility of the States to legally define the specific procedure for the declaration of death while the essential functions are still artificially maintained. In this respect, it can be noted that in most countries, the law defines the concept and the conditions of brain death.

95. The death is confirmed by doctors following an agreed procedure and only this form of death certification can permit the transplantation to go ahead. The retrieval team must satisfy themselves that the required procedure has been completed before any retrieval operation is started. In some States, this procedure for certification of death is separate from the formal issuance of the death certificate.

96. The second paragraph of Article 16 provides an important safeguard for the deceased person by ensuring the impartiality of the certification of death, by requiring that the medical team which certifies death should not be the same one that is involved in any stage of the transplant process. It is important that the interests of

any such deceased person and the subsequent certification of death are, and are seen to be, the responsibility of a medical team entirely separate from those involved in transplantation. Failure to keep the two functions separate would jeopardise the public's trust in the transplantation system and might have an adverse effect on donation.

97. For the purposes of this Protocol, neonates including anencephalic neonates receive the same protection as any person and the rules on certification of death are applicable to them."

Article 17 – Consent and authorisation

"98. Article 17 bars the removal of any organ or tissue unless the consent or authorisation required by national law has been obtained by the person proposing to remove the organ or tissue. This requires member States to have a legally recognised system specifying the conditions under which removal of organs or tissues is authorised. Furthermore, by virtue of Article 8, the Parties should take appropriate measures to inform the public, namely about matters relating to consent or authorisation with regard to removal from deceased persons …

99. If a person has made known their wishes for giving or denying consent during their lifetime, these wishes should be respected after his/her death. If there is an official facility for recording these wishes and a person has registered consent to donation, such consent should prevail: removal should go ahead if it is possible. By the same token, it may not proceed if the person is known to have objected. Nonetheless, consultation of an official register of last wishes is valid only in respect of the persons entered in it. Nor may it be considered the only way of ascertaining the deceased person's wishes unless their registration is compulsory.

100. The removal of organs or tissues can be carried out on a deceased person who has not had, during his/her life, the capacity to consent if all the authorisations required by law have been obtained. The authorisation may equally be required to carry out a removal on a deceased person who, during his/her life, was capable of giving consent but did not make known his wishes regarding an eventual removal post-mortem.

101. Without anticipating the system to be introduced, the Article accordingly provides that if the deceased person's wishes are at all in doubt, it must be possible to rely on national law for guidance as to the appropriate procedure. In some States the law permits that if there is no explicit or implicit objection to donation, removal can be carried out. In that case, the law provides means of expressing intention, such as drawing up a register of objections. In other countries, the law does not prejudge the wishes of those concerned and prescribes enquiries among relatives and friends to establish whether or not the deceased person was in favour of organ donation.

102. Whatever the system, if the wishes of the deceased are not sufficiently established, the team in charge of the removal of organs must beforehand endeavour to obtain testimony from relatives of the deceased. Unless national law otherwise provides, such authorisation should not depend on the preferences of the close relatives themselves for or against organ and tissue donation. Close relatives should be asked only about the deceased persons expressed or presumed wishes. It is the expressed views of the potential donor which are paramount in deciding whether organs or tissue may be retrieved. Parties should make clear whether organ or tissue retrieval can take place if a deceased person's wishes are not known and cannot be ascertained from relatives or friends.

103. When a person dies in a country in which he/she is not normally resident, the retrieval team shall take all reasonable measures to ascertain the wishes of the deceased. In case of doubt, the retrieval team should respect the relevant applicable laws in the country in which the deceased is normally resident or, by default, the law of the country of which the deceased person is a national."

Article 18 – Respect for the human body

"104. A dead body is not legally regarded as a person, but nonetheless should be treated with respect. This article accordingly provides that during removal the human body must be treated with respect and after removal the body should be restored as far as possible to its original appearance."

38. In May 2002 the Secretary General of the Council of Europe sent a questionnaire to the Council of Europe member States concerning aspects of law and practice in relation to transplantation. The Latvian government replied in the affirmative to the question of whether removal from a living donor required authorisation and referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine and section 13 of the Law on the protection of the body of a deceased person and use of human organs and tissue. They noted that written consent was required. In their response to the question "What kind of relationships should exist between the living donor of an organ and the recipient?", they referred to Articles 19 and 20 of the Convention on Human Rights and Biomedicine. In their response to the question "What sanctions are provided for [organ-trafficking] offenders, in particular, for intermediaries and health professionals?", the Latvian government referred to section 139 of the Criminal Law (see paragraph 53 below).

B. European Union documents

39. On 21 July 1998 the European Group on Ethics in Science and New Technologies (EGE)[2] issued Opinion no. 11 on ethical aspects of human tissue banking. Its relevant parts read as follows.

"2.3 Information and consent

The procurement of human tissues requires, as a principle, the prior, informed and free consent of the person concerned. This does not apply in the case of tissue procurement ordered by a judge in the context of judicial, in particular criminal, proceedings.

While consent is a fundamental ethical principle in Europe, the procedures involved and forms of such consent (oral or in writing, before a witness or not, explicit or presumed, etc.) are a matter for national legislation based on the legal traditions of each country.

…

2.3.2 Deceased donors

Consent of a donor for retrieval of tissues after death may take different forms depending on the national systems ('explicit' or 'presumed' consent). However, no retrieval of tissues may take place, with the exception of judicial proceedings, if the party concerned formally objected while alive. Furthermore, if there has been no expression of will and the applicable system is that of 'presumed' consent, doctors must ensure as far as possible that relatives or next of kin have the opportunity to express the deceased person's wishes, and must take these into account."

40. The relevant parts of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells provide as follows.

Article 13 – Consent

"1. The procurement of human tissues or cells shall be authorised only after all mandatory consent or authorisation requirements in force in the Member State concerned have been met.

2. Member States shall, in keeping with their national legislation, take all necessary measures to ensure that donors, their relatives or any persons granting authorisation on behalf of the donors are provided with all appropriate information as referred to in the Annex."

ANNEX – INFORMATION TO BE PROVIDED ON THE DONATION OF CELLS AND/OR TISSUES

B. Deceased donors

"1. All information must be given and all necessary consents and authorisations must be obtained in accordance with the legislation in force in Member States.

2. The confirmed results of the donor's evaluation must be communicated and clearly explained to the relevant persons in accordance with the legislation in Member States."

C. World Health Organisation (WHO) documents

41. The WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation (endorsed by the sixty-third World Health Assembly on 21 May 2010, Resolution WHA63.22) provide, in so far as relevant, as follows.

Guiding Principle 1

"Cells, tissues and organs may be removed from the bodies of deceased persons for the purpose of transplantation if:

(a) any consent required by law is obtained, and

(b) there is no reason to believe that the deceased person objected to such removal."

Commentary on Guiding Principle 1

"Consent is the ethical cornerstone of all medical interventions. National authorities are responsible for defining the process of obtaining and recording consent for cell, tissue and organ donation in the light of international ethical standards, the manner in which organ procurement is organized in their country, and the practical role of consent as a safeguard against abuses and safety breaches.

Whether consent to procure organs and tissues from deceased persons is 'explicit' or 'presumed' depends upon each country's social, medical and cultural traditions, including the manner in which families are involved in decision-making about health care generally. Under both systems any valid indication of deceased persons' opposition to posthumous removal of their cells, tissues or organs will prevent such removal.

Under a regime of explicit consent – sometimes referred to as 'opting in' – cells, tissues or organs may be removed from a deceased person if the person had expressly consented to such removal during his or her lifetime; depending upon domestic law, such consent may be made orally or recorded on a donor card, driver's license or identity card or in the medical record or a donor registry. When the deceased has neither consented nor clearly expressed opposition to organ removal, permission should be obtained from a legally specified surrogate, usually a family member.

The alternative, presumed consent system – termed 'opting (or contracting) out' – permits material to be removed from the body of a deceased person for transplantation and, in some countries, for anatomical study or research, unless the person had expressed his or her opposition before death by filing an objection with an identified office, or an informed party reports that the deceased definitely voiced an objection to donation. Given the ethical importance of consent, such a system should ensure that people are fully informed about the policy and are provided with an easy means to opt out.

Although expressed consent is not required in an opting-out system before removal of the cells, tissues or organs of a deceased person who had not objected while

still alive, procurement programmes may be reluctant to proceed if the relatives personally oppose the donation; likewise, in opting-in systems, programmes typically seek permission from the family even when the deceased gave pre-mortem consent. Programmes are more able to rely on the deceased's explicit or presumed consent, without seeking further permission from family members, when the public's understanding and acceptance of the process of donating cells, tissues and organs is deep-seated and unambiguous. Even when permission is not sought from relatives, donor programmes need to review the deceased's medical and behavioural history with family members who knew him or her well, since accurate information about donors helps to increase the safety of transplantation.

For tissue donation, which entails slightly less challenging time constraints, it is recommended always to seek the approval of the next of kin. An important point to be addressed is the manner in which the appearance of the deceased's body will be restored after the tissues are removed."

D. Domestic law

1. Law on the protection of the body of a deceased person and use of human organs and tissues

42. The Law on protection of the body of a deceased person and use of human organs and tissue (likums "Par miruša cilvēka ķermeņa aizsardzību un cilvēka audu un orgānu izmantošanu medicīnā" – "the Law"), as in force at the relevant time (with amendments effective as of 1 November 1995 and up until 31 December 2001), provides in section 2 that every living person with legal capacity is entitled to consent or object, in writing, to the use of his or her body after death. The wish expressed, unless it is contrary to the law, is binding.

43. Section 3 provides that any such refusal of or consent to the use of one's body after death has legal effect only if it has been signed by a person with legal capacity, recorded in his or her medical record and denoted by a special stamp in his or her passport. The Department of Health in the Ministry of Welfare is responsible for prescribing the procedure for recording refusal or consent in a person's medical record (contrast with the situation following legislative amendments effective as of 1 January 2002, Petrova v. Latvia, no. 4605/05, § 35, 24 June 2014).

44. Pursuant to section 4, which is entitled "The rights of the closest relatives", the organs and tissues of a deceased person may not be removed against his or her wishes as expressed during his or her lifetime. In the absence of express wishes, removal may be carried out if none of the closest relatives (children, parents, siblings or spouse) objects. Transplantation may be carried out after the biological or brain death of the potential donor (section 10).

45. More specifically, section 11 of the Law provides that organs and tissue from a deceased donor may be removed for transplantation purposes if that person has

not objected to such removal during his or her lifetime and if his or her closest relatives have not prohibited it.

46. By virtue of a transitional provision of the Law, a stamp in a person's passport added before 31 December 2001 denoting objection or consent to the use of his or her body after death has legal effect until a new passport is issued or an application to the Office of Citizenship and Migration Affairs is submitted.

47. Section 17 provides that the State is responsible for protecting the body of a deceased person and for using organs or tissues for medical purposes. At the material time this function was entrusted to the Department of Health in the Ministry of Welfare (as of 1 January 2002, the Ministry of Welfare, as of 30 June 2004, the Ministry of Health). No organisation or authority can carry out the removal of organs and tissues and use them without an authorisation issued by the Department of Health (as of 1 January 2002, the Minister of Welfare, as of 30 June 2004, the Minister of Health).

48. Section 18 prohibits the selection, transportation and use of the removed organs and tissues for commercial purposes. It also provides that the removal of organs and tissues from any living or deceased person can only be carried out with strict respect for that person's expressed consent or objection.

49. Section 21 originally provided that the prosecutor's office was to supervise compliance with this Law (paragraph 1). The Department of Health of the Ministry of Welfare and other competent bodies were responsible for monitoring the legality of the use of human tissue and organs (paragraph 2). By virtue of amendments effective from 1 January 2002, paragraph 1 was repealed; the remaining paragraph provided that the Ministry of Welfare was to bear responsibility for checking the compatibility of the use of human tissue and organs with law and other legislative instruments. From 30 June 2004 this task was entrusted to the Ministry of Health. Lastly, since 27 August 2012 this section has been repealed in its entirety.

50. On 2 June 2004 amendments to sections 4 and 11 of the Law were passed by Parliament, effective as of 30 June 2004. From that date onwards, section 4 provides that if no information is recorded in the population register about a deceased person's refusal of or consent to the use of his or her body, organs or tissue after death, the closest relatives have the right to inform the medical institution in writing of the wishes of the deceased person expressed during his or her lifetime. Section 11 provides that the organs and body tissue of a deceased person may be removed for transplantation purposes if no information is recorded in the population register about the deceased person's refusal of or consent to the use of his or her organs or body tissue after death and if the closest relatives of the deceased have not, before the start of the transplantation, informed the medical institution in writing of any

objection by the deceased person to the use of his or her organs and body tissue after death expressed during his or her lifetime. It is forbidden to remove organs and body tissue from a dead child for transplantation purposes unless one of his or her parents or his or her legal guardian has consented to it in writing.

2. Regulation of the Cabinet of Ministers no. 431 (1996)

51. This Regulation (Noteikumi par miruša cilvēka audu un orgānu uzkrāšanas un izmantošanas kārtību medicīnā) provides that removal of organs and tissue may be carried out after the biological or brain death of a person if his or her passport and medical record contain a stamp denoting consent to such removal (see paragraph 3 of the Regulation). In the absence of such a stamp, the provisions of the Law (see paragraphs 42-50 above) are to be followed.

3. Legal regulation of the MADEKKI

52. The legal regulations governing the Inspectorate of Quality Control for Medical Care and Working Capability ("MADEKKI") in Latvian law are summarised in L.H. v. Latvia (no. 52019/07, §§ 24-27, 29 April 2014). For the purposes of the present case it suffices to note that these regulations – approved by the Cabinet of Ministers (Regulation no. 391 (1999), effective from 26 November 1999 to 30 June 2004) – provided, inter alia, that one of the main functions of the MADEKKI was to monitor the professional quality of healthcare in medical institutions.

4. Criminal law provisions

53. Section 139 of the Criminal Law (Krimināllikums) provides that the unlawful removal of organs or tissues from a living or deceased human being in order to use them for medical purposes is a criminal offence if carried out by a medical practitioner.

54. The relevant provisions pertaining to the rights of civil parties in criminal proceedings under the former Code of Criminal Procedure (Latvijas Kriminālprocesa kodekss, effective until 1 October 2005) are described in Liģeres v. Latvia (no. 17/02, §§ 39-41, 28 June 2011) and Pundurs v. Latvia ((dec.), no. 43372/02, §§ 12-17, 20 September 2011).

55. In addition, the relevant provisions pertaining to the rights of civil parties in criminal proceedings under the Criminal Procedure Law (Kriminālprocesa likums, effective from 1 October 2005), as in force at the material time, read as follows.

Section 22 – Right to compensation for damage

"A person who has sustained psychological distress, physical injury or pecuniary loss as a result of a criminal offence shall be guaranteed procedural opportunities to request and receive compensation for pecuniary and non-pecuniary damage."

Section 351 – Claim for compensation

"(1) An injured party shall have the right to submit a claim for compensation for harm caused at any stage of criminal proceedings up to the commencement of

a judicial investigation in a court of first instance. The claim shall contain justification of the amount of compensation requested.

(2) A claim may be submitted in writing or expressed orally. An oral request shall be recorded in the minutes by the person directing the proceedings.

(3) During pre-trial proceedings, the public prosecutor shall indicate the submission of a claim and the amount of compensation claimed, as well as his or her opinion thereon, in the document concerning the completion of pre-trial proceedings.

(4) Failure to ascertain the criminal liability of a person shall not be an impediment to the submission of a compensation claim.

(5) An injured party shall have the right to withdraw a submitted compensation claim at any stage of criminal proceedings up to the moment when the court retires to give judgment. The refusal of compensation by a victim may not constitute grounds for the revocation or modification of charges, or for acquittal."

5. The right to receive compensation

56. Article 92 of the Constitution (Satversme) provides, inter alia, that "any person whose rights are violated without justification has a right to commensurate compensation".

57. Domestic legal provisions pertaining to compensation for pecuniary and non-pecuniary damage under the Civil Law (Civillikums), before and after the amendments that were effective from 1 March 2006, are quoted in full in Zavoloka v. Latvia (no. 58447/00, §§ 17-19, 7 July 2009). Sections 1635 and 1779 are further described in Holodenko v. Latvia (no. 17215/07, § 45, 2 July 2013).

58. Under section 92 of the Administrative Procedure Law (Administratīvā procesa likums), in force since 1 February 2004, everyone has the right to receive commensurate compensation for pecuniary and non-pecuniary damage caused by an administrative act or action of a public authority. Under section 93 of the same Law, a claim for compensation can be submitted either together with an application to the administrative courts to declare an administrative act or action of a public authority unlawful, or to the public authority concerned following a judgment adopted in such proceedings. Under section 188, an application to an administrative court regarding an administrative act or action of a public authority must be lodged within one month or one year depending on the circumstances. In relation to an action of a public authority, the one-year time-limit runs from the date on which the applicant finds out that such action has occurred. Lastly, under section 191(1) an application will be refused if more than three years have elapsed since the applicant found out or ought to have found out that such action occurred. This time-limit is not amenable to extension (atjaunots).

59. The amount of compensation and the procedure for claiming damages from a public authority on account of an unlawful administrative act or an unlawful action

of a public authority are prescribed by the Law on compensation for damage caused by public authorities (Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums), in force since 1 July 2005. Chapter III of the Law provides for the procedure to be followed when an individual claims damages from a public authority. Under section 15, an individual is entitled to lodge an application with the public authority that was responsible for the damage. Pursuant to section 17, such an application must be lodged not later than one year from the date when the individual became aware of the damage and, in any event, not later than five years after the date of the unlawful administrative act or unlawful action of a public authority.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

60. The applicant complained in substance under Article 8 of the Convention, firstly, that the removal of tissue from her husband's body had been carried out without his or the applicant's prior consent. Secondly, she complained that – in the absence of such consent – his dignity, identity and integrity had been breached and his body had been treated disrespectfully.

61. Article 8 of the Convention reads as follows.

"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 the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

62. The Government denied that there had been a violation of that Article.

A. Preliminary issues

63. The Court must start by examining whether it is competent ratione personae to examine the applicant's complaint; this issue calls for consideration by the Court of its own motion (see Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, § 27, ECHR 2009).

64. The Court's approach as concerns direct and indirect victims has been recently summarised in Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania ([GC], no. 47848/08, §§ 96-100, ECHR 2014) as follows (references omitted).

"(i) Direct victims

96. In order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he or she was 'directly affected' by the measure complained of … This is indispensable for putting the protection mechanism of the

Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings …

Moreover, in accordance with the Court's practice and with Article 34 of the Convention, applications can only be lodged by, or in the name of, individuals who are alive … Thus, in a number of cases where the direct victim has died prior to the submission of the application, the Court has not accepted that the direct victim, even when represented, had standing as an applicant for the purposes of Article 34 of the Convention …

(ii) Indirect victims

97. Cases of the above-mentioned type have been distinguished from cases in which an applicant's heirs were permitted to pursue an application which had already been lodged. An authority on this question is Fairfield and Others …, where a daughter lodged an application after her father's death, alleging a violation of his rights to freedom of thought, religion and speech (Articles 9 and 10 of the Convention). While the domestic courts granted Ms Fairfield leave to pursue the appeal after her father's death, the Court did not accept the daughter's victim status and distinguished this case from the situation in Dalban v. Romania …, where the application had been brought by the applicant himself, whose widow had pursued it only after his subsequent death.

In this regard, the Court has differentiated between applications where the direct victim has died after the application was lodged with the Court and those where he or she had already died beforehand.

Where the applicant has died after the application was lodged, the Court has accepted that the next of kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case …

98. However, the situation varies where the direct victim dies before the application is lodged with the Court. In such cases the Court has, with reference to an autonomous interpretation of the concept of 'victim', been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to 'respect for human rights' (Article 37 § 1 in fine of the Convention) and the applicants as heirs had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights … The latter cases, it may be noted, were brought before the Court following or in connection with domestic proceedings in which the direct victim himself or herself had participated while alive.

Thus, the Court has recognised the standing of the victim's next of kin to submit an application where the victim has died or disappeared in circumstances allegedly engaging the responsibility of the State …

99. In Varnava and Others … the applicants lodged the applications both in their own name and on behalf of their disappeared relatives. The Court did not consider

it necessary to rule on whether the missing men should or should not be granted the status of applicants since, in any event, the close relatives of the missing men were entitled to raise complaints concerning their disappearance … The Court examined the case on the basis that the relatives of the missing persons were the applicants for the purposes of Article 34 of the Convention.

100. In cases where the alleged violation of the Convention was not closely linked to disappearances or deaths giving rise to issues under Article 2, the Court's approach has been more restrictive, as in Sanles Sanles v. Spain …, which concerned the prohibition of assisted suicide. The Court held that the rights claimed by the applicant under Articles 2, 3, 5, 8, 9 and 14 of the Convention belonged to the category of non-transferable rights, and therefore concluded that the applicant, who was the deceased's sister-in-law and legal heir, could not claim to be the victim of a violation on behalf of her late brother-in-law. The same conclusion has been reached in respect of complaints under Articles 9 and 10 brought by the alleged victim's daughter …

In other cases concerning complaints under Articles 5, 6 or 8 the Court has granted victim status to close relatives, allowing them to submit an application where they have shown a moral interest in having the late victim exonerated of any finding of guilt … or in protecting their own reputation and that of their family …, or where they have shown a material interest on the basis of the direct effect on their pecuniary rights … The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration …

The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria …"

65. As regards the first part of the complaint, the Court considers that the applicant has adequately demonstrated that she has been directly affected by the removal of tissue from her deceased husband's body without her consent (see also Petrova v. Latvia, no. 4605/05, § 56, 24 June 2014). The Court is therefore satisfied that the applicant can be considered a "direct victim" in that regard (see paragraph 60 above). However, in so far as the applicant's complaint relates to the lack of consent from her deceased husband, the Court considers that it is incompatible ratione personae with the provisions of the Convention within the meaning of Article 35 § 3 (a) of the Convention and must therefore be rejected in accordance with Article 35 § 4.

66. As regards the second part of the complaint, the Court notes that the applicant conceded that it concerned her deceased husband's rights. Accordingly, it must also be rejected as incompatible ratione personae with the provisions of the Convention in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

67. Lastly, the Court notes that in certain respects the second part of the complaint overlaps with the applicant's complaint under Article 3 of the Convention. Accordingly, the Court will examine it below in so far as it relates to the applicant's rights.

B. Admissibility

1. The parties' submissions

68. The Government conceded that the applicant's complaint fell within the ambit of "private life" under Article 8 of the Convention, but they did not accept that it concerned "family life".

69. First of all, relying on the Court's decision in Grišankova and Grišankovs v. Latvia ((dec.), no. 36117/02, ECHR 2003-II), the Government argued that the applicant had failed to exhaust domestic remedies. They submitted that the applicant should have lodged a complaint with the Constitutional Court since the removal of tissue from her husband's body had been carried out in accordance with the procedure laid down in sections 4 and 11 of the Law. She should have raised the issue of the compliance of these legal provisions with the Latvian Constitution.

70. Secondly, the Government argued that the applicant had not submitted a complaint to the MADEKKI. The Government pointed out that at the material time the MADEKKI had been the body with competence to examine the applicant's complaints, since its function was to monitor the professional quality of healthcare in medical institutions. It was the Government's submission that an examination by MADEKKI of the compliance of the tissue removal procedure with domestic law was a necessary precondition for instituting any civil or criminal proceedings against those responsible. They did not provide any further information in this regard.

71. Thirdly, the Government submitted that the applicant could have relied on section 1635 of the Civil Law (as effective from 1 March 2006) and claimed compensation for pecuniary and non-pecuniary damage before the civil courts. The Government provided some examples of domestic case-law pertaining to the application of section 1635 in practice. They referred to the proceedings in case PAC-714 (instituted on 7 February 2005), where a claimant had sought compensation for non-pecuniary damage from a hospital where she had given birth and where tubal ligation (surgical contraception) had been performed without her consent (referring to L.H. v. Latvia, no. 52019/07, § 8, 29 April 2014). On 1 December 2006 that claim had been upheld and the claimant had been awarded compensation for physical injury and psychological distress in the amount of 10,000 Latvian lati (LVL) in respect of the unlawful sterilisation on the basis of section 2349 of the Civil Law. This judgment had taken effect on 10 February 2007. The Government also referred to one of the "Talsi tragedy" cases (instituted on 15 September 2006), in which on 16 March 2010 the appellate court had awarded compensation payable by the State in the amount of LVL 20,000 in connection with an incident of 28 June 1997 in Talsi, in which the claimant's daughter, among other children, had died. The final decision in that case had been adopted on 28 September 2011. The Government did not provide copies of the decisions in that case.

72. The applicant disagreed. She submitted that her complaint fell within the ambit of private and family life under Article 8 of the Convention.

73. In response to the first remedy cited by the Government – recourse to the Constitutional Court – the applicant pointed out that the court's competence was limited to reviewing compliance with the Constitution of laws and other legal instruments. The applicant argued that the tissue removal had been contrary to sections 4 and 11 of the Law; she did not consider these legal provisions to be contrary to the Constitution. The decision in Grišankova and Grišankovs, cited above, concerned the wording of the Education Law. The present case, however, concerned an individual action – the removal of tissue from her husband's body. Moreover, the applicant argued that if any provisions of the Law were indeed not compatible with the Constitution, the criminal court, the Prosecutor General or the Cabinet of Ministers should and could themselves have submitted an application to the Constitutional Court.

74. In response to the second remedy cited by the Government, namely a complaint to the MADEKKI, the applicant submitted that it would not have been the competent body. Tissue removal was not healthcare. The applicant referred to section 21 of the Law and explained that at the relevant time supervision had been the responsibility of the prosecutor's office (see paragraph 49 above).

75. In response to the third remedy cited by the Government, the applicant argued that the Forensic Centre was a State institution under the supervision of the Ministry of Health. Since the entry into force of the Administrative Procedure Law on 1 February 2004, administrative acts and actions of public authorities had been amenable to judicial review by the administrative courts. Thus, an appeal against an action of a public authority – in this case, the removal of tissue from the body of the applicant's husband – could only be lodged in the administrative courts. Referring to the Forensic Centre's regulations, the applicant noted that the actions of its employees were amenable to appeal before its head, whose decisions or actions were subsequently amenable to judicial review by the administrative courts. Appeals under the Administrative Procedure Law, however, would have been time-barred in the applicant's case by the time the final decision had been taken in the criminal proceedings. The applicant concluded that the actions of the expert concerned could not be subject to judicial review by the civil courts.

76. The applicant also pointed out that the amount of compensation and the procedure for claiming damages from a public authority on account of an unlawful administrative act or unlawful action by a public authority were prescribed by the Law on compensation for damage caused by public authorities and not by the Civil Law. An action under the former law, however, would also have been time-barred.

77. Lastly, even if the applicant had, as suggested by the Government, lodged a civil claim under section 1635 of the Civil Law against the experts who had

removed tissue from her husband's body, it would have been bound to fail since in the criminal proceedings it had been established that they were not guilty. The applicant also pointed out that the examples of domestic case-law referred to by the Government were not comparable. In the first case the civil proceedings had been instituted against a private hospital and not against a State institution. The second case concerned events which dated back to 1997, long before the Administrative Procedure Law and the Law on compensation for damage caused by public authorities had come into effect. In addition, at that time, the Code of Civil Procedure contained a chapter concerning litigation in matters arising from administrative relations, which had been superseded by the entry into force of the Administrative Procedure Law.

2. The Court's assessment

(a) Non-exhaustion of domestic remedies

78. In so far as the Government referred to a constitutional complaint as a relevant remedy in the applicant's circumstances, the Court considers that such a complaint could not constitute an effective means of protecting the applicant's rights under Article 8 of the Convention for the following reasons.

79. The Court has already examined the scope of the Constitutional Court's review in Latvia (see Grišankova and Grišankovs, cited above; Liepājnieks v. Latvia (dec.), no. 37586/06, §§ 73-76, 2 November 2010; Savičs v. Latvia, no. 17892/03, §§ 113-17, 27 November 2012; Mihailovs v. Latvia, no. 35939/10, §§ 157-58, 22 January 2013; Nagla v. Latvia, no. 73469/10, § 48, 16 July 2013; and Latvijas jauno zemnieku apvienība v. Latvia (dec.), no. 14610/05, §§ 44-45, 17 December 2013).

80. The Court noted in the above cases that the Constitutional Court examined, inter alia, individual complaints challenging the constitutionality of a legal provision or its compliance with a provision having superior legal force. An individual constitutional complaint can be lodged against a legal provision only when an individual considers that the provision in question infringes his or her fundamental rights as enshrined in the Constitution. The procedure of an individual constitutional complaint cannot therefore serve as an effective remedy if the alleged violation resulted only from the erroneous application or interpretation of a legal provision which, in its content, is not unconstitutional (see Latvijas jauno zemnieku apvienība, cited above, §§ 44-45).

81. In the present case, the Court considers that the applicant's complaint concerning the removal of tissue does not relate to the compatibility of one legal provision with another legal provision having superior force. The Government argued that the tissue removal had taken place in accordance with the procedure laid down in law. The applicant, for her part, did not contest the constitutionality of this procedure. Instead, she argued that the tissue removal from her husband's body constitut-

ed an individual action that was contrary to sections 4 and 11 of the Law. The Court finds that the applicant's complaint relates to the application and interpretation of domestic law, particularly in the light of the absence of any relevant administrative regulation; it cannot be said that any issues of compatibility arise. In such circumstances the Court considers that the applicant was not required to avail herself of the proposed remedy.

82. The Court understands the Government's argument in relation to the examination by the MADEKKI (see paragraph 70 above) as chiefly pertaining to civil remedies; the Court will examine it immediately below. It is not clear from the evidence in the case file whether the MADEKKI carried out any examination in relation to the criminal proceedings in the present case (contrast Petrova, cited above, § 15). In any event, it does not appear that any examination by the MADEKKI was necessary in order to institute criminal proceedings. Be that as it may, it is irrelevant that the applicant did not lodge a separate complaint with the MADEKKI, as long as she complained of all the decisions adopted by the investigating and prosecuting authorities, whose task it is normally to establish whether any crime has been committed (ibid., § 71).

83. As regards the possibility of lodging a civil claim for damages, in Calvelli and Ciglio v. Italy ([GC], no. 32967/96, § 51, ECHR 2002-I), the Court held:

"… In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged."

84. The Court has further stated that this principle applies when the infringement of the right to life or personal integrity is not caused intentionally (see Vo v. France [GC], no. 53924/00, § 90, ECHR 2004-VIII, and Öneryıldız v. Turkey [GC], no. 48939/99, § 92, ECHR 2004-XII).

85. However, the Court has also found that, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose the remedy which addresses his or her essential grievance (see Jasinskis v. Latvia, no. 45744/08, § 50, 21 December 2010). The Court observes that the applicant was originally unaware of the fact that tissue from her husband's body had been removed; she learned about it only when the security police opened a criminal inquiry into these facts. Subsequently, she availed herself of the criminal avenue of redress – she was declared an injured party in these proceedings and she pursued them by lodging various complaints with the investigating and prosecuting authorities. The criminal-law remedy could have given rise to a finding that the removal of

tissue from her husband's body had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached. It could eventually have led to a compensation award, given that the Latvian legal system recognises victims' rights to lodge civil claims in criminal proceedings and to request compensation for damage suffered as a result of a crime (see paragraphs 54-55 above). In such circumstances, there is nothing to suggest that the applicant could have legitimately expected that the criminal-law remedy would not be an effective one in her case.

86. The Court is of the view that the applicant was not required to submit to the civil courts a separate, additional request for compensation, which could also have given rise to a finding that the removal of tissue from her husband's body had been carried out contrary to the domestic procedure and that her rights as the closest relative had been breached (see also Sergiyenko v. Ukraine, no. 47690/07, §§ 40-43, 19 April 2012; Arskaya v. Ukraine, no. 45076/05, §§ 75-81, 5 December 2013; and Valeriy Fuklev v. Ukraine, no. 6318/03, §§ 77-83, 16 January 2014, where the applicants were not required to lodge separate civil claims for the alleged medical malpractice). The Court concludes that the applicant exhausted the available domestic remedies by pursuing the criminal-law remedy.

87. In the light of the above conclusion, the Court does not consider it necessary to address the Government's argument that an examination by the MADEKKI was necessary to institute civil proceedings. Nor does it consider it necessary to address the applicant's argument that her claim under the Administrative Procedure Law and the Law on compensation for damage caused by public authorities was time-barred or that her claim under the Civil Law was bound to fail.

(b) Applicability

88. The Court notes that, while the Government did not accept that the applicant's complaint concerned "family life", they did not dispute that it fell within the ambit of "private life" under Article 8 of the Convention.

89. The Court reiterates that the concepts of private and family life are broad terms not susceptible to exhaustive definition (see Hadri-Vionnet v. Switzerland, no. 55525/00, § 51, 14 February 2008). In Pannullo and Forte v. France (no. 37794/97, § 36, ECHR 2001-X), the Court considered the excessive delay by the French authorities in returning the body of their child following an autopsy to be an interference with the applicants' private and family life. It has also held that the refusal of the investigating authorities to return the bodies of deceased persons to their relatives constituted an interference with the applicants' private and family life (see Sabanchiyeva and Others v. Russia, no. 38450/05, § 123, ECHR 2013, and Maskhadova and Others v. Russia, no. 18071/05, § 212, 6 June 2013). However, that issue does not arise in the present case and no complaint has been made to that effect. The Court notes that there is no dispute between the parties that the applicant's right – established

under domestic law – to express consent or refusal in relation to the removal of tissue from her husband's body comes within the scope of Article 8 of the Convention in so far as private life is concerned. The Court sees no reason to hold otherwise and thus considers that this Article is applicable in the circumstances of the case.

(c) Conclusion

90. The Court notes that the applicant's complaint – in so far as it concerns the removal of tissue from her deceased husband's body without her consent – is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

91. The applicant submitted that the removal of tissue from her husband's body without her consent had constituted interference with her private life. She argued that she had been prevented from expressing her wishes regarding the removal of tissue from her deceased husband's body. She had not even been informed of this intrusive fact. The applicant also submitted that the expert could not have verified the existence of a stamp in her husband's passport because it had been at their home in Sigulda and therefore unavailable to the expert.

92. First of all, relying on Hokkanen v. Finland (23 September 1994, § 55, Series A no. 299-A), the applicant argued that the interference had not been in accordance with the law and had not pursued a legitimate aim. The applicant referred to sections 4 and 11 of the Law and argued that in 2001 the system of "explicit consent" had operated in Latvia. The applicant was of the opinion that the experts should have enquired whether the closest relatives had agreed or objected to tissue removal and that they had been under an obligation to do so under the aforementioned provisions. She argued that the aim of the Law was to protect the body of a deceased person and that it was necessary for this aim to be taken into account when interpreting its provisions. In this connection she also referred to international material (see paragraph 37 above). Lastly, the 2004 amendments to the Law demonstrated that previously the system of "explicit consent" had prevailed. The discussion regarding "explicit" and "presumed" consent systems in Latvia had only started at about the time that the criminal inquiry was opened in the present case. As a result, substantive legislative amendments had been passed by Parliament in 2004 (see paragraph 50 above). The applicant submitted that even after these amendments the relevant legal provisions were still not clear enough, but their wording had been changed to establish the system of "presumed consent".

93. The applicant argued furthermore that the domestic law was not foreseeable in its application because it did not provide for the possibility for the relatives to

object to tissue removal. She referred to various findings by the domestic authorities that the legal provisions were unclear (see, for example, paragraph 28 above) and noted that several prosecutors had considered that the Law had indeed been breached (see, for example, paragraphs 22, 24 and 27 above). The applicant argued that the experts had exploited the lack of clarity for their own ends and had derived financial benefit from it. The applicant concluded that the removal of tissue from her husband's body had not been carried out in accordance with the law.

94. Secondly, the applicant submitted that "saving the lives of others" could not constitute a legitimate aim for removing tissue without consent. And, thirdly, she argued that it had not been sufficiently proved by the Government to be necessary in a democratic society.

95. The Government maintained that the interference with the applicant's private life as a result of the removal of tissue from her husband's body without his or the applicant's prior consent had complied with the criteria set out in Article 8 § 2.

96. Firstly, the Government argued that the tissue removal had been carried out in accordance with domestic law. They specifically pointed out that the Court – if it were to reject their non-exhaustion argument as regards recourse to the Constitutional Court – ought to proceed on the assumption that national law was compatible with the standard laid down in Article 8 of the Convention.

97. They referred to paragraph 3 of Regulation no. 431 (1996) and sections 4 and 11 of the Law and argued that the tissue removal had been carried out in accordance with domestic law. No prior consent had been necessary, nor had it been necessary to seek permission from the deceased person's closest relatives. It had not been unlawful to proceed with the tissue removal without the consent of the deceased person or his or her closest relatives. The Government argued that under sections 4 and 11 of the Law only "an absence of any objection by the deceased person expressed prior to his death or an absence of explicit objection by [the closest relatives] expressed prior to the tissue removal" had been required. The Government thus argued that the system of "presumed consent" had been operating in Latvia at the material time. They pointed out that the system of "presumed consent" was not innovative and that Latvia had not been the only country employing this system; it was also established in eleven other States.

98. According to the Government, the expert had verified – prior to the tissue removal – that there was no stamp in Mr Elberts' passport denoting his objection to the use of his body tissue, and this had allegedly been noted in the form of an abbreviation ("zīm. nav") in the registration log. However, in the copy of the registration log provided to the Court no such legible abbreviation could be seen.

99. At the same time, the Government acknowledged that national laws did not impose any obligation on a doctor to make specific enquiries in order to ascertain

if there were any close relatives and to inform them of possible tissue removal. In this connection they referred to the court's decision in the criminal proceedings (see paragraph 28 above).

100. Secondly, the Government argued that the tissue removal had been carried out in order to "save and/or improve the lives of others". They referred to the court's decision in the criminal proceedings (see paragraph 28 above), which had noted that "tissue [was] removed in the name of humanity with the aim of improving the health of others and prolonging their lives". They also referred to the Preamble to the Additional Protocol on Transplantation of Organs and Tissues of Human Origin to the effect that the practice of tissue donation and tissue removal for transplantation purposes "contributes to saving lives or greatly improving their quality" and that "transplantation of … tissues is an established part of the health services offered to the population". The Government concluded that the tissue removal had had a legitimate aim – namely the protection of the health and the rights of others.

101. Thirdly, the Government reiterated that the States enjoyed a margin of appreciation when determining measures to be taken in response to the pressing social need to protect the health and the rights of others. The Government relied on Dudgeon v. the United Kingdom (22 October 1981, § 52, Series A no. 45) and argued that it was for the national authorities to make the initial assessment of the pressing social need in each case and that the margin of appreciation was left to them. Tissue removal and transplantation contributed to saving lives and could greatly improve their quality. Thus, there was a "pressing social need" for tissue donation because tissue transplantation had become an established part of the health services offered to the whole population. They reiterated that Mr Elberts' tissue had been removed in order to secure bio-material for transplantation purposes to potentially improve and/or save the lives of others.

102. It was primarily the duty and responsibility of the deceased's closest relative to duly inform the medical personnel in good time of the deceased person's objection to his or her tissue removal. The national law at the time had not prevented either Mr Elberts or the applicant, as his closest relative, from expressing their wishes in relation to tissue removal. They could have objected to the donation of tissue. However, neither of them had done so before the tissue had been removed in accordance with the Law. The Government concluded that a fair balance had been struck between the applicant's "right to private life under the Convention – as national laws envisaged the closest relative's right to object to the removal of the deceased person's tissue prior to the removal procedure (which had not been exercised either by Mr Elberts or by the applicant) – and the pressing social need to secure bio--implants for tissue transplantation as part of the health services offered to the whole population".

2. The Court's assessment

(a) General principles

103. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. The notion of necessity implies that the interference correlates with a pressing social need and, in particular, that it is proportionate to one of the legitimate aims pursued by the authorities (see A, B and C v. Ireland [GC], no. 25579/05, §§ 218-41, ECHR 2010).

104. The Court refers to the interpretation given to the phrase "in accordance with the law" in its case-law (as summarised in S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, §§ 95-96, ECHR 2008). Of particular relevance in the present case is the requirement for the impugned measure to have some basis in domestic law, which should be compatible with the rule of law; this, in turn, means that the domestic law must be formulated with sufficient precision and must afford adequate legal protection against arbitrariness. Accordingly, the domestic law must indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see, most recently, L.H. v. Latvia, cited above, § 47).

(b) Application in the present case

105. As to the alleged interference, turning to the circumstances of the present case, the Court notes that following a car accident the applicant's husband sustained life-threatening injuries, of which he died on the way to hospital. On the following day, his body was transported to the Forensic Centre, where an autopsy was carried out. Subsequently, some of his body tissue was removed and later sent to a company in Germany to be transformed into bio-implants with the intention that they would be sent back to Latvia for transplantation purposes. The applicant, who was one of his closest relatives, was not informed of this and could not exercise certain rights established under domestic law – notably the right to express consent or refusal in relation to the removal of tissue from her husband's body. She did not learn about the tissue removal until about two years later, when the security police opened a criminal inquiry into the illegal removal of organs and tissue between 1994 and 2003 and contacted her.

106. The Court notes that it has not been contested that the Forensic Centre was a public institution and that the acts or omissions of its medical staff, including experts who carried out organ and tissue removal, were capable of engaging the responsibility of the respondent State under the Convention (see Glass v. the United Kingdom, no. 61827/00, § 71, ECHR 2004-II).

107. The Court considers that the above-mentioned circumstances are sufficient for it to conclude that there has been an interference with the applicant's right to respect for her private life under Article 8 of the Convention.

108. As to whether the interference was "in accordance with the law", the Court observes that Latvian law at the material time explicitly provided for the right on the part of not only the person concerned but also the person's closest relatives, including his or her spouse, to express their wishes in relation to the removal of tissue after that person's death (see paragraphs 44-45 above). The parties did not contest this. However, their views differed as far as the exercise of this right was concerned. The applicant considered that the experts were obliged to establish the wishes of the closest relatives. The Government argued that the mere absence of any objection was all that was required to proceed with tissue removal. It is the Court's view that these issues relate to the quality of domestic law, in particular the question of whether the domestic legislation was formulated with sufficient precision and afforded adequate legal protection against arbitrariness in the absence of relevant administrative regulations.

109. In this context, the Court observes that the principal disagreement between the parties is whether or not the law – which in principle afforded the closest relatives the right to express consent or refusal in relation to tissue removal – was sufficiently clear and foreseeable in its application as regards the exercise of this right. The applicant argued that there had been no possibility for her as the closest relative to object to the tissue removal, but the Government were of the view that she could have nonetheless exercised that right as nothing had prevented her from expressing her wishes or her objection.

110. The Court reiterates, however, that where national legislation is in issue it is not the Court's task to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see Taxquet v. Belgium [GC], no. 926/05, § 83 in fine, ECHR 2010). The Court observes that the parties submitted detailed arguments on the dispute as to whether the system of "explicit consent" or "presumed consent" had been operating in Latvia at the material time (see also the divided views of experts and investigators in paragraph 18 above). It has to be borne in mind, however, that the issue before the Court in the present case is not the general question of whether the respondent State should provide for a particular consent system. The issue is rather the applicant's right to express wishes in connection with the removal of tissue from her husband's body after his death and the domestic authorities' alleged failure to ensure the legal and practical conditions for the exercise of that right.

111. The starting-point for the Court's analysis is the fact that the applicant was not informed of the removal of tissue from her husband's body when it was carried

out. The domestic authorities established that it was common practice at the time for the experts at the Forensic Centre who carried out such removal not to attempt to contact relatives of the deceased (see paragraph 16 above); there was also evidence that, even where the experts did have some contact with the relatives, they neither informed them of the imminent removal of tissue nor obtained their consent (see paragraph 27 above).

112. As to whether or not the domestic law was formulated with sufficient precision, the Court observes that the domestic authorities themselves held conflicting views as to the scope of the obligations enshrined in national law. On the one hand, while the security police considered that tissue removal was allowed only with prior express consent and that its absence rendered the removal unlawful, they also accepted – referring to the views held by the experts – that different interpretations of domestic law were possible, thus rendering it impossible to secure a conviction (see paragraphs 18 and 20 above). On the other hand, various supervising prosecutors concluded that by removing the tissue without prior express consent the experts had breached the law and were to be held criminally liable (see paragraphs 22, 24 and 25 above). Eventually, the security police accepted the prosecutors' interpretation of the domestic law and found that the rights of the closest relatives, including the applicant, had been breached. However, any criminal prosecution had in the meantime become time-barred (see paragraph 27 above). Lastly, a domestic court, while accepting that the closest relatives had the right to express consent or refusal in relation to the removal of tissue, overruled the view adopted by the prosecution and found that the domestic law did not impose an obligation on the experts to inform the closest relatives and explain their rights to them. The experts could not be convicted of breaching an obligation which was not clearly established by law (see paragraph 28 above).

113. The Court considers that such disagreement as to the scope of the applicable law among the very authorities responsible for its enforcement inevitably indicates a lack of sufficient clarity. In this regard, the Court refers to the domestic court's finding that, although section 4 of the Law provided for the right of the closest relatives to refuse the removal of the deceased person's organs and/or tissue, it did not impose an obligation on the expert to explain this right to the relatives (see paragraph 28 above). The Government also relied on this statement to argue that the tissue removal had not been unlawful (see paragraphs 97 and 99 above). The Court therefore concludes that, although Latvian law set out the legal framework allowing the closest relatives to express consent or refusal in relation to tissue removal, it did not clearly define the scope of the corresponding obligation or the margin of discretion conferred on experts or other authorities in this respect. The Court notes, in this connection, that the relevant European and international documents on this

matter accord particular importance to the principle that the relatives' views must be established by means of reasonable enquiries (see paragraphs 34 et seq. above). More specifically, as noted in the Explanatory Report to the Additional Protocol, whichever system a State chooses to put in place – be it that of "explicit consent" or that of "presumed consent" – appropriate procedures and registers should also be established. If the wishes of the deceased are not sufficiently clearly established, relatives should be contacted to obtain testimony prior to tissue removal (see, in particular, the commentary on Article 17 of the Additional Protocol, paragraph 37 above).

114. Furthermore, the Court reiterates that the principle of legality requires States not only to respect and apply, in a predictable and consistent manner, the laws they have enacted, but also, as a necessary element, to assure the legal and practical conditions for their implementation (see, mutatis mutandis, Broniowski v. Poland [GC], no. 31443/96, §§ 147 and 184, ECHR 2004-V). Following the death of the applicant's husband on 19 May 2001, an expert from the Forensic Centre was authorised to remove tissue from his body within twenty-four hours of verifying that his passport did not contain a special stamp denoting objection (see paragraph 16 above). However, it appears that at the material time there was no common register of stamps that had been entered in passports in order to denote refusal of or consent to the use of the passport-holder's body after death (contrast with the situation following legislative amendments effective as of 1 January 2002 and the inclusion of this information in the population register, as described in Petrova, cited above, § 35). Moreover, it appears that there was no procedure for the State institutions and experts to follow in order to request and obtain this information. The Government argued that the expert had physically checked Mr Elberts' passport prior to removing the tissue, but the applicant claimed that her husband's passport was at home. Therefore, the procedure followed by the expert to verify the information contained in his passport remains unclear. Irrespective of whether or not the expert checked Mr Elberts' passport, it remains unclear how the system of consent, as established under Latvian law at the material time, operated in practice in the circumstances in which the applicant found herself, where she had certain rights as the closest relative but was not informed how and when these rights might be exercised, still less provided with any explanation.

115. As to whether the domestic law afforded adequate legal protection against arbitrariness, the Court notes that the removal of tissue in the present case was not an isolated act as in the above-cited Petrova case, but was carried out under a State-approved agreement with a pharmaceutical company abroad; tissue removal had been carried out on a large number of people (see paragraphs 13, 14 and 26 above). In such circumstances it is all the more important that adequate mechanisms are put in place to counterbalance the wide margin of discretion conferred on the experts

to carry out tissue removal on their own initiative (see paragraph 15), but this was not done (see also the international material cited in paragraphs 34 et seq. above). In response to the Government's argument that nothing had prevented the applicant from expressing her wishes in relation to tissue removal, the Court notes the lack of any administrative or legal regulation in this regard. The applicant was, accordingly, unable to foresee what was expected from her if she wished to exercise that right.

116. In the light of the foregoing, the Court cannot find that the applicable Latvian law was formulated with sufficient precision or afforded adequate legal protection against arbitrariness.

117. The Court accordingly concludes that the interference with the applicant's right to respect for her private life was not in accordance with the law within the meaning of Article 8 § 2 of the Convention. Consequently, there has been a violation of Article 8. Having regard to this conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see, for example, Kopp v. Switzerland, 25 March 1998, § 76, Reports of Judgments and Decisions 1998-II, and Heino v. Finland, no. 56720/09, § 49, 15 February 2011).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

118. The applicant also complained under Article 3 of the Convention that the removal of tissue from her husband's body had been carried out without her prior consent or knowledge and that she had been forced to bury him with his legs tied together.

119. Article 3 of the Convention reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

120. The Government contested that argument.

A. Admissibility

121. The Government raised the same preliminary objections pertaining to non-exhaustion of domestic remedies as already referred to above, and the applicant disagreed (see paragraphs 69-77 above). In this connection the Court refers to its assessment (see paragraphs 78-87 above) and considers it applicable also under this head.

122. Furthermore, the Government referred to an instruction issued by the Ministry of Justice (effective until 1 January 2002) concerning the procedure for post mortem forensic examinations and the Law on the order of examination of applications, complaints and suggestions by State and municipal institutions (effective until 1 January 2008). They argued that the applicant could have lodged a complaint regarding the condition of her deceased husband's body. The applicant disagreed. The Court notes that the Government did not specify the manner in which the proposed remedy could provide redress in respect of the applicant's complaint. The Court

considers it sufficient to refer to its assessment above to the effect that the applicant's recourse to a criminal-law remedy was appropriate (see paragraph 85 above). The Court would add here that the applicant also complained of acts of desecration on her husband's body after the tissue removal in the criminal proceedings concerning the allegedly unlawful tissue removal. Prosecutors at two levels examined her complaints and dismissed them, holding that there was no evidence of desecration (see paragraphs 31-32 above). The Government's objection is therefore dismissed.

123. The Government argued that the applicant had failed to comply with the six-month time-limit, given that she had found out about the condition of her deceased husband's body on 26 May 2001, the day of his funeral. The Court notes, however, that on that date the applicant was not yet aware of the removal of tissue from her husband's body; she learned about it only two years later, when the criminal inquiry was opened. She subsequently became a party to this investigation. The Court therefore regards the final decision in respect of the applicant's complaint as having been issued on 23 October 2008, when the criminal inquiry was discontinued by means of a final decision. It dismisses the preliminary objection in this respect.

124. The Government, relying on Çakıcı v. Turkey ([GC], no. 23657/94, § 98, ECHR 1999-IV), argued that the applicant could not be considered a victim under Article 3 of the Convention since neither she nor her husband had ever objected to the removal of tissue. They also argued that, since the applicant had never complained at the domestic level that she had been forced to bury her husband with his legs tied together, she could not claim to be a victim before the Court now. The applicant pointed out that Çakıcı was a disappearance case, whereas she had herself seen her husband's remains before the funeral and his legs had been tied together. She had been shocked, but at the time she was unaware of the tissue removal. The Court considers that in the present case the question of whether or not the applicant can be considered a victim is closely linked to the merits of the case. It should therefore be joined to the merits.

125. Lastly, the Government maintained that the applicant's complaint was incompatible ratione materiae with the provisions of the Convention. The Government argued that only the outer layer of the meninges (dura mater) had been removed. While they agreed that the removal of tissue from a deceased person without the consent or knowledge of that person's closest relatives might on an individual and subjective basis give rise to distress, they did not consider that this – in itself – raised an issue under Article 3 of the Convention. The Government submitted that Article 3 did not lay down a general obligation to obtain consent for or to inform the closest relatives of tissue removal. The Government considered that the applicant's complaint fell to be examined solely under Article 8 of the Convention. The Court considers that in the present case the question of whether or not the applicant's

complaint falls within the scope of Article 3 of the Convention is closely linked to the merits of the case. It should therefore be joined to the merits.

126. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds, subject to the questions joined to the merits. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

127. The applicant submitted that the minimum level of severity for Article 3 of the Convention to apply had been reached in the present case. She had witnessed the condition of her husband's body – with the legs tied together – after the tissue removal. She had also been pregnant at the time with their second child. The applicant submitted that the unlawful tissue removal amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention, since it had caused her shock and suffering. In support, she provided a written statement from her sister, who stated that she had seen Mr Elberts' body in Sigulda, after it had been transported from the Forensic Centre prior to the funeral, and that his legs had been tied together with dark tape; she had assumed that this had been due to the car accident.

128. Furthermore, the applicant stressed that throughout the criminal inquiry she had been denied the possibility of finding out which organs or tissue had been removed from her husband's body. At first, she had thought that his legs had been tied together to prevent certain consequences of the car accident. Later, she had assumed that they had been tied together following the removal of tissue from the legs and because other material had been inserted. The applicant was finally able to discover what specific body tissue had been removed from her husband's body only when she received the Government's observations in the present case.

129. The applicant, relying on Labita v. Italy ([GC], no. 26772/95, § 131, ECHR 2000-IV), argued that there had been no effective investigation. The inquiry had lasted for five years; it had been terminated because of the expiry of the statutory time-limit. The applicant pointed out that she had lodged some thirteen complaints and that four decisions had been quashed. She considered that the inquiry had not been completed within a reasonable time and that it had been unduly protracted. The applicant, together with other victims, had been left with no redress and the experts had received no punishment.

130. The Government insisted that the tissue removal had been carried out in accordance with domestic law. The applicant had failed to demonstrate that the removal of tissue from her husband's body had amounted to inhuman or degrading treatment. With reference to Selçuk and Asker v. Turkey (24 April 1998, § 78, Reports 1998-II), the Government argued that the applicant had failed to demon-

strate "anguish and suffering" on account of the removal of tissue without her prior consent. With reference to Ireland v. the United Kingdom (18 January 1978, § 167, Series A no. 25), they likewise argued that she had failed to demonstrate that she had experienced "feelings of fear, anguish and inferiority capable of humiliating and debasing" her. The Government reiterated that only dura mater had been removed from the body. Even if the applicant might have experienced a certain level of emotional suffering and distress on account of the removal of tissue without her consent or knowledge, accompanied by the suffering and distress inherent in losing a close family member, such suffering did not attain the minimum level of severity required for it to fall within the scope of Article 3 of the Convention. The Government also argued that during the autopsy, the heart had also been removed from the applicant's husband's body and that dura mater had in any event had to be removed and examined in order to assess whether his skull had been damaged. This could also be said to have caused emotional suffering, but would not attain the minimum level of severity required for Article 3 to apply.

131. The Government pointed out that the applicant had not been present at Sigulda Hospital and that it had been the responsibility of the closest relatives to inform the medical staff of their whereabouts and to contact them if they wished to object to tissue removal. They further emphasised that the removal had taken place under the agreement with the company, that tissues had been sent to the company for transformation into bio-implants and then sent back to Latvia for transplantation purposes, and that the aim behind this had been to improve and save the lives of others. The Government emphasised that tissue removal had to be carried out "very quickly" and that even the most insignificant of delays would have meant losing some of the precious time during which tissue removal was possible. The Government, relying on the fact that during his lifetime the applicant's husband had not objected to tissue removal or expressed such a view to the applicant, argued that she could not claim that it had been carried out contrary to his or her wishes.

132. The Government further submitted that the applicant's allegation that her deceased husband's legs had been tied together was false since it was not substantiated by any credible evidence. In their submission, according to the information provided by the Forensic Centre, his body had been tidied, cleansed and washed after the autopsy. They reiterated that no complaints had been registered concerning the condition of his body. According to the autopsy report, his legs had not been damaged in the car accident. In the present case, the standard of proof "beyond reasonable doubt" was not fulfilled as the applicant's allegation concerning the condition of her deceased husband's body had not been substantiated by any evidence.

2. The Court's assessment

(a) General principles

133. In Svinarenko and Slyadnev v. Russia ([GC], nos. 32541/08 and 43441/08, §§ 113-18, ECHR 2014) the Court recently summarised the applicable principles as follows.

"113. As the Court has repeatedly stated, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among many other authorities, Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV).

114. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, Jalloh v. Germany [GC], no. 54810/00, § 67, ECHR 2006-IX). Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see, among other authorities, V. v. the United Kingdom [GC], no. 24888/94, § 71, ECHR 1999-IX).

115. Treatment is considered to be 'degrading' within the meaning of Article 3 when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (see M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 220, ECHR 2011, and El-Masri v. the former Yugoslav Republic of Macedonia [GC], no. 39630/09, § 202, ECHR 2012). The public nature of the treatment may be a relevant or aggravating factor in assessing whether it is 'degrading' within the meaning of Article 3 (see, inter alia, Tyrer v. the United Kingdom, 25 April 1978, § 32, Series A no. 26; Erdoğan Yağız v. Turkey, no. 27473/02, § 37, 6 March 2007; and Kummer v. the Czech Republic, no. 32133/11, § 64, 25 July 2013).

116. In order for treatment to be 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment (see V. v. the United Kingdom, cited above, § 71). …

118. Respect for human dignity forms part of the very essence of the Convention (see Pretty v. the United Kingdom, no. 2346/02, § 65, ECHR 2002-III). The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. Any interpretation of the rights and freedoms

guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society (see Soering v. the United Kingdom, 7 July 1989, § 87, Series A no. 161)."

134. The Court further notes that in assessing evidence in connection with a claim of a violation of Article 3 of the Convention, it adopts the standard of proof "beyond reasonable doubt". Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see Farbtuhs v. Latvia, no. 4672/02, § 54, 2 December 2004, and Bazjaks v. Latvia, no. 71572/01, § 74, 19 October 2010).

(b) Application in the present case

135. Turning to the circumstances of the instant case, the Court observes that the applicant alleged emotional suffering on account of the fact that the removal of tissue from her husband's body had been carried out contrary to domestic law without her prior consent or knowledge and that she had been forced to bury her husband with his legs tied together; the Government argued that the first of these allegations did not reach the level of severity for Article 3 of the Convention to apply and that the second was not proved "beyond reasonable doubt".

136. The Court notes that the applicant learned about the fact of tissue removal two years after her husband's funeral and that a further period of some five years elapsed before the final conclusions were reached as to the possibility of criminal acts in this respect. The applicant alleged, and the Government did not deny, that during this entire time she had not been informed what organs or tissue had been removed from her deceased husband's body; she had learned the answer only upon receiving the Government's observations in the present case. Also, the applicant had come up with several reasons as to why her husband's legs had been tied together and her submissions were further corroborated by written evidence from a family member. In view of these facts the applicant, as her husband's closest relative, may have endured emotional suffering.

137. The Court's task is to ascertain whether, in view of the specific circumstances of the case, such suffering had a dimension capable of bringing it within the scope of Article 3 of the Convention. The Court has never questioned in its case-law the profound psychological impact of a serious human rights violation on the victim's family members. However, in order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself (see Salakhov and Islyamova v. Ukraine, no. 28005/08, § 199, 14 March 2013). Relevant elements include the closeness of the family bond and the way the authorities responded to the relative's enquiries (see, for example, Çakıcı, cited above, § 98, where this principle

was applied in the context of enforced disappearance; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, § 61, ECHR 2006-XI, where the Court further relied on this principle in consideration of a mother's complaint regarding her suffering on account of her five-year old daughter's detention in another country; and M.P. and Others v. Bulgaria, no. 22457/08, §§ 122-24, 15 November 2011, where the relevant complaint concerned the suffering of the relatives of an abused child). In the cases cited the Court attached weight to the parent-child bond. It has held that the essence of a violation lay in the authorities' reactions and attitudes to the situation when it was brought to their attention (see Salakhov and Islyamova, cited above, § 200). Similar considerations may be said to be applicable in the present case involving the applicant and her deceased husband.

138. The Court would distinguish the present case from cases brought before the Court by family members of the victims of "disappearances" or extra-judicial killings committed by the security forces (see, for example, Luluyev and Others v. Russia, no. 69480/01, §§ 116-18, ECHR 2006-XIII), and from cases where people were killed as a result of actions of the authorities in contravention of Article 2 of the Convention (see, for example, Esmukhambetov and Others v. Russia, no. 23445/03, §§ 138-51 and 190, 29 March 2011). Nor is there any suggestion in the present case that the body had been mutilated (see Akkum and Others v. Turkey, no. 21894/93, §§ 258-59, ECHR 2005-II, and Akpınar and Altun v. Turkey, no. 56760/00, §§ 84-87, 27 February 2007) or dismembered and decapitated (see Khadzhialiyev and Others v. Russia, no. 3013/04, §§ 120-22, 6 November 2008).

139. While it cannot be said that the applicant was suffering from any prolonged uncertainty regarding the fate of her husband, the Court finds that she had to face a long period of uncertainty, anguish and distress in not knowing what organs or tissue had been removed from her husband's body, and in what manner and for what purpose this had been done. In this context, the Government's argument that only dura mater was removed is of no relevance here. In any event, the applicant discovered this only during the proceedings before the Court. At the time of the events, the applicant had no reason to question the activities carried out in the Forensic Centre, as her husband's body had been delivered there to establish the cause of death. Subsequently, a criminal inquiry was opened to determine the legality of the tissue removal carried out in the Forensic Centre and it was revealed that tissue had been removed not only from her husband's body but also from hundreds of other persons (nearly 500 people in only three years, by way of example) over a period of some nine years (see paragraphs 13-33 above). It was also established that removals had been carried out under a State-approved agreement with a pharmaceutical company abroad. This scheme had been implemented by State officials – forensic experts – who, in addition to their ordinary duties of carrying out forensic examinations, had

carried out removals on their own initiative (see paragraph 15 above). These are special factors which caused additional suffering for the applicant.

140. The Court considers that the applicant's suffering had a dimension and character which went beyond the suffering inflicted by grief following the death of a close family member. The Court has already found a violation of Article 8 of the Convention because, as the closest relative, the applicant had a right to express consent or refusal in relation to tissue removal, but the corresponding obligation or margin of discretion on the part of the domestic authorities was not clearly established by Latvian law and there were no administrative or legal regulations in this respect (see paragraphs 109-16 above). While there are considerable differences between the present case and the above-cited Petrova case as concerns the scale and magnitude of the organ or tissue removal, the Court has nonetheless noted in both cases certain structural deficiencies which have prevailed in the field of organ and tissue transplantation in Latvia. These factors are also to be taken into account in the Latvian context as far as Article 3 of the Convention is concerned. In addition, not only were the applicant's rights as the closest relative not respected, but she was also faced with conflicting views on the part of the domestic authorities as to the scope of the obligations enshrined in national law. Furthermore, while the security police and various prosecutors disagreed as to whether or not domestic law was sufficiently clear to allow a person to be prosecuted on the basis thereof, they all considered that removal without consent was unlawful (see paragraphs 18, 20, 22, 24 and 25 above). However, criminal prosecution had become time-barred by the time their disagreement had been resolved (see paragraph 27 above) and, in any event, the domestic court would not have allowed such a prosecution because the law was not sufficiently clear (see paragraph 28 above). These facts demonstrate the manner in which the domestic authorities dealt with the complaints brought to their attention and their disregard vis-à-vis the victims of these acts and their close relatives, including the applicant. These circumstances contributed to feelings of helplessness on the part of the applicant in the face of a breach of her personal rights relating to a very sensitive aspect of her private life, namely giving consent or refusal in relation to tissue removal, and were coupled with the impossibility of obtaining any redress.

141. The applicant's suffering was further aggravated by the fact that she was not informed of what exactly had been done in the Forensic Centre. She was not informed of the tissue removal and, having discovered that her deceased husband's legs were tied together on the day of the funeral, assumed this to be a consequence of the car accident. Two years later she was informed of the pending criminal inquiry and the potentially unlawful acts carried out in respect of her deceased husband's body. It is clear that at this point the applicant experienced particular anguish and realised that her husband might possibly have been buried with his legs tied together

as a consequence of the acts that had been carried out in the Forensic Centre on his body. The Government's argument that this was not proved "beyond reasonable doubt" is misplaced, since the applicant's complaint relates to the anguish resulting from precisely that uncertainty regarding the acts carried out at the Forensic Centre in respect of her deceased husband's body.

142. In the special field of organ and tissue transplantation it has been recognised that the human body must still be treated with respect even after death. Indeed, international treaties including the Convention on Human Rights and Biomedicine and the Additional Protocol, as noted in the Explanatory Report to the latter, have been drafted to safeguard the rights of organ and tissue donors, living or deceased. The object of these treaties is to protect the dignity, identity and integrity of "everyone" who has been born, whether now living or dead (see paragraph 37 above). As cited in paragraph 133 above, respect for human dignity forms part of the very essence of the Convention; treatment is considered "degrading" within the meaning of Article 3 of the Convention when, inter alia, it humiliates an individual, showing a lack of respect for human dignity. The applicant's suffering was caused not only by the breach of her rights as the closest relative and the ensuing uncertainty regarding what had been done in the Forensic Centre, but was also due to the intrusive nature of the acts carried out on her deceased husband's body and the anguish she suffered in that regard as his closest relative.

143. In these specific circumstances, the Government's objections that the applicant's complaint does not fall within the scope of Article 3 of the Convention and that she cannot be considered a victim in that regard are dismissed. The Court has no doubt that the suffering caused to the applicant in the present case amounted to degrading treatment contrary to Article 3 of the Convention. It accordingly finds a violation of that provision.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

144. Lastly, the applicant relied on Article 13 of the Convention in connection with her contention that there were several possible interpretations of domestic law.

145. The Government contested that argument.

146. The Court notes that this complaint is linked to the complaint examined above under Article 8 of the Convention and must therefore likewise be declared admissible.

147. The Court considers, however, that it has already examined the lack of clarity of the domestic law under Article 8 of the Convention above. Accordingly, it does not consider it necessary to examine this complaint separately under Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

149. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

150. The Government argued that the applicant had not sufficiently demonstrated that she had sustained non-pecuniary damage to the extent claimed and deemed the amount claimed by her excessive and exorbitant. With reference to Shannon v. Latvia (no. 32214/03, § 84, 24 November 2009), the Government considered that the finding of a violation alone would constitute adequate and sufficient compensation.

151. Having regard to the nature of the violations found in the present case and deciding on an equitable basis, the Court awards the applicant EUR 16,000 in respect of non-pecuniary damage.

B. Costs and expenses

152. The applicant also claimed EUR 500 for the costs and expenses incurred before the Court.

153. The Government did not contest the applicant's claim under this head. They considered it sufficiently substantiated and reasonable.

154. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 500 covering costs under all heads.

C. Default interest

155. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Joins to the merits the Government's objections that the applicant's complaint under Article 3 is incompatible ratione materiae and ratione personae with the provisions of the Convention and dismisses them;

2. Declares the applicant's complaint under Article 8, in so far as it relates to the removal of her deceased husband's tissue without her consent, and the complaint under Article 13 admissible and the remainder of the complaint under Article 8 of the Convention inadmissible;

3. Declares the applicant's complaint under Article 3 admissible;

4. Holds that there has been a violation of Article 8 of the Convention;

5. Holds that there has been a violation of Article 3 of the Convention;

6. Holds that there is no need to examine the complaint under Article 13 of the Convention;

7. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş AracıPäivi Hirvelä

Deputy RegistrarPresident

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

P.H.

F.A.

CONCURRING OPINION OF JUDGE WOJTYCZEK

1. In the instant case, I have voted with the majority; however I have certain doubts about part of the reasoning.

2. I have already expressed my views concerning rights in respect of transplantation in my concurring opinion in Petrova v. Latvia (no. 4605/05, 24 June 2014). I should like to add some further explanations here.

In my view, the applicant's right to oppose the transplantation of her deceased husband's organs is not an autonomous right which could be exercised ad libitum. This right is derived from the right of the deceased man to decide freely on the transplantation of his organs. The surviving relative acts as the depositary of the rights of the deceased. Therefore, the applicant may agree or object to the transplantation of her deceased husband's organs only in so far as she expresses the wishes of the

deceased. Holding otherwise would transform the body of a deceased person into an object of arbitrary decisions by relatives.

3. The fact that the applicant indeed exercises a right protecting the wishes of her deceased husband does not mean that – under the Convention – this right has identical status with her husband's right. However close the connection between the two rights in question, the protection afforded to them under the Convention may be different. As I explained in my concurring opinion in Petrova, cited above, an individual's right to express the wishes of a deceased relative in respect of transplantation comes within the scope of family life, within the meaning of Article 8 of the Convention. The right under consideration ensures a multidimensional protection, since it protects not only the wishes of the deceased person but also those of the deceased person's relatives themselves, and relationships within the family. Whether the right to decide freely on the transplantation of one's own organs comes within the scope of Article 8 of the Convention is a separate issue.

4. The Court's case-law has constantly extended the scope of private life within the meaning of Article 8. Recent judgments may suggest that protection of private life is to be identified with the general freedom of decision in personal or private matters. The meaning of "private life" is thus gradually being transformed into a general freedom of action, a notion which is known as allgemeine Handlungsfreiheit in German legal science. In my view, such an extensive interpretation of Article 8 in the Court's case-law does not have a sufficient legal basis in the Convention. The provision in question is sometimes misused to fill lacunae in the Convention protection.

5. In the present case the Court has declared the complaint brought by the applicant on behalf of her deceased husband inadmissible. This is explained in the reasoning on the ground that this part of the complaint is "incompatible ratione personae".

I accept the view that Article 8 of the Convention is not applicable to the deceased husband's rights, at stake in the instant case. Such a restrictive interpretation of the Convention corresponds more closely to the applicable rules of treaty interpretation. However, in my view the application should be considered inadmissible ratione materiae rather than ratione personae. I do not see sufficiently strong arguments to consider that decisions concerning the transplantation of one's own organs are covered by the notions of private life or family life as understood under the rules of treaty interpretation established in international law. To sum up, rights in respect of transplantation are only partially protected by the Convention.

[1]. www.coe.int/T/DG3/Health/Source/CDBI_INF(2003)11_en.pdf.

[2]. Formed in December 1997, the EGE is an independent advisory body to the European Commission. Its predecessor was the Group of Advisers to the European Commission on the Ethical Implications of Biotechnology, an ad hoc advisory body.

Annex 2

GRAND CHAMBER
CASE OF S. AND MARPER v. THE UNITED KINGDOM

(Applications nos. 30562/04 and 30566/04)
JUDGMENT
STRASBOURG
4 December 2008
In the case of S. and Marper v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:
Jean-Paul Costa, President,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Corneliu Bîrsan,
Nina Vajić,
Anatoly Kovler,
Stanislav Pavlovschi,
Egbert Myjer,
Danutė Jočienė,
Ján Šikuta,
Mark Villiger,
Päivi Hirvelä,
Ledi Bianku, judges,
and Michael O'Boyle, Deputy Registrar,

Having deliberated in private on 27 February and 12 November 2008,
Delivers the following judgment, which was adopted on the last- mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 30562/04 and 30566/04) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mr S. ("the first applicant") and Mr Michael Marper ("the second applicant"), on 16 August 2004. The President of the Grand Chamber acceded to the first applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants, who were granted legal aid, were represented by Mr P. Mahy of Messrs Howells, a solicitor practising in Sheffield. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.

3. The applicants complained under Articles 8 and 14 of the Convention that the authorities had continued to retain their fingerprints and cellular samples and DNA profiles after the criminal proceedings against them had ended with an acquittal or had been discontinued.

4. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1). On 16 January 2007 they were declared admissible by a Chamber of that Section composed of Josep Casadevall, President, Nicolas Bratza, Giovanni Bonello, Kristaq Traja, Stanislav Pavlovschi, Ján Šikuta, Päivi Hirvelä, judges, and Lawrence Early, Section Registrar.

5. On 10 July 2007 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither party having objected to relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicants and the Government each filed memorials on the merits. In addition, third-party submissions were received from Ms A. Fairclough on behalf of the National Council for Civil Liberties ("Liberty") and from Covington and Burling LLP on behalf of Privacy International, who had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). Both parties replied to Liberty's submissions, and the Government also replied to the comments by Privacy International (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 February 2008 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

MrsE. Willmott, Agent,

MrRabinder Singh QC,

MrJ. Strachan, Counsel,
MrN. Fussell,
MsP. McFarlane,
MrM. Prior,
MrS. Bramble,
MsE. Rees,
MrS. Sen, Advisers,
MrD. Gourley,
MrD. Loveday, Observers;

(b) for the applicants
MrS. Cragg,
MrA. Suterwalla, Counsel,
MrP. Mahy, Solicitor.

The Court heard addresses by Mr Cragg and Mr Rabinder Singh QC, as well as their answers to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were born in 1989 and 1963 respectively and live in Sheffield.

10. The first applicant, Mr S., was arrested on 19 January 2001 at the age of 11 and charged with attempted robbery. His fingerprints and DNA samples [1] were taken. He was acquitted on 14 June 2001.

11. The second applicant, Mr Michael Marper, was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. Before a pre-trial review took place, he and his partner had reconciled, and the charge was not pressed. On 11 June 2001, the Crown Prosecution Service served a notice of discontinuance on the applicant's solicitors, and on 14 June 2001 the case was formally discontinued.

12. Both applicants asked for their fingerprints and DNA samples to be destroyed, but in both cases the police refused. The applicants applied for judicial review of the police decisions not to destroy the fingerprints and samples. On 22 March 2002 the Administrative Court (Rose LJ and Leveson J) rejected the application [[2002] EWHC 478 (Admin)].

13. On 12 September 2002 the Court of Appeal upheld the decision of the Administrative Court by a majority of two (Lord Woolf CJ and Waller LJ) to one (Sedley LJ) [[2003] EWCA Civ 1275]. As regards the necessity of retaining DNA samples, Lord Justice Waller stated:

"… [F]ingerprints and DNA profiles reveal only limited personal information. The physical samples potentially contain very much greater and more personal and detailed information. The anxiety is that science may one day enable analysis of samples to go so far as to obtain information in relation to an individual's propensity to commit certain crime and be used for that purpose within the language of the present section [section 82 of the Criminal Justice and Police Act 2001]. It might also be said that the law might be changed in order to allow the samples to be used for purposes other than those identified by the section. It might also be said that while samples are retained there is even now a risk that they will be used in a way that the law does not allow. So, it is said, the aims could be achieved in a less restrictive manner … Why cannot the aim be achieved by retention of the profiles without retention of the samples?

The answer to [these] points is as I see it as follows. First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a reanalysis for the upgrading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) reanalysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits which must be balanced against the risks identified by Liberty. In relation to those risks, the position in any event is first that any change in the law will have to be itself Convention compliant; second any change in practice would have to be Convention compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime."

14. Lord Justice Sedley considered that the power of a chief constable to destroy data which he would ordinarily retain had to be exercised in every case, however rare such cases might be, where he or she was satisfied on conscientious consideration that the individual was free of any taint of suspicion. He also noted that the difference between the retention of samples and DNA profiles was that the retention of samples would enable more information to be derived than had previously been possible.

15. On 22 July 2004 the House of Lords dismissed an appeal by the applicants. Lord Steyn, giving the lead judgment, noted the legislative history of section 64(1A) of the Police and Criminal Evidence Act 1984 (PACE), in particular the way in which it had been introduced by Parliament following public disquiet about the previous law, which had provided that where a person was not prosecuted or was acquitted of offences, the sample had to be destroyed and the information could not be used. In

two cases, compelling DNA evidence linking one suspect to a rape and another to a murder had not been able to be used, as at the time the matches were made both defendants had either been acquitted or a decision made not to proceed for the offences for which the profiles had been obtained: as a result it had not been possible to convict either suspect.

16. Lord Steyn noted that the value of retained fingerprints and samples taken from suspects was considerable. He gave the example of a case in 1999, in which DNA information from the perpetrator of a crime was matched with that of "I" in a search of the national database. The sample from "I" should have been destroyed, but had not been. "I" had pleaded guilty to rape and was sentenced. If the sample had not been wrongly detained, the offender might have escaped detection.

17. Lord Steyn also referred to statistical evidence from which it appeared that almost 6,000 DNA profiles had been linked with crime-scene stain profiles which would have been destroyed under the former provisions. The offences involved included 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 cases involving the supply of controlled drugs. On the basis of the existing records, the Home Office statistics estimated that there was a 40% chance that a crime-scene sample would be matched immediately with an individual's profile on the national database. This showed that the fingerprints and samples which could now be retained had in the previous three years played a major role in the detection and prosecution of serious crime.

18. Lord Steyn also noted that PACE dealt separately with the taking of fingerprints and samples, their retention and their use.

19. As to the Convention analysis, Lord Steyn inclined to the view that the mere retention of fingerprints and DNA samples did not constitute an interference with the right to respect for private life but stated that, if he were wrong in that view, he regarded any interference as very modest indeed. Questions of whether, in the future, retained samples could be misused were not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. If future scientific developments required it, judicial decisions could be made, when the need occurred, to ensure compatibility with the Convention. The provision limiting the permissible use of retained material to "purposes related to the prevention or detection of crime …" did not broaden the permitted use unduly, because it was limited by its context.

20. If the need to justify the modest interference with private life arose, Lord Steyn agreed with Lord Justice Sedley in the Court of Appeal that the purposes of retention – the prevention of crime and the protection of the right of others to be free from crime – were "provided for by law", as required by Article 8 of the Convention.

21. As to the justification for any interference, the applicants had argued that the retention of fingerprints and DNA samples created suspicion in respect of persons who had been acquitted. Counsel for the Home Secretary had contended that the aim of the retention had nothing to do with the past, that is, with the offence of which a person had been acquitted, but was to assist in the investigation of offences in the future. The applicants would only be affected by the retention of the DNA samples if their profiles matched those found at the scene of a future crime. Lord Steyn saw five factors which led to the conclusion that the interference was proportionate to the aim: (i) the fingerprints and samples were kept only for the limited purpose of the detection, investigation and prosecution of crime; (ii) the fingerprints and samples were not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints would not be made public; (iv) a person was not identifiable from the retained material to the untutored eye; (v) the resultant expansion of the national database by the retention conferred enormous advantages in the fight against serious crime.

22. In reply to the contention that the same legislative aim could be obtained by less intrusive means, namely by a case-by-case consideration of whether or not to retain fingerprints and samples, Lord Steyn referred to Lord Justice Waller's comments in the Court of Appeal, which read as follows:

"If justification for retention is in any degree to be by reference to the view of the police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not. It is not in fact in any way stigmatising someone who has been acquitted to say simply that samples lawfully obtained are retained as the norm, and it is in the public interest in its fight against crime for the police to have as large a database as possible."

23. Lord Steyn did not accept that the difference between samples and DNA profiles affected the position.

24. The House of Lords further rejected the applicants' complaint that the retention of their fingerprints and samples subjected them to discriminatory treatment in breach of Article 14 of the Convention when compared to the general body of persons who had not had their fingerprints and samples taken by the police in the course of a criminal investigation. Lord Steyn held that, even assuming that the retention of fingerprints and samples fell within the ambit of Article 8 of the Convention so as to trigger the application of Article 14, the difference of treatment relied on by the applicants was not one based on "status" for the purposes of Article 14: the difference simply reflected the historical fact, unrelated to any personal characteristic, that the authorities already held the fingerprints and samples of the individuals

concerned which had been lawfully taken. The applicants and their suggested comparators could not in any event be said to be in an analogous situation. Even if, contrary to his view, it was necessary to consider the justification for any difference in treatment, Lord Steyn held that such objective justification had been established: firstly, the element of legitimate aim was plainly present, as the increase in the database of fingerprints and samples promoted the public interest by the detection and prosecution of serious crime and by exculpating the innocent; secondly, the requirement of proportionality was satisfied, section 64(1A) of PACE objectively representing a measured and proportionate response to the legislative aim of dealing with serious crime.

25. Baroness Hale of Richmond disagreed with the majority, considering that the retention of both fingerprint and DNA data constituted an interference by the State in a person's right to respect for his private life and thus required justification under the Convention. In her opinion, this was an aspect of what had been called informational privacy and there could be little, if anything, more private to the individual than the knowledge of his genetic make-up. She further considered that the difference between fingerprint and DNA data became more important when it came to justify their retention as the justifications for each of these might be very different. She agreed with the majority that such justifications had been readily established in the applicants' cases.

II. RELEVANT DOMESTIC LAW AND MATERIALS

A. England and Wales

1. Police and Criminal Evidence Act 1984 (PACE)

26. PACE contains powers for the taking of fingerprints (principally section 61) and samples (principally section 63). By section 61, fingerprints may only be taken without consent if an officer of at least the rank of superintendent authorises the taking, or if the person has been charged with a recordable offence or has been informed that he will be reported for such an offence. Before fingerprints are taken, the person must be informed that the prints may be the subject of a speculative search, and the fact of the informing must be recorded as soon as possible. The reason for the taking of the fingerprints is recorded in the custody record. Parallel provisions relate to the taking of samples (section 63).

27. As to the retention of such fingerprints and samples (and the records thereof), section 64(1A) of PACE was substituted by section 82 of the Criminal Justice and Police Act 2001. It provides as follows:

"Where (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled

the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution. …

(3) If (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must, except as provided in the following provisions of this section, be destroyed as soon as they have fulfilled the purpose for which they were taken.

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if (a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and (b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation."

28. Section 64 in its earlier form had included a requirement that if the person from whom the fingerprints or samples were taken in connection with the investigation was acquitted of that offence, the fingerprints and samples, subject to certain exceptions, were to be destroyed "as soon as practicable after the conclusion of the proceedings".

29. The subsequent use of materials retained under section 64(1A) is not regulated by statute, other than the limitation on use contained in that provision. In Attorney-General's Reference (No. 3 of 1999) [2001] 2 AC 91, the House of Lords had to consider whether it was permissible to use in evidence a sample which should have been destroyed under the then text of section 64 of PACE. The House considered that the prohibition on the use of an unlawfully retained sample "for the purposes of any investigation" did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with the prohibition, but left the question of admissibility to the discretion of the trial judge.

2. Data Protection Act 1998

30. The Data Protection Act was adopted on 16 July 1998 to give effect to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (see paragraph 50 below). Under the Data Protection Act "personal data" means data which relate to a living individual who can be identified (a) from those data; or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (section 1). "Sensitive personal data" means personal data consisting, inter alia, of information as to the racial or ethnic origin of the data subject, the commission or alleged commission by him of any offence, or any proceedings for any offence committed or alleged to have been

committed by him, the disposal of such proceedings or the sentence of any court in such proceedings (section 2).

31. The Act stipulates that the processing of personal data is subject to eight data protection principles listed in Schedule 1. Under the first principle personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met; and (b) in case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. Schedule 2 contains a detailed list of conditions, and provides, inter alia, that the processing of any personal data is necessary for the administration of justice or for the exercise of any other functions of a public nature exercised in the public interest by any person (§ 5 (a) and (d)). Schedule 3 contains a more detailed list of conditions, including that the processing of sensitive personal data is necessary for the purpose of, or in connection with, any legal proceedings (§ 6 (a)), or for the administration of justice (§ 7 (a)), and is carried out with appropriate safeguards for the rights and freedoms of data subjects (§ 4 (b)). Section 29 notably provides that personal data processed for the prevention or detection of crime are exempt from the first principle except to the extent to which it requires compliance with the conditions in Schedules 2 and 3. The fifth principle stipulates that personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

32. The Information Commissioner created pursuant to the Act (as amended) has an independent duty to promote the following of good practice by data controllers and has power to make orders ("enforcement notices") in this respect (section 40). The Act makes it a criminal offence not to comply with an enforcement notice (section 47) or to obtain or disclose personal data or information contained therein without the consent of the data controller (section 55). Section 13 affords a right to claim damages in the domestic courts in respect of contraventions of the Act.

3. Retention Guidelines for Nominal Records on the Police National Computer 2006

33. A set of guidelines for the retention of fingerprint and DNA information is contained in the Retention Guidelines for Nominal Records on the Police National Computer 2006 drawn up by the Association of Chief Police Officers in England and Wales. The Guidelines are based on a format of restricting access to the Police National Computer (PNC) data, rather than the deletion of that data. They recognise that their introduction may thus have implications for the business of the non-police agencies with which the police currently share PNC data.

34. The Guidelines set various degrees of access to the information contained on the PNC through a process of "stepping down" access. Access to information concerning persons who have not been convicted of an offence is automatically "stepped down" so that this information is only open to inspection by the police. Access to information about convicted persons is likewise "stepped down" after the expiry

of certain periods of time ranging from five to thirty-five years, depending on the gravity of the offence, the age of the suspect and the sentence imposed. For certain convictions the access will never be "stepped down".

35. Chief police officers are the data controllers of all PNC records created by their force. They have the discretion in exceptional circumstances to authorise the deletion of any conviction, penalty notice for disorder, acquittal or arrest histories "owned" by them. An "exceptional case procedure" to assist chief police officers in relation to the exercise of this discretion is set out in Appendix 2. It is suggested that exceptional cases are rare by definition and include those where the original arrest or sampling was unlawful or where it is established beyond doubt that no offence existed. Before deciding whether a case is exceptional, the chief police officer is instructed to seek advice from the DNA and Fingerprint Retention Project.

B. Scotland

36. Under the 1995 Criminal Procedure Act of Scotland, as subsequently amended, the DNA samples and resulting profiles must be destroyed if the individual is not convicted or is granted an absolute discharge. A recent qualification provides that biological samples and profiles may be retained for three years, if the arrestee is suspected of certain sexual or violent offences even if a person is not convicted (section 83 of the 2006 Act, adding section 18A to the 1995 Act.). Thereafter, samples and information are required to be destroyed unless a chief constable applies to a sheriff for a two-year extension.

C. Northern Ireland

37. The Police and Criminal Evidence Order of Northern Ireland 1989 was amended in 2001 in the same way as PACE applicable in England and Wales. The relevant provisions currently governing the retention of fingerprint and DNA data in Northern Ireland are identical to those in force in England and Wales (see paragraph 27 above).

D. Nuffield Council on Bioethics' report [2]

38. According to a recent report by the Nuffield Council on Bioethics, the retention of fingerprints, DNA profiles and biological samples is generally more controversial than the taking of such bioinformation, and the retention of biological samples raises greater ethical concerns than digitised DNA profiles and fingerprints, given the differences in the level of information that could be revealed. The report referred, in particular, to the lack of satisfactory empirical evidence to justify the present practice of retaining indefinitely fingerprints, samples and DNA profiles from all those arrested for a recordable offence, irrespective of whether they were subsequently charged or convicted. The report voiced particular concerns at the policy of permanently retaining the bioinformation of minors, having regard to the requirements of the 1989 United Nations Convention on the Rights of the Child.

39. The report also expressed concerns at the increasing use of the DNA data for familial searching, inferring ethnicity and non-operational research. Familial searching is the process of comparing a DNA profile from a crime scene with profiles stored on the national database, and prioritising them in terms of "closeness" to a match. This allows possible genetic relatives of an offender to be identified. Familial searching might thus lead to revealing previously unknown or concealed genetic relationships. The report considered the use of the DNA database in searching for relatives as particularly sensitive.

40. The particular combination of alleles [3] in a DNA profile can furthermore be used to assess the most likely ethnic origin of the donor. Ethnic inferring through DNA profiles is possible as the individual "ethnic appearance" is systematically recorded on the database: when taking biological samples, police officers routinely classify suspects into one of seven "ethnic appearance" categories. Ethnicity tests on the database might thus provide inferences for use during a police investigation in order, for example, to help reduce a "suspect pool" and to inform police priorities. The report noted that social factors and policing practices lead to a disproportionate number of people from black and ethnic minority groups being stopped, searched and arrested by the police, and hence having their DNA profiles recorded; it therefore voiced concerns that inferring ethnic identity from biological samples might reinforce racist views of propensity to criminality.

III. RELEVANT NATIONAL AND INTERNATIONAL MATERIALS

A. Council of Europe texts

41. The Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data ("the Data Protection Convention"), which entered into force for the United Kingdom on 1 December 1987, defines "personal data" as any information relating to an identified or identifiable individual ("data subject"). The Convention provides, inter alia:

Article 5 – Quality of data

"Personal data undergoing automatic processing shall be

…

(b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are stored;

…

(e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

Article 6 – Special categories of data

"Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. …"

Article 7 – Data security

"Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination."

42. Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector (adopted on 17 September 1987) states, inter alia:

Principle 2 – Collection of data

"2.1. The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation.

…"

Principle 3 – Storage of data

"3.1. As far as possible, the storage of personal data for police purposes should be limited to accurate data and to such data as are necessary to allow police bodies to perform their lawful tasks within the framework of national law and their obligations arising from international law.

…"

Principle 7 – Length of storage and updating of data

"7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored.

For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data."

43. Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted on 10 February 1992) states, inter alia:

"3. Use of samples and information derived therefrom

Samples collected for DNA analysis and the information derived from such analysis for the purpose of the investigation and prosecution of criminal offences must not be used for other purposes. …

…

Samples taken for DNA analysis and the information so derived may be needed for research and statistical purposes. Such uses are acceptable provided the identity of the individual cannot be ascertained. Names or other identifying references must therefore be removed prior to their use for these purposes.

4. Taking of samples for DNA analysis

The taking of samples for DNA analysis should only be carried out in circumstances determined by the domestic law; it being understood that in some states this may necessitate specific authorisation from a judicial authority.

…

8. Storage of samples and data

Samples or other body tissue taken from individuals for DNA analysis should not be kept after the rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected.

Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law.

Samples and other body tissues, or the information derived from them, may be stored for longer periods

– when the person so requests; or
– when the sample cannot be attributed to an individual, for example when it is found at the scene of an offence.

Where the security of the state is involved, the domestic law of the member State may permit retention of the samples, the results of DNA analysis and the information so derived even though the individual concerned has not been charged or convicted of an offence. In such cases strict storage periods should be defined by domestic law.

…"

44. The Explanatory Memorandum to the Recommendation stated, as regards item 8:

"47. The working party was well aware that the drafting of recommendation 8 was a delicate matter, involving different protected interests of a very difficult nature. It was necessary to strike the right balance between these interests. Both the European Convention on Human Rights and the Data Protection Convention provide exceptions for the interests of the suppression of criminal offences and the protection of the rights and freedoms of third parties. However, the exceptions are

only allowed to the extent that they are compatible with what is necessary in a democratic society.

…

49. Since the primary aim of the collection of samples and the carrying out of DNA analysis on such samples is the identification of offenders and the exoneration of suspected offenders, the data should be deleted once persons have been cleared of suspicion. The issue then arises as to how long the DNA findings and the samples on which they were based can be stored in the case of a finding of guilt.

50. The general rule should be that the data are deleted when they are no longer necessary for the purposes for which they were collected and used. This would in general be the case when a final decision has been rendered as to the culpability of the offender. By 'final decision' the CAHBI [Ad hoc Committee of Experts on Bioethics] thought that this would normally, under domestic law, refer to a judicial decision. However, the working party recognised that there was a need to set up databases in certain cases and for specific categories of offences which could be considered to constitute circumstances warranting another solution, because of the seriousness of the offences. The working party came to this conclusion after a thorough analysis of the relevant provisions in the European Convention on Human Rights, the Data Protection Convention and other legal instruments drafted within the framework of the Council of Europe. In addition, the working party took into consideration that all member States keep a criminal record and that such record may be used for the purposes of the criminal justice system … It took into account that such an exception would be permissible under certain strict conditions:

– when there has been a conviction;
– when the conviction concerns a serious criminal offence against the life, integrity and security of a person;
– the storage period is limited strictly;
– the storage is defined and regulated by law;
– the storage is subject to control by Parliament or an independent supervisory body."

B. Law and practice in the Council of Europe member States

45. According to the information provided by the parties or otherwise available to the Court, a majority of the Council of Europe member States allow the compulsory taking of fingerprints and cellular samples in the context of criminal proceedings. At least twenty member States make provision for the taking of DNA information and storing it on national databases or in other forms (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland [4], Italy [5], Latvia, Luxembourg, the Netherlands, Norway, Poland, Spain, Sweden and Switzerland). This number is steadily increasing.

46. In most of these countries (including Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden), the taking of DNA information in the context of criminal proceedings is not systematic but limited to some specific circumstances and/or to more serious crimes, notably those punishable by certain terms of imprisonment.

47. The United Kingdom is the only member State expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. Five States (Belgium, Hungary, Ireland, Italy and Sweden) require such information to be destroyed ex officio upon acquittal or the discontinuance of the criminal proceedings. Ten other member States apply the same general rule with certain very limited exceptions: Germany, Luxembourg and the Netherlands allow such information to be retained where suspicions remain about the person or if further investigations are needed in a separate case; Austria permits its retention where there is a risk that the suspect will commit a dangerous offence and Poland does likewise in relation to certain serious crimes; Norway and Spain allow the retention of profiles if the defendant is acquitted for lack of criminal accountability; Finland and Denmark allow retention for one and ten years respectively in the event of an acquittal and Switzerland for one year when proceedings have been discontinued. In France, DNA profiles can be retained for twenty-five years after an acquittal or discharge; during this period the public prosecutor may order their earlier deletion, either on his or her own motion or upon request, if their retention has ceased to be required for the purposes of identification in connection with a criminal investigation. Estonia and Latvia also appear to allow the retention of DNA profiles of suspects for certain periods after acquittal.

48. The retention of DNA profiles of convicted persons is allowed, as a general rule, for limited periods of time after the conviction or after the convicted person's death. The United Kingdom thus also appears to be the only member State expressly to allow the systematic and indefinite retention of both profiles and samples of convicted persons.

49. Complaint mechanisms before data-protection monitoring bodies and/or before courts are available in most of the member States with regard to decisions to take cellular samples or retain samples or DNA profiles.

C. European Union

50. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data provides that the object of national laws on the processing of personal data is notably to protect the right to privacy as recognised both in Article 8 of the European Convention on Human Rights and in the general principles of Community law. The

Directive sets out a number of principles in order to give substance to and amplify those contained in the Data Protection Convention of the Council of Europe. It allows member States to adopt legislative measures to restrict the scope of certain obligations and rights provided for in the Directive when such a restriction constitutes notably a necessary measure for the prevention, investigation, detection and prosecution of criminal offences (Article 13).

51. The Prüm Convention on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, which was signed by several member States of the European Union on 27 May 2005, sets out rules for the supply of fingerprinting and DNA data to other Contracting Parties and their automated checking against their relevant databases. The Convention provides, inter alia:

Article 35 – Purpose

"2. … The Contracting Party administering the file may process the data supplied … solely where this is necessary for the purposes of comparison, providing automated replies to searches or recording … The supplied data shall be deleted immediately following data comparison or automated replies to searches unless further processing is necessary for the purposes mentioned … above."

52. Article 34 guarantees a level of protection of personal data at least equal to that resulting from the Data Protection Convention and requires the Contracting Parties to take into account Recommendation No. R (87) 15 of the Committee of Ministers of the Council of Europe.

53. The Council framework decision of 24 June 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters states, inter alia:

Article 5

"Establishment of time-limits for erasure and review

Appropriate time-limits shall be established for the erasure of personal data or for a periodic review of the need for the storage of the data. Procedural measures shall ensure that these time-limits are observed."

D. Case-law in other jurisdictions

54. In the case of R. v. R.C. [[2005] 3 SCR 99, 2005 SCC 61] the Supreme Court of Canada considered the issue of retaining a juvenile first-time offender's DNA sample on the national database. The court upheld the decision by a trial judge who had found, in the light of the principles and objects of youth criminal justice legislation, that the impact of the DNA retention would be grossly disproportionate. In his opinion, Fish J observed:

"Of more concern, however, is the impact of an order on an individual's informational privacy interests. In R. v. Plant, [1993] 3 S.C.R. 281, at p. 293, the Court found

that section 8 of the Charter protected the 'biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state'. An individual's DNA contains the 'highest level of personal and private information': S.A.B., at paragraph 48. Unlike a fingerprint, it is capable of revealing the most intimate details of a person's biological make-up. … The taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy."

E. United Nations Convention on the Rights of the Child of 1989

55. Article 40 of the United Nations Convention on the Rights of the Child of 20 November 1989 states the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

IV. THIRD-PARTY SUBMISSIONS

56. The National Council for Civil Liberties ("Liberty") submitted case-law and scientific material highlighting, inter alia, the highly sensitive nature of cellular samples and DNA profiles and the impact on private life arising from their retention by the authorities.

57. Privacy International referred to certain core data-protection rules and principles developed by the Council of Europe and insisted on their high relevance for the interpretation of the proportionality requirement enshrined in Article 8 of the Convention. It emphasised, in particular, the "strict periods" recommended by Recommendation No. R (92) 1 of the Committee of Ministers for the storage of cellular samples and DNA profiles. It further pointed out a disproportionate representation on the United Kingdom National DNA Database of certain groups of the population, notably youth, and the unfairness that that situation might create. The use of data for familial testing and additional research purposes was also of concern. Privacy International also provided a summary of comparative data on the law and practice of different countries with regard to DNA storage and stressed the numerous restrictions and safeguards which existed in that respect.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

58. The applicants complained under Article 8 of the Convention about the retention of their fingerprints, cellular samples and DNA profiles pursuant to section

64(1A) of the Police and Criminal Evidence Act 1984 (PACE). Article 8 provides, in so far as relevant, as follows:

"1. Everyone has the right to respect for his private … life …

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 … for the prevention of disorder or crime …"

A. Existence of an interference with private life

59. The Court will first consider whether the retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples constitutes an interference with their private life.

1. The parties' submissions

(a) The applicants

60. The applicants submitted that the retention of their fingerprints, cellular samples and DNA profiles interfered with their right to respect for private life as they were crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their control. They pointed out that the initial taking of such bioinformation had consistently been held to engage Article 8 and submitted that their retention was more controversial given the wealth of private information that became permanently available to others and thus came out of the control of the person concerned. They stressed, in particular, the social stigma and psychological implications provoked by such retention in the case of children, which made the interference with the right to private life all the more pressing in respect of the first applicant.

61. They considered that the Convention organs' case-law supported this contention, as did a recent domestic decision of the Information Tribunal (Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v. the Information Commissioner, [2005] UK IT EA 2005 0010 (12 October 2005), 173). The latter decision relied on the speech of Baroness Hale of Richmond in the House of Lords (see paragraph 25 above) and followed in substance her finding when deciding a similar question about the application of Article 8 to the retention of conviction data.

62. They further emphasised that the retention of cellular samples involved an even greater degree of interference with Article 8 rights as they contained full genetic information about a person, including genetic information about his or her relatives. It was of no significance whether information was actually extracted from the samples or caused a detriment in a particular case as an individual was entitled to a guarantee that such information, which fundamentally belonged to him, would remain private and not be communicated or accessible without his permission.

(b) The Government

63. The Government accepted that fingerprints, DNA profiles and samples were "personal data" within the meaning of the Data Protection Act in the hands of those who can identify the individual. They considered, however, that the mere retention of fingerprints, DNA profiles and samples for the limited use permitted under section 64 of PACE did not fall within the ambit of the right to respect for private life under Article 8 § 1 of the Convention. Unlike the initial taking of this data, their retention did not interfere with the physical and psychological integrity of the persons; nor did it breach their right to personal development, to establish and develop relationships with other human beings or the right to self-determination.

64. The Government submitted that the applicants' real concerns related to fears about the future uses of stored samples, to anticipated methods of analysis of DNA material and to potential intervention with the private life of individuals through active surveillance. It emphasised in this connection that the permitted extent of the use of the material was clearly and expressly limited by the legislation, the technological processes of DNA profiling and the nature of the DNA profile extracted.

65. The profile was merely a sequence of numbers which provided a means of identifying a person against bodily tissue, containing no materially intrusive information about an individual or his personality. The DNA database was a collection of such profiles which could be searched using material from a crime scene and a person would be identified only if and to the extent that a match was obtained against the sample. Familial searching through partial matches only occurred in very rare cases and was subject to very strict controls. Fingerprints, DNA profiles and samples were neither susceptible to any subjective commentary nor provided any information about a person's activities and thus presented no risk to affect the perception of an individual or affect his or her reputation. Even if such retention were capable of falling within the ambit of Article 8 § 1, the extremely limited nature of any adverse effects rendered the retention not sufficiently serious to constitute an interference.

2. The Court's assessment

(a) General principles

66. The Court notes that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002-III, and Y.F. v. Turkey, no. 24209/94, § 33, ECHR 2003-IX). It can therefore embrace multiple aspects of the person's physical and social identity (see Mikulić v. Croatia, no. 53176/99, § 53, ECHR 2002-I). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, Bensaid v. the United Kingdom,

no. 44599/98, § 47, ECHR 2001-I with further references, and Peck v. the United Kingdom, no. 44647/98, § 57, ECHR 2003-I). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see, mutatis mutandis, Burghartz v. Switzerland, 22 February 1994, § 24, Series A no. 280-B, and Ünal Tekeli v. Turkey, no. 29865/96, § 42, ECHR 2004-X). Information about the person's health is an important element of private life (see Z v. Finland, 25 February 1997, § 71, Reports of Judgments and Decisions 1997-I). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see, in particular, Article 6 of the Data Protection Convention quoted in paragraph 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects, in addition, a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, and Friedl v. Austria, 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45). The concept of private life moreover includes elements relating to a person's right to their image (see Sciacca v. Italy, no. 50774/99, § 29, ECHR 2005-I).

67. The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see Leander v. Sweden, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (see Amann v. Switzerland [GC], no. 27798/95, § 69, ECHR 2000-II). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, mutatis mutandis, Friedl, cited above, §§ 49-51, and Peck, cited above, § 59).

(b) Application of the above principles to the present case

68. The Court notes at the outset that all three categories of the personal information retained by the authorities in the present case, namely fingerprints, DNA profiles and cellular samples, constitute personal data within the meaning of the Data Protection Convention as they relate to identified or identifiable individuals. The Government accepted that all three categories are "personal data" within the meaning of the Data Protection Act 1998 in the hands of those who are able to identify the individual.

69. The Convention organs have already considered in various circumstances questions relating to the retention of such personal data by the authorities in the context of criminal proceedings. As regards the nature and scope of the information

contained in each of these three categories of data, the Court has distinguished in the past between the retention of fingerprints and the retention of cellular samples and DNA profiles in view of the stronger potential for future use of the personal information contained in the latter (see Van der Velden v. the Netherlands (dec.), no. 29514/05, ECHR 2006-XV). The Court considers it appropriate to examine separately the question of interference with the applicants' right to respect for their private lives by the retention of their cellular samples and DNA profiles on the one hand, and of their fingerprints on the other.

(i) Cellular samples and DNA profiles

70. In Van der Velden, the Court considered that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material was sufficiently intrusive to disclose interference with the right to respect for private life (see Van der Velden, cited above). The Government criticised that conclusion on the ground that it speculated on the theoretical future use of samples and that there was no such interference at present.

71. The Court maintains its view that an individual's concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today. Accordingly, the Court does not find any sufficient reason to depart from its finding in the Van der Velden case.

72. Legitimate concerns about the conceivable use of cellular material in the future are not, however, the only element to be taken into account in the determination of the present issue. In addition to the highly personal nature of cellular samples, the Court notes that they contain much sensitive information about an individual, including information about his or her health. Moreover, samples contain a unique genetic code of great relevance to both the individual and his relatives. In this respect the Court concurs with the opinion expressed by Baroness Hale in the House of Lords (see paragraph 25 above).

73. Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion (see Amann, cited above, § 69).

74. As regards DNA profiles themselves, the Court notes that they contain a more limited amount of personal information extracted from cellular samples in a coded form. The Government submitted that a DNA profile is nothing more than a sequence of numbers or a barcode containing information of a purely objective and irrefutable character and that the identification of a subject only occurs in case of a match with another profile in the database. They also submitted that, being in coded form, computer technology is required to render the information intelligible and that only a limited number of persons would be able to interpret the data in question.

75. The Court observes, nonetheless, that the profiles contain substantial amounts of unique personal data. While the information contained in the profiles may be considered objective and irrefutable in the sense submitted by the Government, their processing through automated means allows the authorities to go well beyond neutral identification. The Court notes in this regard that the Government accepted that DNA profiles could be, and indeed had in some cases been, used for familial searching with a view to identifying a possible genetic relationship between individuals. They also accepted the highly sensitive nature of such searching and the need for very strict controls in this respect. In the Court's view, the DNA profiles' capacity to provide a means of identifying genetic relationships between individuals (see paragraph 39 above) is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The frequency of familial searches, the safeguards attached thereto and the likelihood of detriment in a particular case are immaterial in this respect (see Amann, cited above, § 69). This conclusion is similarly not affected by the fact that, since the information is in coded form, it is intelligible only with the use of computer technology and capable of being interpreted only by a limited number of persons.

76. The Court further notes that it is not disputed by the Government that the processing of DNA profiles allows the authorities to assess the likely ethnic origin of the donor and that such techniques are in fact used in police investigations (see paragraph 40 above). The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life. This conclusion is consistent with the principle laid down in the Data Protection Convention and reflected in the Data Protection Act that both list personal data revealing ethnic origin among the special categories of sensitive data attracting a heightened level of protection (see paragraphs 30-31 and 41 above).

77. In view of the foregoing, the Court concludes that the retention of both cellular samples and DNA profiles discloses an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 § 1 of the Convention.

(ii) Fingerprints

78. It is common ground that fingerprints do not contain as much information as either cellular samples or DNA profiles. The issue of alleged interference with the right to respect for private life caused by their retention by the authorities has already been considered by the Convention organs.

79. In McVeigh and Others, the Commission first examined the issue of the taking and retention of fingerprints as part of a series of investigative measures. It accepted that at least some of the measures disclosed an interference with the applicants' private life, while leaving open the question of whether the retention of fingerprints alone would amount to such interference (see McVeigh and Others v. the United Kingdom (nos. 8022/77, 8025/77 and 8027/77, Commission's report of 18 March 1981, Decisions and Reports 25, p. 15, § 224).

80. In Kinnunen, the Commission considered that fingerprints and photographs retained following the applicant's arrest did not constitute an interference with his private life as they did not contain any subjective appreciations which called for refutation. The Commission noted, however, that the data at issue had been destroyed nine years later at the applicant's request (see Kinnunen v. Finland, no. 24950/94, Commission decision of 15 May 1996, unreported).

81. Having regard to these findings and the questions raised in the present case, the Court considers it appropriate to review this issue. It notes at the outset that the applicants' fingerprint records constitute their personal data (see paragraph 68 above) which contain certain external identification features much in the same way as, for example, personal photographs or voice samples.

82. In Friedl, the Commission considered that the retention of anonymous photographs that have been taken at a public demonstration did not interfere with the right to respect for private life. In so deciding, it attached special weight to the fact that the photographs concerned had not been entered in a data-processing system and that the authorities had taken no steps to identify the persons photographed by means of data processing (see Friedl, cited above, §§ 49-51).

83. In P.G. and J.H. v. the United Kingdom, the Court considered that the recording of data and the systematic or permanent nature of the record could give rise to private-life considerations even though the data in question may have been available in the public domain or otherwise. The Court noted that a permanent record of a person's voice for further analysis was of direct relevance to identifying that person when considered in conjunction with other personal data. It accordingly regarded the recording of the applicants' voices for such further analysis as amounting to interference with their right to respect for their private lives (see P.G. and J.H. v. the United Kingdom, no. 44787/98, §§ 59-60, ECHR 2001-IX).

84. The Court is of the view that the general approach taken by the Convention organs in respect of photographs and voice samples should also be followed in respect of fingerprints. The Government distinguished the latter by arguing that they constituted neutral, objective and irrefutable material and, unlike photographs, were unintelligible to the untutored eye and without a comparator fingerprint. While true, this consideration cannot alter the fact that fingerprints objectively contain unique information about the individual concerned, allowing his or her identification with precision in a wide range of circumstances. They are thus capable of affecting his or her private life and the retention of this information without the consent of the individual concerned cannot be regarded as neutral or insignificant.

85. The Court accordingly considers that the retention of fingerprints on the authorities' records in connection with an identified or identifiable individual may in itself give rise, notwithstanding their objective and irrefutable character, to important private-life concerns.

86. In the instant case, the Court notes furthermore that the applicants' fingerprints were initially taken in criminal proceedings and subsequently recorded on a national database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. It is accepted in this regard that, because of the information they contain, the retention of cellular samples and DNA profiles has a more important impact on private life than the retention of fingerprints. However, the Court, like Baroness Hale (see paragraph 25 above), considers that, while it may be necessary to distinguish between the taking, use and storage of fingerprints, on the one hand, and samples and profiles, on the other, in determining the question of justification, the retention of fingerprints constitutes an interference with the right to respect for private life.

B. Justification for the interference

1. The parties' submissions

(a) The applicants

87. The applicants argued that the retention of fingerprints, cellular samples and DNA profiles was not justified under Article 8 § 2. The Government were given a very wide remit to use samples and DNA profiles notably for "purposes related to the prevention or detection of crime", "the investigation of an offence" or "the conduct of a prosecution". These purposes were vague and open to abuse as they might, in particular, lead to the collation of detailed personal information outside the immediate context of the investigation of a particular offence. The applicants further submitted that there were insufficient procedural safeguards against misuse or abuse of the information. Records on the Police National Computer (PNC) were not only accessible to the police, but also to fifty-six non-police bodies, including government agencies and departments, private groups such as British Telecom

and the Association of British Insurers, and even certain employers. Furthermore, the PNC was linked to the Europe-wide "Schengen Information System". Consequently, their case involved a very substantial and controversial interference with the right to private life, as notably illustrated by ongoing public debate and disagreement about the subject in the United Kingdom. Contrary to the assertion of the Government, the applicants concluded that the issue of the retention of this material was of great individual concern and the State had a narrow margin of appreciation in this field.

88. The applicants contended that the indefinite retention of fingerprints, cellular samples and DNA profiles of unconvicted persons could not be regarded as "necessary in a democratic society" for the purpose of preventing crime. In particular, there was no justification at all for the retention of cellular samples following the original generation of the DNA profile; nor had the efficacy of the profiles' retention been convincingly demonstrated since the high number of DNA matches relied upon by the Government was not shown to have led to successful prosecutions. Likewise, in most of the specific examples provided by the Government, the successful prosecution had not been contingent on the retention of the records and in certain others the successful outcome could have been achieved through more limited retention in time and scope.

89. The applicants further submitted that the retention was disproportionate because of its blanket nature irrespective of the offences involved, the unlimited period, the failure to take account of the applicants' circumstances and the lack of an independent decision-making process or scrutiny when considering whether or not to order retention. They further considered the retention regime to be inconsistent with the Council of Europe's guidance on the subject. They emphasised, finally, that retention of the records cast suspicion on persons who had been acquitted or discharged of crimes, thus implying that they were not wholly innocent. The retention thus resulted in stigma which was particularly detrimental to children, as in the case of S., and to members of certain ethnic groups over-represented on the database.

(b) The Government

90. The Government submitted that any interference resulting from the retention of the applicants' fingerprints, cellular samples and DNA profiles was justified under Article 8 § 2. It was in accordance with the law as expressly provided for, and governed by section 64 of PACE, which set out detailed powers and restrictions on the taking of fingerprints and samples and clearly stated that they would be retained by the authorities regardless of the outcome of the proceedings in respect of which they were taken. The exercise of the discretion to retain fingerprints and samples was also, in any event, subject to the normal principles of law regulating discretionary power and to judicial review.

91. The Government further stated that the interference was necessary and proportionate for the legitimate purpose of the prevention of disorder or crime and/or the protection of the rights and freedoms of others. It was of vital importance that law enforcement agencies took full advantage of available techniques of modern technology and forensic science in the prevention, investigation and detection of crime for the interests of society generally. They submitted that the retained material was of inestimable value in the fight against crime and terrorism and the detection of the guilty, and provided statistics in support of this view. They emphasised that the benefits to the criminal-justice system were enormous, not only permitting the detection of the guilty but also eliminating the innocent from inquiries and correcting and preventing miscarriages of justice.

92. As at 30 September 2005, the National DNA Database held 181,000 profiles from individuals who would have been entitled to have those profiles destroyed before the 2001 amendments. Of those profiles, 8,251 were subsequently linked with crime-scene stains which involved 13,079 offences, including 109 murders, 55 attempted murders, 116 rapes, 67 sexual offences, 105 aggravated burglaries and 126 offences of the supply of controlled drugs.

93. The Government also submitted specific examples of the use of DNA material for successful investigation and prosecution in some eighteen specific cases. In ten of these cases the DNA profiles of suspects matched some earlier unrelated crime-scene stains retained on the database, thus allowing successful prosecution for those earlier crimes. In another case, two suspects arrested for rape were eliminated from the investigation as their DNA profiles did not match the crime-scene stain. In two other cases the retention of DNA profiles of the persons found guilty of certain minor offences (disorder and theft) led to establishing their involvement in other crimes committed later. In one case the retention of a suspect's DNA profile following an alleged immigration offence helped his extradition to the United Kingdom a year later when he was identified by one of his victims as having committed rape and murder. Finally, in four cases DNA profiles retained from four persons suspected but not convicted of certain offences (possession of offensive weapons, violent disorder and assault) matched the crime-scene stains collected from victims of rape up to two years later.

94. The Government contended that the retention of fingerprints, cellular samples and DNA profiles could not be regarded as excessive since they were kept for specific limited statutory purposes and stored securely and subject to the safeguards identified. Their retention was neither warranted by any degree of suspicion of the applicants' involvement in a crime or propensity to crime nor directed at retaining records in respect of investigated alleged offences in the past. The records were retained because the police had already been lawfully in possession of them, and their

retention would assist in the future prevention and detection of crime in general by increasing the size of the database. Retention resulted in no stigma and produced no practical consequence for the applicants unless the records matched a crime-scene profile. A fair balance was thus struck between individual rights and the general interest of the community and fell within the State's margin of appreciation.

2. The Court's assessment

(a) In accordance with the law

95. The Court notes from its well established case-law that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise (see Malone v. the United Kingdom, 2 August 1984, §§ 66-68, Series A no. 82; Rotaru v. Romania [GC], no. 28341/95, § 55, ECHR 2000-V; and Amann, cited above, § 56).

96. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000-XI, with further references).

97. The Court notes that section 64 of PACE provides that the fingerprints or samples taken from a person in connection with the investigation of an offence may be retained after they have fulfilled the purposes for which they were taken (see paragraph 27 above). The Court agrees with the Government that the retention of the applicants' fingerprint and DNA records had a clear basis in the domestic law. There is also clear evidence that these records are retained in practice save in exceptional circumstances. The fact that chief police officers have power to destroy them in such rare cases does not make the law insufficiently certain from the point of view of the Convention.

98. As regards the conditions attached to and arrangements for the storing and use of this personal information, section 64 is far less precise. It provides that retained samples and fingerprints must not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.

99. The Court agrees with the applicants that at least the first of these purposes is worded in rather general terms and may give rise to extensive interpretation. It reiterates that it is as essential, in this context, as in telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness (see, mutatis mutandis, Kruslin v. France, 24 April 1990, §§ 33 and 35, Series A no. 176-A; Rotaru, cited above, §§ 57-59; Weber and Saravia v. Germany (dec.), no. 54934/00, ECHR 2006-XI; Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, no. 62540/00, §§ 75-77, 28 June 2007; and Liberty and Others v. the United Kingdom, no. 58243/00, §§ 62-63, 1 July 2008). The Court notes, however, that these questions are in this case closely related to the broader issue of whether the interference was necessary in a democratic society. In view of its analysis in paragraphs 105-26 below, the Court does not find it necessary to decide whether the wording of section 64 meets the "quality of law" requirements within the meaning of Article 8 § 2 of the Convention.

(b) Legitimate aim

100. The Court agrees with the Government that the retention of fingerprint and DNA information pursues the legitimate purpose of the detection and, therefore, prevention of crime. While the original taking of this information pursues the aim of linking a particular person to the particular crime of which he or she is suspected, its retention pursues the broader purpose of assisting in the identification of future offenders.

(c) Necessary in a democratic society

(i) General principles

101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see Coster v. the United Kingdom [GC], no. 24876/94, § 104, 18 January 2001, with further references).

102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference.

The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see Connors v. the United Kingdom, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-I). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see Dickson v. the United Kingdom [GC], no. 44362/04, § 78, ECHR 2007-V).

103. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see, mutatis mutandis, Z v. Finland, cited above, § 95). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see Article 5 of the Data Protection Convention and the Preamble thereto and Principle 7 of Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse (see notably Article 7 of the Data Protection Convention). The above considerations are especially valid as regards the protection of special categories of more sensitive data (see Article 6 of the Data Protection Convention) and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system).

104. The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned (see, mutatis mutandis, Z v. Finland, cited above, § 96).

(ii) Application of these principles to the present case

105. The Court finds it to be beyond dispute that the fight against crime, and in particular against organised crime and terrorism, which is one of the challenges faced by today's European societies, depends to a great extent on the use of modern scientific techniques of investigation and identification. The techniques of DNA analysis were acknowledged by the Council of Europe more than fifteen years ago as offering advantages to the criminal-justice system (see Recommendation No. R (92) 1 of the Committee of Ministers, paragraphs 43-44 above). Nor is it disputed that the member States have since that time made rapid and marked progress in using DNA information in the determination of innocence or guilt.

106. However, while it recognises the importance of such information in the detection of crime, the Court must delimit the scope of its examination. The question is not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8 § 2 of the Convention.

107. The Court will consider this issue with due regard to the relevant instruments of the Council of Europe and the law and practice of the other Contracting States. The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage (see paragraphs 41-44 above). These principles appear to have been consistently applied by the Contracting States in the police sector in accordance with the Data Protection Convention and subsequent Recommendations of the Committee of Ministers (see paragraphs 45-49 above).

108. As regards, more particularly, cellular samples, most of the Contracting States allow these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity. In the great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle are allowed by some Contracting States (see paragraphs 47-48 above).

109. The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard. As noted above (see paragraph 36), the Scottish parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff.

110. This position is notably consistent with Recommendation No. R (92) 1 of the Committee of Ministers, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases (see paragraphs 43-44 above). Against this background, England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.

111. The Government lay emphasis on the fact that the United Kingdom is in the vanguard of the development of the use of DNA samples in the detection of crime and that other States have not yet achieved the same maturity in terms of the size and resources of DNA databases. It is argued that the comparative analysis of the law and practice in other States with less advanced systems is accordingly of limited importance.

112. The Court cannot, however, disregard the fact that, notwithstanding the advantages provided by comprehensive extension of the DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance with the competing interests of preserving respect for private life. The Court observes that the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. In the Court's view, the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere. The Court considers that any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance in this regard.

113. In the present case, the applicants' fingerprints and cellular samples were taken and DNA profiles obtained in the context of criminal proceedings brought on suspicion of attempted robbery in the case of the first applicant and harassment of his partner in the case of the second applicant. The data were retained on the basis of legislation allowing for their indefinite retention, despite the acquittal of the former and the discontinuance of the criminal proceedings against the latter.

114. The Court must consider whether the permanent retention of fingerprint and DNA data of all suspected but unconvicted people is based on relevant and sufficient reasons.

115. Although the power to retain fingerprints, cellular samples and DNA profiles of unconvicted persons has only existed in England and Wales since 2001, the

Government argue that their retention has been shown to be indispensable in the fight against crime. Certainly, the statistical and other evidence, which was before the House of Lords and is included in the material supplied by the Government (see paragraph 92 above) appears impressive, indicating that DNA profiles that would have been previously destroyed were linked with crime-scene stains in a high number of cases.

116. The applicants, however, assert that the statistics are misleading, a view supported in the Nuffield Council on Bioethics' report. It is true, as pointed out by the applicants, that the figures do not reveal the extent to which this "link" with crime scenes resulted in convictions of the persons concerned or the number of convictions that were contingent on the retention of the samples of unconvicted persons. Nor do they demonstrate that the high number of successful matches with crime-scene stains was only made possible through indefinite retention of DNA records of all such persons. At the same time, in the majority of the specific cases quoted by the Government (see paragraph 93 above), the DNA records taken from the suspects produced successful matches only with earlier crime-scene stains retained on the database. Yet such matches could have been made even in the absence of the present scheme, which permits the indefinite retention of DNA records of all suspected but unconvicted persons.

117. While neither the statistics nor the examples provided by the Government in themselves establish that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate retention of the fingerprint and DNA records of all persons in the applicants' position, the Court accepts that the extension of the database has nonetheless contributed to the detection and prevention of crime.

118. The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests.

119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the national database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of

the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

120. The Court acknowledges that the level of interference with the applicants' right to private life may be different for each of the three different categories of personal data retained. The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein. However, such an indiscriminate and open-ended retention regime as the one in issue calls for careful scrutiny regardless of these differences.

121. The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having a direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data (see paragraph 67 above).

122. Of particular concern in the present context is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal (see Rushiti v. Austria, no. 28389/95, § 31, 21 March 2000, with further references). It is true that the retention of the applicants' private data cannot be equated with the voicing of suspicions. Nonetheless, their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed.

123. The Government argue that the power of retention applies to all fingerprints and samples taken from a person in connection with the investigation of an offence and does not depend on innocence or guilt. It is further submitted that the fingerprints and samples have been lawfully taken and that their retention is not related to the fact that they were originally suspected of committing a crime, the sole reason for their retention being to increase the size and, therefore, the use of the database in the identification of offenders in the future. The Court, however, finds this argument difficult to reconcile with the obligation imposed by section 64(3) of PACE to destroy the fingerprints and samples of volunteers at their request, despite the similar value of the material in increasing the size and utility of the database. Weighty reasons would have to be put forward by the Government before the Court

could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people.

124. The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the United Nations Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere and has noted, in particular, the need for the protection of their privacy at criminal trials (see T. v. the United Kingdom [GC], no. 24724/94, §§ 75 and 85, 16 December 1999). In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council on Bioethics as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities who have not been convicted of any crime (see paragraphs 38-40 above).

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants' criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data.

126. Accordingly, there has been a violation of Article 8 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8 OF THE CONVENTION

127. The applicants submitted that they had been subjected to discriminatory treatment as compared to others in an analogous situation, namely other unconvicted persons whose samples had still to be destroyed under the legislation. This treatment related to their status and fell within the ambit of Article 14 of the Convention, which had always been liberally interpreted. For the reasons set out in their submissions under Article 8, there was no reasonable or objective justification for

the treatment, nor any legitimate aim or reasonable relationship of proportionality to the purported aim of crime prevention, in particular as regards the samples which played no role in crime detection or prevention. It was an entirely improper and prejudicial differentiation to retain materials of persons who should be presumed to be innocent.

128. The Government submitted that as Article 8 was not engaged, Article 14 of the Convention was not applicable. Even if it were, there was no difference of treatment as all those in an analogous situation to the applicants were treated the same and the applicants could not compare themselves with those who had not had samples taken by the police or those who consented to give samples voluntarily. In any event, any difference in treatment complained of was not based on "status" or a personal characteristic but on historical fact. If there was any difference in treatment, it was objectively justified and within the State's margin of appreciation.

129. The Court refers to its conclusion above that the retention of the applicants' fingerprints, cellular samples and DNA profiles was in violation of Article 8 of the Convention. In the light of the reasoning that has led to this conclusion, the Court considers that it is not necessary to examine separately the applicants' complaint under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

131. The applicants requested the Court to award them just satisfaction for non-pecuniary damage and for costs and expenses.

A. Non-pecuniary damage

132. The applicants claimed compensation for non-pecuniary damage in the sum of 5,000 pounds sterling (GBP) each for distress and anxiety caused by the knowledge that intimate information about each of them had been unjustifiably retained by the State, and in relation to anxiety and stress caused by the need to pursue this matter through the courts.

133. The Government, referring to the Court's case-law (see, in particular, Amann v. Switzerland [GC], no. 27798/95, ECHR 2000-II), submitted that a finding of a violation would in itself constitute sufficient just satisfaction for both applicants and distinguished the present case from those cases where violations had been found as a result of the use or disclosure of the personal information (see, in particular, Rotaru v. Romania [GC], no. 28341/95, ECHR 2000-V).

134. The Court notes that it has found that the retention of the applicants' fingerprint and DNA data violates their rights under Article 8 of the Convention. In accordance with Article 46 of the Convention, it will be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life (see Scozzari and Giunta v. Italy [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 120, ECHR 2002-VI). In these circumstances, the Court considers that the finding of a violation, with the consequences which will ensue for the future, may be regarded as constituting sufficient just satisfaction in this respect. The Court accordingly rejects the applicants' claim for non-pecuniary damage.

B. Costs and expenses

135. The applicants also requested the Court to award GBP 52,066.25 for costs and expenses incurred before the Court and attached detailed documentation in support of their claim. These included the costs of the solicitor (GBP 15,083.12) and the fees of three counsel (GBP 21,267.50, GBP 2,937.50 and GBP 12,778.13 respectively). The hourly rates charged by the lawyers were as follows: GBP 140 in respect of the applicants' solicitor (increased to GBP 183 as from June 2007) and GBP 150, GBP 250 and GBP 125 respectively in respect of three counsel.

136. The Government qualified the applicants' claim as entirely unreasonable. They submitted in particular that the rates charged by the lawyers were excessive and should be reduced to no more than two-thirds of the level claimed. They also argued that no award should be made in respect of the applicants' decision to instruct a fourth lawyer at a late stage of the proceedings as it had led to the duplication of work. The Government concluded that any cost award should be limited to GBP 15,000 and in any event, to no more than GBP 20,000.

137. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Roche v. the United Kingdom [GC], no. 32555/96, § 182, ECHR 2005-X).

138. On the one hand, the present applications were of some complexity as they required examination in a Chamber and in the Grand Chamber, including several rounds of observations and an oral hearing. The application also raised important legal issues and questions of principle requiring a large amount of work. It notably required an in-depth examination of the current debate on the issue of retention of fingerprint and DNA records in the United Kingdom and a comprehensive comparative research of the law and practice of other Contracting States and of the relevant texts and documents of the Council of Europe.

139. On the other hand, the Court considers that the overall sum of GBP 52,066.25 claimed by the applicants is excessive as to quantum. In particular, the Court agrees with the Government that the appointment of the fourth lawyer in the later stages of the proceedings may have led to a certain amount of duplication of work.

140. Making its assessment on an equitable basis and in the light of its practice in comparable cases, the Court awards the sum of 42,000 euros (EUR) in respect of costs and expenses, less the amount of EUR 2,613.07 already paid by the Council of Europe in legal aid.

C. Default interest

141. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that it is not necessary to examine separately the complaint under Article 14 of the Convention;

3. Holds that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

4. Holds

(a) that the respondent State is to pay the applicants, within three months, EUR 42,000 (forty-two thousand euros) in respect of costs and expenses (inclusive of any tax which may be chargeable to the applicants), to be converted into pounds sterling at the rate applicable at the date of settlement, less EUR 2,613.07 already paid to the applicants in respect of legal aid;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 2008.

Michael O'Boyle Jean-Paul Costa

Deputy Registrar President

[1]. DNA stands for deoxyribonucleic acid; it is the chemical found in virtually every cell in the body and the genetic information therein, which is in the form of a code or language, determines physical characteristics and directs all the chemical processes in the body. Except for identical twins, each person's DNA is unique. DNA samples are cellular samples and any subsamples or part samples retained from these after analysis. DNA profiles are digitised information which is stored

electronically on the National DNA Database together with details of the person to whom it relates.

[2]. The Nuffield Council on Bioethics is an independent expert body composed of clinicians, lawyers, philosophers, scientists and theologians established by the Nuffield Foundation in 1991. The present report was published on 18 September 2007 under the following title, The Forensic Use of Bioinformation: Ethical Issues.

[3]. An allele is one of two or more alternative forms of a particular gene. Different alleles may give rise to different forms of the characteristic for which the gene codes (World Encyclopedia, Philip's, 2008, Oxford Reference Online: Oxford University Press).

[4]. The law and practice in Ireland are presently governed by the Criminal Justice (Forensic Evidence) Act 1990. A new bill has been approved by the government with a view to extending the use and storage of DNA information in a national database. The bill has not yet been approved by Parliament.

[5]. The legislative decree of 30 October 2007 establishing a national DNA database was approved by the Italian government and the Senate. However, the decree eventually expired without having been formally converted into a statute as a mistake in the drafting was detected. A corrected version of the decree is expected to be issued in 2008.

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Chapter 3

Realization of the Principles of Criminal Law under Martial Law

ABSTRACT

Despite international documents aimed at protecting human rights, national legislation, diplomatic relations and agreements, the Russian Federation has launched active hostilities in Ukraine.

A number of legal issues are on the raise because of the situation in Ukraine, among them the problem of the expediency of legislation and international agreements, the value of such documents, the importance of research in this area, the significance and purpose of criminal law, and realization of the principles of criminal law.

The aim of the article is to optimize the implementation of the principles of the criminal law during martial law.

This chapter consists of three sections. In the first section, we analyze issues of approximation of European norms in the context of realization principles. The problem faced by Ukraine does not concern a single country, but all humanity. Following the aggressive military actions against Ukraine, there is a threat to the security of other countries of the world if an effective counteraction mechanism is not developed. It has been established that any armed invasion of the territory of another state in the 21st century is not only an encroachment on its territorial integrity, but an encroachment on European values. These values have been developedfor centuries in response to the experience of war. After the outbreak of war in Ukraine, European community demonstrated the power of European values, and the effectiveness of the European sanction mechanism.

The second sectionfocuses on the questions about the essence of criminal law. It is expressed through its principles. Among them are the principles of humanism, legality, certainty, proportionality, individualization and differentiation of criminal responsibility, presumption of innocence, and inevitability of criminal liability. Fair punishment should comply with the principles of criminal law during martial law as well.

In the third section, we analyzed the issues of interpretation of these principles in the practice of the European Court of Human Rights (ECtHR). The practice of the ECtHR is dynamic and changing. The interpretation of the principles is dynamic and changing as well.

The best way to deal with crimes against humanity, including war crimes, is the integration and unity of the international community in combating these crimes.

Last but not least, the number of crimes committed by the Russian Federation isincreasing significantly. The more crimes committed, the more anger is stirred up among Ukrainians and people all over the world who support Ukraine. However, the civilized world must respond and ensure security by means of civilized methods.

Keywords: war crimes, principles of criminal law, international standards, victims, casualties of war, war in Ukraine.

Introduction

Despite international documents aimed at protecting human rights, national legislation, diplomatic relations and agreements, on 24 February 2022, the Russian Federation began active hostilities on the territory of Ukraine.

Currently, more than ever, the question of the expediency of legislation and international treaties arises. The issues of the value of such documents, scientific research in this field, purpose and principles of criminal law, are of paramount importance today.

Many researchers and scholars have studied the issue of the principles of criminal law. In particular, V.O. Gatselyuk carried out a comprehensive study on the implementation of the criminal law of Ukraine's principle of legality (Gatselyuk, 2006), N.A. Orlovskarevealed in her research the problems of the principles of criminal sanctions' construction (Orlovska, 2011), S.P. Pogrebnyak considered the issue of meaningful characteristics of the fundamental principles of law (Pogrebnyak, 2008). V.O. Tulyakov investigated the peculiarities of the principle of legality in the practice of the European Court of Human Rights (ECtHR), M.I. Khavronyuk examined the principles of criminal law in the context of its reform, V.V. Shablystiy considered the issue of criminal law principles in its dimension of security (Shablystiy, 2015). In addition, certain issues of theoretical understanding and development of humanism in the field of criminal law were investigated by modern Ukrainian criminal law researchers, D.O. Balobanova, Y.V. Baulin, M.I. Panov, E.O. Pysmenskyi, Y.A. Ponomarenko, N.A. Savinova, P.L. Fries, O.V. Kharitonova, P.V. Khryapinsky, as well as other scientists and scholars.

Research in the fields of war crimes, crimes against humanity, international humanitarian law and international criminal law should also be mentioned here.

In particular, O.V. Senatorova investigated the issue of human rights in the reality of armed conflicts (Senatorova, 2018).

The issue of realization the principles of criminal law takes on a new meaning in connection with the situation in Ukraine.

3. The Purpose and Objectives of the Research

The purpose of the work is to bring the national criminal legislation closer to international standards in the context of combating crimes against humanity and ensuring the implementation of the principles of criminal law.

In order to achieve this goal, the following tasks were set:

1. To establish the inadmissibility of violation of fundamental human rights and freedoms, which are stipulated in international documents.
2. To define the necessity for integration and unity of the international community in combating crimes against humanity and war crimes.
3. To substantiate the need for additional guarantees of implementation of the international institutions' decisionsconcerning the aggressor state.
4. To establish the need to observe human rights standards when bringing to justice perpetrators of crimes against humanity, as well as those involved in committing them.

Methodology

The application of the *dogmatic method* contributed to clarifying the content of international treaties that provide for responsibility for war crimes and those that provide for fundamental human rights. The *dialectical method* contributed to the analysis of the concept of war crimes and crimes against humanity in international and national criminal law. The *comparative legal method* was applied during the international criminal law in order to use the globalexperience in establishing responsibility for war crimes and crimes against humanity. The methods of *deduction, analysis and generalization* were used in the framework of the study of doctrinal provisions on the researched issue. The *systemic-functional method* made it possible to analyze the available resources, including the issue of responsibility for war crimes and the concept and characteristic features of implementation. The *Narrative method* was used in the analysis of specific situations related to the implementation of the principles of criminal law, and *Case study* in the analysis of the practice of the ECtHR, the Supreme Court of Ukraine and the Constitutional Court of Ukraine.

It is extremely important for everyone to have the opportunity to learn and understand the grounds of criminal responsibility. This is one of the main requirements of the "social contract" (J.J. Rousseau, 1895). Violation of agreements must inevitably lead to responsibility. However, a person should know about the contract's existence, its subject, conditions and terms of validity. Owing to this purpose, international treaties and conventions on the protection of fundamental human rights have been adopted.

The concept of crime and punishment is conditional. It changes over time. The main idea is that the list of crimes and punishments for them should be clearly and unambiguously formulated in the legislation. Everyone should be able to know which actions result in criminal liability.

Moreover it is crucial to mention the approach of the classical school of criminal law: "punishment for a crime." It is based on the fact that the state reacts with legal measures that correspond to the act considered a crime in contemporary criminal law. No one can be punished only for thoughts or feelings. Even Goethe noted in *Faust* (Goethe, 1808) that thought could not create or act, therefore, "In the beginning was the Deed."

Only a person who has committed a crime can be held criminally liable. Every person must clearly and unambiguously know about such responsibility. And those who have already committed a crime, should be prosecuted in accordance with the law. In modern criminal law, the principle of certainty is one of its main principles.

Any meaning in a person's life must be realized in compliance with the principle of humanity. After all, humanity is a feature that distinguishes man from animals. According to V. Frankl, by realizing meaning in life, people realize themselves. By realizing the meaning contained in suffering, people realize humanity. When people are helpless and hopeless, unable to change their situation, they feel a need for change. People always decide whether they want to realize a certain meaning or not. Making sense always involves making a decision (Frankl, 1946, 13). At the same time, V. Frankl notes that people always can say "no" to their passions and should not always say "yes" to them. When they say "yes" to them, it is always only by identifying with them (Frankl, 1946, p. 14).[1]

According to E. Toffler, it would be foolish to assume that the fundamentally changed material conditions of life do not affect personality or, more precisely, social character. By changing the deep structures of society, we are also changing people. Even if one believes in some fixed human nature, society still rewards and produces

[1] Freedom is freedom in relation to three things, namely: 1. In relation to passions (tendencies, urges). 2. In relation to heredity. 3. In relation to the environment. (Frankl V., 2008. 1946).

certain character traits and punishes others, which leads to evolutionary changes in some human character traits. Character traits of the "human of the future" arise not only under the influence of external pressure on people. They arise from the tension that exists between the internal needs or desires of many individuals and the external needs or pressures of society. But, once formed, these general character traits influence the economic and social development of society (Toffler, 2004, p. 259).

N.N. Taleb has noted some very true things about the Russian-Ukrainian war. There are two imperial models: either a heavy model, as in Russia, or a coordination of states on the model of NATO. This war not only opposes Ukraine and Russia, it is a confrontation between two systems, one modern, decentralized and multi-headed, the other archaic, centralized and monocephalous. Ukraine wants to belong to the liberal system: being Slavic-speaking, like Poland, it wants to be part of the West (Taleb, 2022).

Since the beginning of the full-scale war of the Russian Federation against Ukraine, 23,766 crimes of aggression and war crimes and 11,462 crimes against national security have been registered (Uryadovyy kur″yer, 2022).

War is a high price to pay, but it shows whether a person is ready to cross the line, cross *human values* and commit a crime. It shows whether a person is ready to sell humanitarian aid to compatriots, to extort money under the guise of volunteering, guide the enemy's fire and pass information to the foe. Every person, society as a whole, and the international community can implement the principles and values laid down in legislation, in particular European and international, by their actions.

1. Challenges of European Integration in the Criminal-Legal Policy of Ukraine in the Reality of War

The war in Ukraine has become an unexpected and devastating event not only for Ukraine, but for the whole world. It has demonstrated the effectiveness of European values, their importance not only in documents, but in concrete steps towards integrating Ukraine with European countries, in the sanctions against Russia.

Moreover, the war strengthened Ukraine's orientation towards the European Union (EU). On 23 June 2022, the European Council announced its opinion on EU candidate status for Ukraine. The implementation of the Association Agreement and the possibility of maintaining the EU candidate status requires changes in Ukrainian legislation, including criminal law, but now this goal has become closer.

Separate aspects related to the problems of European integration have been studied by: G.V. Yepur, O.O. Zhitny, V.V. Kornienko, K.O. Trichlib, M.I. Khavronyuk and others. Various problems of the European integration course are considered in different works. In particular, V.O. Tulyakov examines the issue of European integration in criminal law of Ukraine (Tulyakov, 2018, pp. 63-65), L.A. Harbovsky considers the features of the application of confiscation of property according to European Union legislation (Harbovsky, 2009), V.V. Kornienko outlines the peculiarities of the structure of European Union criminal law (Kornienko, 2011). R. Klymkevich, O.M. Moskalenko and K.V. Smirnova in their works consider the peculiarities of the source of law of the European Union (Klymkevich, 2021; Moskalenko, 2006; Smirnova, 2005). O.Y. Tragniuk examines the peculiarities of the principle of subsidiarity under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Tragniuk, 2003, pp. 25-26).

From 2018 to 2020, the project "European integration criminal law policy of Ukraine" was implemented at the National University "Odesa Law Academy" (State registration number: 0118U003677). At the same time, significant changes in legal relations as a result of the conclusion of the Association Agreement require further research and development of optimal models of the criminal law of Ukraine's Europeanization and preservation of its own identity.

On 28 February 2022, President V. Zelenskyy signed the application for Ukraine's membership in the European Union. On 8 April 2022, during her visit to Kyiv, the President of the European Commission, Ursula von der Leyen, personally handed over to the Ukrainian side a questionnaire for obtaining the status of a candidate for EU membership. On 18 April 2022, the President of Ukraine handed over the completed questionnaire to the Head of the Delegation of the European Union to Ukraine, Matti Maasikas, and Ukraine received the second part of the questionnaire regarding the assessment of the compliance of Ukrainian legislation with the EU acquis (Acquis communautaire) (Ukrinform, 2022).

The Chairman of the European Council, Charles Michel, said at a joint briefing with the President of Ukraine in Kyiv that Ukraine demonstrates its commitment to European principles and freedoms every day: "You are fighting not just for the future of Ukrainian children, but for the fundamental values, the foundations of Europe." That is, Ukraine has common values with the countries of the European Union, including: respect for the rule of law, human rights and fundamental freedoms, non-discrimination, and respect for diversity (Timofieieva, 2020).

The above-mentioned values are also reflected in other international documents, the Convention for the Protection of Human Rights and Fundamental Freedoms, decisions of the ECtHR, EU Directives, documents of the Council of Europe and the

EU.[2] These values are really common to many countries of the world, because they are universal.

Values directly affect all activities of the EU. The Association Agreement and EU legal acts lay down several important goals that Ukraine seeks to implement and thus approach EU legislation. Among them are the following: combating illegal migration and human trafficking, organized crime, terrorism, environmental protection, strengthening interpersonal contacts. These goals are highlighted for a reason, because they address the causes of the greatest damage not only at the national, but also international level.

Areas such as migration and asylum, the fight against terrorism and the protection of personal data, which have a global dimension, must be addressed both within the EU and in relations with third countries.

The prospect of granting Ukraine the status of an EU candidate (decision made on 23 June 2022) has a number of requirements. First of all, these requirements are related to the level of values, in particular, the genuine provision of the principle of the rule of law, the inadmissibility of corrupt practices, the openness and transparency of government.

The document of the European Commission of 23 June 2022 separately specifies the list of requirements for Ukraine: 1) to implement the legislation on the selection procedure of judges of the Constitutional Court of Ukraine, including the preselection process based on an assessment of their integrity and professional skills, in accordance with the recommendations of the Venice Commission; 2) to complete the integrity check by the Ethics Council of candidates for membership of the

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[2] The system of sources of European law, according to O.M. Moskalenko, includes: the first level—foundingtreaties, decisions of the Council, general principles of EU law; the second level—international legal obligations of the European Communities and the Union, which arise from all sources of international law; the third level—precedents of the EU Court; the fourth level—normative legal acts adopted by EU bodies within the framework of the European Communities, closed conventions between member states concluded within the framework of the European Communities, customs formed in the process of European integration. (Moskalenko, 2006, p. 7). Directives are one of the important sources of criminal law of the European Union. In particular, the following Directives can be singled out, which are important for the application of criminal law. Directive on strengthening certain aspects of the presumption of innocence and the right to be present in court during criminal proceedings 2016/343/EU dated 9 March 2016. Directive on the freezing and confiscation of the means and proceeds of crime in the European Union 2014/42/EU dated 3 April 2014, Directive on the protection of natural persons regarding the processing of their personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offenses or the execution of criminal penalties, as well as the free transfer of such data 2016/680, dated 27 April 2016. (Klimkevich, 2021, pp. 47-53).

High Council of Justice; 3) to strengthen the fight against corruption, particularly at a high level, through active and effective investigations; to complete the appointment of the new head of the Specialized Anti-Corruption Prosecutor's Office by approving the winner of the competition, and to start and complete the process of selection and appointment of the new director of the National Anti-Corruption Bureau of Ukraine; 4) to ensure compliance of the anti-money laundering legislation with the standards of the Financial Action Task Force (FATF), to adopt a comprehensive strategic plan for reforming the entire law enforcement sector as part of Ukraine's security environment; 5) to introduce an anti-oligarchic law to limit the excessive influence of oligarchs on economic, political and social life; this must be done in a legally sound manner, taking into account the forthcoming opinion of the Venice Commission on the relevant legislation; 6) to overcome the influence of vested interests by adopting a law on mass media that harmonizes the legislation of Ukraine with the EU Directive on audiovisual media services and empowers an independent mass media regulator; 7) to complete the reform of legislation on national minorities, in accordance with the recommendations of the Venice Commission.

The European Commission will monitor Ukraine's progress in implementing these steps and report on them together with a detailed country assessment by the end of 2022 (*Yevropeys'ka Pravda*, 2022).

According to the UN Sustainable Development Goals (No. 16 Peace, Justice and Strong Institutions), it is envisaged to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" (UN Sustainable Development Goals, 2015).

Without peace, stability, ensuring human rights and effective governance based on the principles of the rule of law, one cannot hope for sustainable development. We live in an increasingly divided world. Some regions have achieved lasting peace, security and prosperity, while others have been caught in a seemingly endless cycle of conflict and violence. However, such a situation is by no means inevitable and must be resolved.

High levels of armed violence and instability have a devastating impact on a country's development. They have a negative impact on economic growth and often lead to resentment that can last for decades. In situations of conflict or in the absence of the rule of law, sexual violence, crime, exploitation and torture are also common, and countries must take measures to protect the most vulnerable individuals.

The Sustainable Development Goals are aimed at significantly reducing all forms of violence, as well as at finding, together with state bodies and communities, long-term solutions to overcome conflicts and improve security. Strengthening the rule of law and strengthening human rights are key factors in this process, as are reducing

illicit arms trafficking and increasing the participation of developing countries in global governance institutions.

Human rights protection mechanisms in the EU. The Convention not only declares the need to protect human rights, but also establishes a mechanism for ensuring such protection. The European mechanism for the protection of human rights is specific. One of the principles in the Convention on which the protection of human rights is based is the principle of "non-illusory rights." It means that the state cannot hide violations of human rights. Certain bodies are established for the realization of rights and freedoms. In particular, the European Committee for the Prevention of Torture was created to prevent torture. In addition, activities aimed at combating crime are carried out by Europol, Interpol, etc. Many actions are aimed at prevention.

The EU's activities are also related to assistance in identifying persons involved in ***terrorism,*** including foreign terrorists. The focusing of the national legislation on effective exchange of information with other countries, in particular on suspected criminals, is necessary.

In September 2018, the EU Council and the European Parliament adopted two pieces of legislation, a regulation establishing the European Travel Information and Authorization System (ETIAS) and an amendment to the Europol Regulation regarding the purpose of establishing ETIAS. ETIAS will be a centralized EU information system that will allow pre-screening of visa-free third country nationals traveling to the Schengen area in order to identify potential security, illegal immigration and health risks. To assess these risks, the personal data used in the ETIAS programs will be compared with the data contained in the records, files or alerts registered in the EU information systems or databases (Newsletter, 2020). It is extremely important to harmonize the national legislation with such innovations.

It is necessary to develop tools that will help in identifying and removing content from the Internet that promotes terrorist acts. To that end, it is also necessary to establish cooperation with Internet providers. These instruments must additionally be complemented by appropriate legislative measures. In March 2018, the Commission published a Recommendation on measures to effectively work and combat illegal content on the Internet, including terrorist propaganda on the Internet. Member States must also ensure the possibility of intervention of competent authorities in the terrorist content on the Internet. In addition, it imposes obligations on Internet service providers to report to law enforcement authorities when they discover content that poses a threat to life or safety. Online service providers are required to retain the content that they remove. This functions as protection against accidental deletion and ensures that potential evidence is not lost for the purpose of preventing, detecting, investigating and prosecuting terrorist criminals.

Directive of the European Parliament and the Council (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing is the main legal instrument to prevent the use of the Union's financial system for the purposes of money laundering and terrorist financing.

Pursuant to point (4) of the Directive of the European Parliament and of the Council (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on preventing the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009 /138/EU and 2013/36/EU, despite significant improvements in the adoption and implementation of the Financial Action Task Force (FATF) standards and the approval by member states of the Organization for Economic Co-operation and Development's transparency activities in recent years, there is an obvious need of further increasing the overall transparency of the economic and financial environment of the Union. The prevention of money laundering and terrorist financing cannot be effective if the environment is not hostile to criminals who seek shelter for their finances through non-transparent structures. The integrity of the financial system of the Union depends on the transparency of corporate and other legal entities, trusts and similar legal entities. The purpose of this Directive is not only to detect and investigate money laundering, but also to prevent it from occurring. Increasing transparency can be a strong deterrent. Countering any crimes should be carried out without violating the fundamental principles of law (Timofieieva, 2023).

Migration. In connection with the war in Ukraine, mass migration began, in particular to neighboring countries. Millions of Ukrainians migrated to Poland, Lithuania, the Czech Republic, Moldova, Germany, Great Britain, the Netherlands and other countries of the world.

Such mass migration also causes problems related to the growth of crime, related in particular to the problems of crossing the border. There were rare cases when the border was crossed using an internal passport in the absence of a foreign one. Also, the requirement to declare goods was removed from the border crossing rules for a certain period of time. When the requirement returned, violations in this regard increased.

Implementing Decision of the Council (EU) 2022/382 of 4 March 2022 established the presence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and introduced temporary protection, which includes the right to housing, education, work, social securityand medical assistance. Such rights become available after registration in the chosen place of residence in any EU country. The status is established for one year and can be extended

for another two years, and in the event of a change in the situation in Ukraine, it can be terminated.

The Directive and the Decision of the Council of the EU on its activation for Ukrainians establish only the minimum standards of protection that each country must provide. The legislation of an individual EU country may also set additional requirements (Directive on temporary protection in EU countries, 2022).

The legal regime of temporary protection has advantages for Ukrainian immigrants in European countries, compared to visiting for tourismor receiving refugee status. But at the same time, it is a crime prevention measure in this area, as people who seek to save their lives get legal grounds for staying and working in another country.

Border crossing rules ensure safety and are preventative measures against crime, including smuggling of goods, cigarettes, and precious metals.

However, this war is not the only one. At the same time, wars in other countries of the world continue, including, in particular, the war in Syria, in which the Russian Federation participates as well. Syria remains the country experiencing the world's largest displacement crisis. More than 13 million people either fled the country or became internally displaced.

The countries that have hosted more than 5.6 million Syrian refugees need international support. These countries are experiencing increasing financial problems, especially in light of the devastating socio-economic consequences of the COVID-19 pandemic. Refugees and host communities have suffered greatly, losing their livelihoods and facing the rising prices of food and other essentials. A number of international treaties contain provisions regarding refugees, in particular those related to protecting their rights and freedoms, as well as combating crime among refugees.

According to Article 2 of the Convention Relating to the Status of Refugees (Ukraine joined the Convention on the basis of Law No. 2942-III dated 10 January 2002) and the Protocol of 16 December 1966, all refugees have obligations to the receiving country, according to which, in particular, they must comply with the laws and regulations of that country, as well as the measures taken to maintain public order. Article 3 of the Convention contains provisions regarding the inadmissibility of discrimination against refugees based on their race, religion or country of origin. The Contracting States shall grant refugees in their territories at least as favorable a treatment as their own nationals with regard to the freedom to practice their religion and the freedom to provide their children with the religious education (Article 4).

In addition, international treaties contain safeguards according to which a refugee cannot be forcibly deported to a country where there is a danger to his or her life, in particular as a result of war, political persecution, etc.

According to Article 33 of the Convention Relating to the Status of Refugees (Prohibition of Expulsion or Return): 1. The Contracting States will not in any way expel or return refugees to the borders of the country where their life or freedom would be threatened because of their race, religion, nationality, membership of a particular social group or political opinion. 2. This resolution, however, cannot be applied to refugees who are considered for good reasons to be socially dangerous and pose a threat to the security of the country in which they are, or who have been convicted by a valid sentence for committing a particularly serious crime.

Ukrainian legislation contains similar provisions. According to Part 1 of Article 31 of the Law On the Legal Status of Foreigners and Stateless Persons No. 3773-VI of 22 September 2011, foreigners or stateless persons cannot be forcibly returned or forcibly expelled or extradited or transferred to countries: where their life or freedom would be threatened on the basis of race, religion, nationality, citizenship, belonging to a certain social group or political beliefs; where they face death penalty, torture, cruel, inhuman or degrading treatment or punishment; where their life or health, safety or freedom is threatened by widespread violence in situations of international or internal armed conflict or systematic violation of human rights, or natural or technological disaster, or lack of life-sustaining medical treatment or care; where they are at risk of deportation or forced return to countries where these cases may occur. According to Part 2 of Article 31 of this law, collective forced deportation of foreigners and stateless persons is prohibited.

Consequently, the principle of personal responsibility must be observed and each case must be considered individually.

For example, A. arrived in Ukraine in 2012 legally, using a Syrian ID, which was subsequently lost. He studied at a university and graduated. In 2017, he committed an administrative offense and the immigration service issued a decision on forced deportation to the country of origin. This decision was disputed in court. The Primorsky District Court of Odesa, on 5 July 2019, in the case 522/6238/19, recognized such a decision as illegal. However, in this context, it is also necessary to consider measures against such foreigners, in particular, if they continue being unregistered with the immigration service and commit administrative or even criminal offenses.

The law provides grounds for banning the entry of foreigners and stateless persons into Ukraine in the interest of national security. According to Article 13 of the Law On the Legal Status of Foreigners and Stateless Persons No. 3773-VI of 22 September 2011, an entry of a foreigner or a stateless person into Ukraine is not allowed: in the interests of the national security of Ukraine or protecting public order, or combating organized crime; if it is necessary to protect health, rights and legitimate interests of citizens of Ukraine and other persons living in Ukraine; if such a person knowingly submitted false information or forged documents when applying for

entry to Ukraine; if the passport of such a person or the visa is forged, damaged or does not correspond to the established model or belongs to another person; if such a person violated the rules of crossing the state border of Ukraine, customs rules, sanitary norms or rules of crossing the state border of Ukraine, or did not comply with the legal requirements of the personnel of the state border protection authorities, customs and other authorities exercising control at the state border; if during the previous stay on the territory of Ukraine, a foreigner or a stateless person did not comply with the decision of a court or state authorities authorized to impose administrative fines, or has other unfulfilled obligations to the state, natural or legal persons, including those related to the previous expulsion, even after the expiration of the ban on further entry into Ukraine; if such a person, in violation of the procedure established by the legislation of Ukraine, entered or exited the temporarily occupied territory of Ukraine or the area of an anti-terrorist operation or made an attempt to enter these territories outside the entry-exit control points.

EU countries also have similar bans. In particular, in connection with the war in Ukraine, a decision was made to ban certain individuals from entering a number of EU countries. Also, as of 1 July 2022, a visa regime for the citizens of the Russian Federation was introduced in Ukraine.

The Judgment of the ECtHR in the case Sufi and Elmi v. the United Kingdom, Application No. 8319/07 and 11449/07, of 28 June 2011, is also important. Following a series of serious criminal convictions against both applicants, citizens of Somalia, deportation orders were issued. However, the situation in Somalia and the possibility of ill-treatment of the applicants were not taken into account. In their complaints, the applicants referred to the fact that they would be at risk of ill-treatment if deported to Somalia.

The group known as al-Shabaab, which originated as an armed group of the Union of Islamic Courts, has emerged as the most powerful and effective armed force in the country, especially in southern Somalia, and is steadily advancing towards Mogadishu.

Regarding compliance with Article 3 of the Convention, the only issue in the expulsion case is whether in the circumstances of the case there are sufficient grounds to believe that the applicants, in the event of their return, would face a genuine risk of ill-treatment as defined in Article 3.

If the existence of such a risk is established, the applicants' expulsion will inevitably violate Article 3 of the Convention, regardless of whether the risk arises from the general situation of violence, the applicant's personal characteristics or a combination of these two factors. However, not every situation of general violence creates such a risk. On the contrary, a general situation of violence can reach a sufficient intensity to gives rise to such a threat only "in extreme cases." For the purposes

of determining the level of intensity of the conflict, the following criteria (which are not exhaustive) are important: whether the parties to the conflict use methods and tactics of military actions that increase the risk of casualties among the civilian population; whether the use of such methods and/or tactics is widespread among the parties to the conflict; whether the collisions are localized or widespread; and finally, the number of civilians killed, injured and displaced as a result of the clashes. As for the situation in Somalia, Mogadishu, the intended point of return, has been subjected to indiscriminate bombing and military attacks, and unpredictable violence is rife there.

In addition, there was a significant number of casualties among the civilian population and displaced persons. Although a person with connections could obtain protection there, only connections at the highest level could provide it, and a person absent from Somalia for any length of time was unlikely to acquire such connections. As a result, the violence reached such a level of intensity that any person in the city, perhaps, except for those who were particularly strongly connected with "powerful figures" (in particular, the ECtHR case NA. v. United Kingdom, application no. 25904/07 of 17 July 2008) would be exposed to a genuine risk of ill-treatment.

It is reasonable to assume that returnees who did not have close family ties or were unable to pass safely to an area where they had such ties may have sought refuge in IDP camps or refugee camps. Therefore, the ECtHR must consider the conditions existing in these camps, which are characterized as oppressive. In this regard, the court noted that if the crisis is mainly caused by direct and indirect actions of the parties to the conflict, as opposed to poverty and the lack of state resources to overcome phenomena of natural origin, such as drought, then it is necessary to take into account a better approach to assess Article 3 of the Convention. According to the judgement in the case of M.S.S. v. Belgium and Greece of 21 January 2011, the goverment should take into account the applicant's essential needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of improving his situation in in the near future. The applicants would be at real risk of ill-treatment if they remained in Mogadishu. They arrived in the UK at a young age (one in 2003 when he was 16, the other in 1988 when he was 19), so they had no experience in living under the repressive Al-Shabaab regime. As such, they would be at real risk if they sought refuge in Al-Shabaab-controlled territory. A similar situation would occur if they were forced to seek refuge in IDP camps or refugee camps.

Spreading the conflict. On 31 July 2022, the conflict in Serbia and Kosovo escalated. Kosovo is a partially recognized state in Southeast Europe, on the Balkan Peninsula. According to the Serbian constitution, the territory of the Republic of Kosovo is part of Serbia as the Autonomous Province of Kosovo and Metohija, but in fact Kosovo is not controlled by the Serbian authorities. In an address to the popula-

tion, the President of Serbia, Aleksandar Vučić said that the Kosovo police would launch a military operation against the Serbs on the night of 31 July. Prior to this, the authorities of Pristina announced that from 1 August, special documents would be issued upon entry into Kosovo, and Serbian documents would be considered invalid. Belgrade did not recognize Kosovo's decision (Suspilne, 2022).

The NATO-KFOR mission responsible for ensuring stability in Kosovo has issued an official statement regarding the conflict between Belgrade and Pristina. The troops of the mission in Kosovo are placed in full combat readiness and are ready to intervene in the situation in the case of further escalation of the conflict. "The general security situation in the northern municipalities of Kosovo remains tense. The NATO-KFOR mission is closely monitoring the situation and is ready to intervene, in accordance with its mandate, if stability is threatened," the mission said in a statement. NATO added that the KFOR mission "is focused on the daily fulfillment of its mandate to ensure security and freedom of movement for the entire population of Kosovo."

"NATO also continues to fully support the process of normalization of relations between Pristina and Belgrade through EU-facilitated dialogue and calls on all parties to continue negotiations. There will be no real prospects for a better future in the Balkans without full respect for human rights and democratic values, the rule of law, internal reforms and good neighborly relations," the Alliance representatives said.

Environmental issues. Ukraine's obligations under international agreements on biodiversity conservation must be respected. Annex XXX to the Association Agreement between Ukraine and the European Union in the Nature Conservation sector provides for measures to approximate national legislation to Directive No. 2009/147/EU on the conservation of wild birds (the Bird Directive) and Directive No. 92/43 EU on preservation of natural habitats and species of natural fauna and flora (the Habitats Directive). The Forest Strategy of the EU until 2030 was adopted as part of the European Green Deal. It seems that it should be taken into account by Ukraine.

The main EU directives that provide legal regulation of environmental liability are Directive 2004/35/EC On environmental liability for the prevention and elimination of the consequences of environmental damage, and Directive 2008/99/EC On environmental protection through criminal law. The purpose of the Environmental Liability Directive is to establish a framework for environmental liability based on the "polluter pays" principle to prevent and remedy environmental damage. The purpose of the Environmental Liability Directive is to ensure that the financial consequences of certain types of damage to the environment are borne by the economic operator that caused the damage.

Reconstruction works and infrastructure restoration processes should take place taking into account the principles of the European Green Deal, including the EU

Biodiversity Strategy until 2030. When developing projects of infrastructure and industrial facilities, the EU Taxonomy should be taken into account, which provides criteria for environmentally sustainable, "green" projects and types of activities. Land use and environmental problems related to it, which directly affect the food security of Ukraine and the world, as well as other environmental and social problems also require an urgent response, especially in the period of their exacerbation due to the Russian invasion.

In order to meet the demand for wood, simultaneously with the preservation of forest biodiversity and ecosystem services of natural forests, the bequest value of forests should be respected.

In particular, the draft Law of Ukraine On the territories of the Emerald Network No. 4461 of 30 November 2020 establishes legal and organizational principles for defining the territories of the Emerald Network and their management in Ukraine for the preservation of natural habitats and species of fauna and flora subject to special protection; legal and organizational principles of impact assessment on the territory of the Emerald Network in the process of decision-making on the implementation of economic activities that may have a significant impact on the territory of the Emerald Network, taking into account state, public and private interests; legal and organizational principles of the creation of a central executive body that ensures the implementation of government policy in the field of protection and use of the nature reserve fund, and preservation of biodiversity.

The provisions of the draft Law of Ukraine On Amendments to Certain Legislative Acts on Forest Conservation No. 5650 of 11 June 2021 provide for the inclusion of self-forested lands in the forest fund. Thus, an increase in the number of forests in Ukraine can be ensured.

It is necessary to make changes to the rules of felling (transition to non-continuous types of felling, as well as reshaping artificial plantations to a structure close to natural). The stability of the forest sector of the Ukrainian economy should be achieved by expanding the use of non-timber forest resources, in particular by stimulating tourism and strengthening legal responsibility for violations of the law, along with increasing the severity of punishment.

One of the mechanisms for financing appropriate measures should be the monetization of forest ecosystem services. In the field of protected affairs, it is necessary to develop the Nature Reserve Fund (increasing the area and efficiency of management based on scientific justifications) and strengthen capacity (from regulatory to financial); establish a system for monitoring activities and preserving biodiversity; create a data infrastructure of the Nature Reserve Fund of Ukraine and ensure its openness; strengthen the interaction between society and the territories of the Nature Reserve Fund of Ukraine (recreation, information, public involvement). It is also

necessary to reform the Environmental Protection Fund in order to provide sources of funds for restoration and establish the procedure for recovering damages from the Russian Federation (*Ekolohiya-Pravo-Lyudyna*, 2022).

On 20 June 2022, the Verkhovna Rada adopted in the second reading and as a whole thelaw No. 2207-1-d On Waste Management. "Ukraine is finally taking the first step on the way to civilized waste management. In fact, today Ukraine is the only country in Europe where the state does not have control over waste, and more than 90% of it is buried in the ground," as noted by the Minister of Environmental Protection and Natural Resources of Ukraine Ruslan Strilets.

The adoption of the framework law "On Waste Management" provides an opportunity to start the changes that Ukraine needs in order to become a member of the European Union. The draft law is proposed: to implement the European hierarchy of waste management; to organize the planning of the waste management system at the national, regional and local levels; to close the old landfills, and to upgrade the remaining ones to European standards; to create conditions for the construction of modern waste processing infrastructure in Ukraine according to European rules and open borders for investors; to establish the "polluter pays" principle; to introduce extended producer responsibility, where the product manufacturer is obliged to ensure complete disposal of the packaging released on the market together with the goods (*Uryadovyy portal*, 2022).

The Law No. 2207-1d only establishes a framework for new modern rules for the functioning of the waste management system in Ukraine. A number of other necessary sectoral laws will be developed on its basis. The ultimate goal is to make waste management more efficient and safer for people and the environment.

Moreover, due to the aggression of the Russian Federation, the problems of large territories of Ukraine being mined should be addressed.

EU sanctions. The EU introduced unprecedented sanctions against the Russian Federation for its war against Ukraine. The representative of the European External Action Service, Luc Devigne, spoke at the European Parliament's Committee on Foreign Affairs, which held a hearing on the effectiveness of sanctions against Russia on 20 April 2022. In total, five packages of restrictions have already been introduced. He noted, "We believe that sanctions work, even if they take time to have a full effect. And we believe that these measures significantly increased the price of Russian aggression and created limitations for its military capabilities" (Sheyko, 2022). The agreed package, approved on 8 April 2022, includes a number of measures aimed at increasing pressure on high-ranking officials of the Russian Federation, the state leadership and the economy, as well as limiting the resources of the Russian Federation for the aggression. It is planned that the coal embargo will be effective from August 2022. The sanctions apply in particular to the import of coal from the Russian

Federation. The conclusion of new contracts is prohibited from the day of adoption of restrictive measures, and it will still be possible to supply coal from the Russian Federation to the EU within four months under the current contracts. In addition, the package prohibits the access of Russian vessels to EU ports, and Russian and Belarusian road freight carriers will also not be allowed to transport goods to the EU.

Sanctions against four banks of the Russian Federation. The EU also imposed a blanket ban on transactions at four key Russian banks. After disconnection from SWIFT, these banks are subject to asset freeze and are completely isolated from EU markets. In addition, the EU Council imposed sanctions on companies whose products or technologies played a role in the invasion of Ukraine, key oligarchs and businessmen, propagandists, and family members of those already under sanctions (Shepeleva, 2022).

On 4 May 2022, the President of the European Commission, Ursula von der Leyen, presented the sixth package of sanctions against the Russian Federation. It includes a gradual embargo on Russian oil, the disconnection of three banks from SWIFT and sanctions for the siege of Mariupol. The first element will be personal sanctions against Russian officers and other persons who "committed war crimes in Bucha and who are responsible for the inhumane siege of Mariupol" (Sheyko, 2022).

On 15 July 2022, the European Commission approved a joint proposal for the seventh package of sanctions against the Russian Federation; the new restrictions include a partial ban on the import of Russian gold and greater control over the export of dual-use and advanced technologies. As part of the new package of sanctions, the European Union plans to add to the sanctions list the First Deputy Prime Minister of Russia A. Belousov, the Mayor of Moscow S. Sobyanin and two Russian actors, as well as introduce additional sanctions against the largest bank in Russia—Sberbank (*Yevropeys'ka Pravda*, 2022).

According to EU's chief diplomat Josep Borrell, "Russia seriously depends on its significant export of raw materials. But at the same time, it depends on significant imports to the Russian Federation of products with high added value, which it does not produce. 45% of all advanced technologies used by Russia are obtained from Europe, 21% from the USA, and only 11% from China. Sanctions limit access to these technologies. In the field of military technology, which is crucial in the context of the war in Ukraine, sanctions limit Russia's ability to produce high-precision missiles such as the Iskander or X-101. Almost all foreign car manufacturers have also decided to leave Russia, and some cars of Russian manufacturers will be sold without airbags and automatic transmissions" (Borel, 2022).

It seems that such sanctions are effective and can cause significant economic consequences for the aggressor state, shake people's trust, and shake the government as such. War is not a cheap event and needs money. However, financial sanctions do

not workquickly. Therefore, the aggressor does not immediately experience their magnitude. Ordinary people were affected almost immediately due to the increase in food prices, the shortage of certain goods (in particular, cereals, sugar and salt). Isolation as a sanction against the aggressor is also effective. Large companies, Internet sites and social networks refuse to work in the Russian Federation. The significant dissatisfaction of Russians is also related to the restrictions on using Instagram, since many of them have businesses on this platform. Sanctions should be painful (punishment), but they should also have a preventive effect.

To sum up, unforeseen problematic situations show how ready we are to implement the principles laid down in official documents. The price of this war is high, but it has united European countries, becoming a basis for demonstrating the EU's sanctioning capabilities.

European integration trends require the approximation of Ukrainian legislation to European legislation. It is necessary to approach this issue, taking into account national characteristics.

Last but not least, European legislation is based on values. Taking into account the need to protect these values, their implementation in law enforcement practice, appropriate bodies are created, normative legal acts are adopted and sanctions are established for their violation. European law is sufficiently progressive and provides for a combination of criminal-legal, procedural, criminal-executive, preventive, and restorative measures. Such an integration of measures will effectively solve the tasks facing the Ukrainian criminal justice system. Therefore, such an approach needs to be implemented in the national practice.

2. The Guarantees of "Just War." International Convention

The international community has adopted documents aimed at protecting universal values and human rights. In particular, the universal human rights and freedoms are provided for by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The countries that ratified the Convention agreed that these rights and freedoms are common to all people and their violation is inadmissible, except in cases specifiedby the law. It was adopted precisely in order to emphasize, after World War II, what is important for everyone and to counteract the violation of these fundamental rights.

In addition, fundamental human rights are enshrined in the following conventions: the Convention on the Elimination of All Forms of Discrimination against Women of 1979; the Convention on the Prevention and Punishment of the Crime of

Genocide of 1948; the Convention on the Rights of the Child of 1989; the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

The Rome Statute of the International Criminal Court of 17 July 1998 (Rome Statute) provided for crimes against humanity, war crimes, and crimes against aggression.

The Preamble of the Rome Statute states, among other things, that during the 20th century, millions of children, women and men became victims of unimaginable crimes that deeply shook the conscience of humanity; these most serious crimes threaten the general peace, security and well-being; the most serious crimes of concern to the entire international community should not go unpunished and their effective prosecution should be ensured both by measures taken at the national level and by the intensification of international cooperation.

The Preamble to the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, signed on 18 October 1907 (date of entry into force for Ukraine: 24 August 1991) states that, together with the search for means for preservation of peace and prevention of armed conflicts between peoples, it is also necessary to keep in mind the case when it will be necessary to take up arms in connection with events which, despite all efforts, proved impossible to prevent; wishing even in this extreme case to serve the cause of humanism and the ever-evolving demands of civilization. Until a more complete body of the laws of war is issued, the High Contracting Parties consider it expedient to declare that, in cases not provided for by the rules approved by them, the local inhabitants and belligerents remain under the protection and supremacy of the principles of the law of nations, as they arise from the usages established between civilized peoples, from the principles of humanity and the requirements of social consciousness.

The Contracting States issue orders to their land forces that correspond to the Regulations concerning the Laws and Customs of War on Land constituting annex to this Convention. According to Article 3 of the Convention, a belligerent party that violates the provisions of this Regulations shall be liable to pay compensation, if there are grounds for this. It is responsible for all actions committed by persons who are part of its armed forces.

Therefore, states have realized that stopping all wars is impossible. However, at least they can agree on customs of war, preserve the lives of civilians and put the warring parties in a more or less clear framework.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted on 14 May 1954, while the Second Protocol to it on

26 March 1999. Ukraine joined it on 30 April 2020 (Law of Ukraine No. 585-IX). According to Article 12 of the Protocol "The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action." According to Article 15 of the Protocol to the Convention,

> 1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act (*Protocol to the Hague Convention*, 1999).

In 1977, the Additional Protocols to the Geneva Conventions of 1949 were adopted: on the protection of victims of international armed conflicts and on conflicts of a non-international nature.

The following conventions aimed at banning certain types of weapons were also adopted:

The Convention on the Prohibition of the Development, Production, Stockpilingand Use of Chemical Weapons and ontheir Destruction of 13 January 1993 (the Convention was ratified by Law of Ukraine No. 187-XIV of 16 October 1998); according to its Article 1:

> Each State Party to this Convention undertakes never, under any circumstances:
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
> (b) To use chemical weapons;
> (c) To engage in any military preparations to use chemical weapons;
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

> Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
> Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
> Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
> Each State Party undertakes not to use riot control agents as a method of warfare. (*Conventionon the Prohibition of the Development, Production, Stockpiling, Use of Chemical Weapons*, 1998).

In 2017, the Treaty on the Prohibition of Nuclear Weapons was adopted, which has not yet entered into force, but almost all nuclear powers have declared that they would not become parties to it.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 were also adopted.

It is also particularly important to create judicial mechanisms for bringing-criminals to justice for committinginternational crimes, including war crimes. The Nuremberg and Tokyo tribunals should be noted here. In 1993 and 1994, respectively, the resolutions of the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as its subsidiary bodies. They were created as ad hoc tribunals, i.e., for specific situations.

As for the situation in Ukraine, it is not clear what model the tribunals will be based on and on the territory of which country. But this issue is hotly debated, and more and more countries (Latvia, Lithuania, and New Zealand) were joining the case of Ukraine against the Russian Federation in the context of genocide at the International Court of Justice.

As O.V. Senatorova said:

> The adoption of international treaties became an important step for the development of IHL. However, the realities of international relations significantly reduced the value of these documents. The scientific and technical progress and the latest technologies have led to the creation of more destructive types of weapons. The number of intrastate armed conflicts has increased (Senatorova, 2018, p. 17).

A substantial number of countries have confirmed that this problem doesnot concern a single country, but the whole of humanity. In this situation, after the aggression against Ukraine, there is a threat to the security of other countries of the world. In addition, other wars continue around the globe (somewith the involvement of the Russian Federation), e.g., the war in Syria, the conflicts between Serbia and Kosovo, Israel and Palestine, China and Taiwan etc. These conflicts escalated in 2022.

It is impressive how war united the countries all over the world in supporting Ukraine. For instance, they provide financial support, weapons, and solidarity. Poland accepted more than a million Ukrainians, supported families who agreed to host them, offered help to Ukraine in its efforts to join the EU. Lithuania, Moldova, Romania, the United Kingdom, Germany and other countries also accept Ukrainians refugees. The EU countries agreed to disconnect the Russian Federation from SWIFT, imposed financial sanctions on the Russian Federation, seized its funds in banks. Many companiesrefused to operate in the Russian Federation.

On 9 May 2022, a historic event took place. President of the USA Joe Biden signed the "Lend Lease" act on the supply of weapons to Ukraine. As of 18 August 2022, such weapons have not yet been delivered, but Ukraine hopes to receive them soon.

On 22 July in Istanbul, Ukraine, Turkey and the UN signed an agreement to unblockports and Ukrainian grain exports. Russia also signed a mirror agreement with Turkey and the UN. On 23 July, Russians launched an attack on the Odesa Sea Trade Port, using Kalibr cruise missiles. This is another proof of the treacherous nature of the Russian Federation's actions.

On 29 July 2022, ambassadors of the G7 countries arrived in Odesa to support the implementation of the concluded agreement on exports of grain from Ukraine. The US representative in Ukraine, Bridget Brink, noted that the United States, like the rest of the world, would monitor how Russia fulfills its part of the agreement: "We are here today to support Ukraine, to do everything we can to get this grain to the people who need it, to hungry people all over the world. And also draw attention to the fact that it is very important for Russia to comply with its obligations regarding the permission to export this grain. The United States and the rest of the world will ensure that Russia lives up to the agreement." UN representative Osnat Lubrani also arrived in Odesa with the ambassadors of the Big Seven countries.

"The United Nations has pledged to remain fully involved so that the parties effectively comply with the agreement. And this agreement is important not only for Ukraine and the Ukrainian economy, it is important for the world because it will help prevent a global food crisis" said Ms. Osnat Lubrani, the UN Resident and Humanitarian Coordinator in Ukraine. Razoni, the first ship with unblocked Ukrain-

ian grain, left the Odesa port on 1 August, bound for the Lebanese port of Tripoli, carrying 26,000 tons of Ukrainian corn that will sail through a safe corridor.

UN Secretary General António Guterres welcomed the departure of the ship with a cargo of corn from the Odesa port, noting that it was possible to resume the exports of Ukrainian agricultural products thanks to the efforts of the coordination center established with the participation of the UN.

On 22 June 2022, Ukraine received the status of a participating partner in the Three SeasInitiative. The Three Seas Initiative unites 12 countries of the European Union located between the Adriatic, Baltic and Black seas. This union currently includes Austria, Bulgaria, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Croatia, the Czech Republic and Estonia.

For a long time after the beginning of the war, NATO refused to close Ukrainian skies, as well as to provide fighter jets to Ukraine, because it did not want to enter into a direct confrontation with the Russian Federation. But the Lend Lease Act can significantly improve Ukraine's situation in this war. Attacks on peaceful settlements increase, in particular in Vinnytsia (14 July 2022—a hotel in the city center), Kramatorsk (8 April 2022—a railwaystation), Kremenchug (a shopping center), Odesa (23 April 2022—a residential building in Odesa, 1 July 2022—a residential building and recreation center in Sergiyivka, Odesa Province) and others. More and more countries of the world identify Russia as a terrorist state because of such actions.

The Russian Federation currently shows disrespectnot for the integrity of the territory of Ukraine, but for international values as a whole. To Russia, agreements mean nothing, official documents ratified by it mean nothing, principles of international law mean nothing. When parties agree on humanitarian corridors or a ceasefire for evacuation of civilians, the Russian Federation violates these agreements. Russian soldiers kill civilians, open fire on vehicles with humanitarian aid, steal that aid, and rape captive women, use heavy weapons against residential buildings, hospitals, kindergartens, and dormitories. This is appallingand violates international norms. Moreover, the political leaders of the Russian Federation said that they were defending themselves from Ukraine's aggression. In particular, the Minister of Foreign Affairs of the Russian Federation S. Lavrov told journalists during the talks in Turkey that "Russia has not attacked Ukraine," while the Russian Federation has moved its troops into the territory of Ukraine and killsits civilian population, but calling it "defense."

Such distortion of information and creation of a reality convenient for the authorities has already been described by J. Orwell. It was so in the Soviet times and continues now, because there are people who introduce and support a totalitarian regime, who are ready to achieve political and economic goals at the cost of human lives, at the cost of the life of the nation.

Information warfare is an important part of the overall strategy. The Russian leadership allocateshuge funds for propaganda. Many researchers, in particular N.A. Savinova draws attention to the phenomenon of "zombification" of the Russian population.

The most sensitive topics related to the principles of Criminal Law are revealed in the literature about the political regimes of the past, about torture in concentration camps, about the abuse of the people by the state.

J. Orwell's novel *1984* now takes on a completely different meaning than before. Previously, it was about the past, about the Soviet government, about its criminal methods. Now it is about the present, especially when it comes to the "Ministry of Truth" that deals with lies and manipulation of information, the "Ministry of Love" that deals with torture, the "Ministry of Peace" that deals with war, the thought police that does not allow thinking, and any alternative opinion, or analysis, or feeling is considered a crime…

In the state described in this novel, there are no laws and no punishments prescribed for crimes. But everyone understands that doing anything that is directly "not allowed," that "others donot do," being different, having "different" thoughts and views is a crime. The main character of the novel buys a notebook in an old store and already feels like a criminal, especially when he starts writing a diary. This novel reflects the most sensitive principles of criminal law—certainty and humanism.

According to Article 8 of the Rome Statute, war crimes mean, among other things:

> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing

attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (Rome Statute, 1998).

In particular, such actions are carried out in Ukraine. The strikes are aimed at residential high-rise buildings, killing civilians, children and women. This is not an exhaustive list of what the Russian Federation is doing against the civilian population.

As of 17 March 2022, Ukraine has not yet ratified the Rome Statute of the International Criminal Court of 17 July 1998, although the issue has been raised for a long time, at least since 2014. Therefore, no international tribunal has jurisdiction to investigate and prosecute the crime of aggression and occupation of the territory of Ukraine by the Russian Federation, in contrast to potential genocide, crimes against humanity and war crimes, which the ICC can and has begun to investigate.

On 28 February 2022, the Prosecutor of the International Criminal Court (ICC) announced his decision to request permission to open an investigation into the situation in Ukraine based on the Office's preliminary findings arising from his preliminary review and covering new alleged crimes falling under the jurisdiction of the ICC. The ICC prosecutor's office received referrals regarding the situation in Ukraine from 39 member states of the ICC, as provided for in Article 14 of the Statute.[3] These referrals allowed to open an investigation of the situation in Ukraine in the time period from 21 November 2013, thus covering any previous and current allegations of war crimes, crimes against humanity or genocide committed in any part of the territory of Ukraine by any person.

During the preliminary review of the situation in Ukraine, the Office already found reasonable grounds to believe that crimes subject to the jurisdiction of the Court have been committed in Ukraine, and identified potential cases that would be admissible for consideration by the Court. On 7 March 2022, public hearings in this

[3] These include: Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Republic of Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland *(ZayavaProkurora MKS, pana Karima, 2022).*

case began at the International Court of Justice (The Hague) (*The Case of Ukraine v. Russian Federation*, 2022).

Every witness who can report the facts of the killing of civilians by the Russian occupiers, barbaric rocketand shelling attackson hospitals, schools, residential buildings and other civilian objects can do so directly to the Prosecutor of the International Criminal Court by e-mail. A special website https://www.ukrainetjdoc.org has also been created to document war crimes (*Ukraine transitional justice and documentation*, 2022).

The order of the UN International Court of Justice in the dispute regarding the interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide was announced on 16 March 2022: the Russian Federation's request to remove the case from the Court's List was rejected, the case will be considered on the merits; an armed attack cannot be justified by accusations of genocide by the victim of aggression; the court did not find any evidence to support the Russian Federation's claims of genocide on the territory of Ukraine; the court orders the Russian Federation to take the following temporary measures: immediately stop the military operations that it commenced on 24 February 2022 in the territory of Ukraine; ensure that any military or any other entity or person under Russian control does not continue military operations. The court unanimously orders both parties to refrain from actions that aggravate the situation (*International Court of Justice*, 2022).

According to Article 1 of the United Nations Charter of 26 June 1945, the UN has purpose to: maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. Chapter VII of the Charter defines "Actionwith respect to threats to the peace, breaches of the peace and acts of aggression." In accordance with Article 39 of the Charter, the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. In accordance with Article 40, in order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures. The Security Council may decide what measures

not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations (Article 41). Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nation (Article 42) (*United Nations Charter*, 1945).

On 22 July 2022, Latvia submitted to the Registry of the ICJ an application to join the case regarding the accusations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). In July 2022, Lithuania, and New Zealand sought to intervene before the International Court of Justice in Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), leading a potential avalanche of interventions in this ongoing case. The Court determined its jurisdiction in another Genocide Convention case, the Gambia v. Myanmar, in which other states have already indicated their intent to intervene.

According to Article 63 of the Statute of the Court, when it comes to the interpretation of a convention to which states other than those participating in the case are parties, each of these states has the right to enter the process. In this case, the interpretation provided by the Court's decision will be equally binding on them.

The Government of Latvia stated that "[a]s a party to the Genocide Convention, Latvia has a direct interest in the interpretation that may be included in this agreement in the judgment of the Court during the review." It was also stated that Latvia wishes to submit its explanations regarding the interpretation of the Convention, both in terms of substance and jurisdiction. The governments of Ukraine and the Russian Federation were invited to provide written comments on Latvia's statement (Article 83 of the Statute).

In addition, it is also important for the participants in hostilities in Ukraine to strictly adhere to the current norms of international humanitarian law. And although it is difficult to talk about the justice and expediency of war and bloodshed, it is precisely the observance of rules and agreements known in advance that puts the parties in more or less clear norms. As Dr. Gregory Noone noted, "laws are never perfect either in their creation or in their application. Of course, laws meant to regulate something as radical as war will fall into the same pitfalls as simpler laws. The law of armed conflict is designed to protect those who cannot defend themselves,

and to encourage nations and combatants to fight within the limits of the law of armed conflict" (Gregory Noone, 2018).

Hugo Grotius in his treatise *On the Law of War and Peace* asked whether a war can be just and what kind of war is just. That which is contrary to the nature of rational beings is contrary to justice. According to Cicero in the treatise *On Duties* (Book II, chapter I), it is against nature to harm another for one's own benefit; and as a proof of this he cites the fact that under such circumstances human society and mutual communication of people would inevitably collapse. It is a sin for a person to have evil thoughts about another person. As I see it, no political ambition is worth human life. But observing the norms of the law against the enemy, observing the international norms that appeared precisely because of the wars of the past, is necessary. It is adherence to agreements and humanistic values (Timofeyeva, 2020) that makes people civilized.

O.V. Senatorova said that international human rights law is a system of principles and norms of international law that determine the obligations of subjects of international law (primarily states) to ensure and observe basic human rights and freedoms without any discrimination as in peacetime, as well as during armed conflicts, and regulate the mechanisms of prosecution for violations of these rights (Senatorova, 2018, pp. 47-48).

Therefore, international human rights law applies both in peacetime, when its norms are in full force, and during armed conflicts, when these norms can be limited and partially replaced by the norms of a special field—international humanitarian law—which can act to ensure certain rights as *lex specialis* (Senatorova, 2018, pp. 47-48).

The norms of international human rights law are intended, first of all, to protect people from the arbitrariness of the government of their own country, not that of a hostile country. This is the right to fight against authoritarian and totalitarian regimes, the right that protects a person as the highest value. The state's obligation to ensure human rights in international humanitarian law depends on whether a particular person is under its jurisdiction. IHL only applies if a person is in a territory controlled by that state, including occupied territories (territorial jurisdiction principle), or if the state exercises effective control over (e.g., detains) persons who are outside its territorial jurisdiction (the principle of personal jurisdiction) (Loizidou v. Turkey, 1995, *Őcalan* v. Turkey, 2005).

International humanitarian law is a branch of international law, a system of principles and norms that regulate the behavior of belligerents during armed conflicts, limiting or prohibiting certain means and methods of conducting hostilities, as well as protecting people who do not take part in hostilities or have stopped participating in them. International humanitarian law was specifically created for use only during

armed conflicts. It does not cover situations of internal turmoil, internal tension or isolated acts of violence. Such situations are regulated by the norms of national law and international human rights law.

Other approaches to the perception of war are also discussedin the literature. In particular, in Orwell's *1984*, war is considered as a necessity for a government to control people and the state. The absence of war, in the presence of population growth, will lead to overpopulation, constant dissatisfaction with the government, riots, etc. War can explain many things and justify inaction or illegal actions. Especially when in fact it does not constitute a threat to the state.

Noting the need to align domestic criminal laws with international criminal law, it is necessary to take into account the significant differences in the approaches of international and national legal systems to the definition of an act as a criminal offense. In Ukrainian law, the Criminal Code provides for the composition of criminal offenses and determines the type and degree of punishment. Norms of international law establish the criminality of certain acts, mostly the composition of crimes, but, as a rule, they do not contain clear explanations regarding the types and limits of punishment. It remains at the discretion of the state.

The draft Law on amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine No. 7290 of 15 April 2022 contains important provisions regarding the criminalization of certain war crimes, crimes against humanity, crimes of aggression, and the inaction of military commanders (as of 29 June 2022) (*Draft Law No. 7290*, 2022).

Article 6 of the Charter of the Nuremberg International Military Tribunal (Nuremberg Tribunal) formulated the types of crimes that were subject to its jurisdiction, and Article 27 explicitly stated its right to impose the death penalty or other punishment on the individuals found guilty. However, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 excluded the death penalty from the list of possible punishments and clearly defined approaches to sentencing the accused. Namely: when determining the term of imprisonment, be guided by the general practice of issuing prison sentences in the courts of the former Yugoslavia; when passing a sentence, take into account factors such as the gravity of the crime and specific circumstances affecting the defendant; in addition to imprisonment, orders may be made to return any property and proceeds of crime to their rightful owners.

The situation that has developed in connection with the full-scale invasion of Ukraine also revises the issue of the implementation of the principles of international law and the fundamental principles of international humanitarian law (IHL). In particular, the fundamental principles of International humanitarian law are the

principle of equality of belligerents and the absence of the principle of reciprocity, the balance between the principle of humanity and military necessity, the principle of proportionality, the principle of demarcation between military and civilian objects/combatants and non-combatants, the need to apply precautionary measures, as well as taking into account the Martens Reservation (Senatorova, 2018).

Jean Pictet proposed to combine the norms of international humanitarian law and the international human rights law under one term "the right of humanity," however, over time, he changed his opinion, explaining that international humanitarian law is an important part of international public law which is inspired by the ideas of humanity but focuses on the protection of individuals precisely during the war and that the international humanitarian law and the international human rights law are "close, opposite, and should remain so, as they perfectly complement each other" (Pictet, 2001).

International humanitarian law is based on a balance between military necessity and humanity. On the one hand, it is clear that when a war begins, it is accompanied by killings, injuries and destruction, which are allowed at this time, provided that the norms of international humanitarian law are observed. On the other hand, war should not turn into total violence and it is not an excuse for the belligerents to do whatever they want. International humanitarian law clearly establishes that military necessity must be balanced by the principle of humanity, the essence of which is as follows: one cannot use more violence than necessary to achieve the objective of war—weakening the power of the enemy. In order to win a war, it is not necessary to kill enemy soldiers, it is enough to capture them or force them to surrender in any other way. To win a war, there is no need to kill civilians, it is enough to weakenthe military forces. It makes no sense to devastate the opposing country—it is enough to occupy it. Civilian infrastructure facilities should not be destroyed—it is enough to destroy only those facilities that make an effective contribution to the conduct of hostilities. If there is an opportunity to choose a more humane weapon or method of waging war—whenever the military situation allows it, one should capture, rather than wound, combatants, or wound them instead of killing, and if there is no other option than to kill, then this can only be done with weapons that do not cause excessive suffering (Senatorova, 2018, p. 71). Considerations of humanity also impose limitations on the means and methods of waging war and require that those who fall into the hands of the enemy should be treated humanely at all times.

3. Realization of the Principles of Criminal Law

The principles of criminal law must be observed both at the level of law enforcement and law-making, as well as at the level of interpretation of normative legal acts. This is important both during peacetime and during war. However, there are certain features of this implementation. And this applies to both general legal and special branch principles.

The Presumption of Knowledge of the Law and the Dynamics of Criminal Legislation in Connection with War and the Peculiarities of Ensuring National Security

One of the most important requirements of the law is its stability and certainty. However, given the huge number of changes to the criminal legislation of Ukraine, it cannot be called stable. Obviously, the period of the martial lawhas been no exception.

Until 2014, Chapter I of the Criminal Code of Ukraine, Criminal Offenses Against National Security, had remained the only not amended one. But in connection with the relevant events, a number of changes have been made to it. In particular, the Law On Amendments to the Criminal Code of Ukraine No. 1183-VII of 8 April 2014 added Article 114-1 which provides for criminal liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period. In addition, amendments were made to Article 49 of the Criminal Code of Ukraine excluding the possibility of applying the statute of limitations also to the crimes against the foundations of the national security of Ukraine, provided for in Articles 109-114-1 of the Criminal Code, and not only to the crimes against the peace and security of humanity, provided for in Articles 437-439 of the Criminal Code of Ukraine and Article 442 of the Criminal Code of Ukraine. The scope of responsibility under Articles 110, 111, 113, and 114 of the Criminal Code of Ukraine was increased.

According to the Law of Ukraine On Amendments to the Criminal Code of Ukraine Regarding Criminal Liability for Financing Separatism No. 1533-VII of 19 June 2014, the Criminal Code of Ukraine was supplemented with a new Article 110-2, which provides liability for financing actions committed to forcibly change or overthrow the constitutional order,to seize state power, or to change the boundaries of the territory or the state borderof Ukraine.

According to the Law of Ukraine On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine Regarding the Inevitability of Punishment for Certain Crimes Against the Foundations of National Security and Public Secu-

rity, and Corruption Crimes No. 1689-VII of 7 October 2014, sanctions provided for in Articles 109, 110, 111, 112, 113, 114, 258, 258-1, 258-2, 258-3, 258-4, 260, 261 of the Criminal Code of Ukraine were supplemented with the words "with or without confiscation of property." Hence, it is possible to apply confiscation of property in such cases.

In addition, the Verkhovna Rada of Ukraine adopted a number of amendments to the Criminal Code of Ukraine in connection with the invasion by the Russian Federation and the start of aggressive war on 24 February 2022. Among such changes, in particular, the Law On Amendments to the Criminal Code of Ukraine on Strengthening Liability for Crimes Against the Foundations of National Security of Ukraine in Conditions of Martial Law No. 2113-IX of 3 March 2022 increased punishment for treason (Article 111 of the Criminal Code) and sabotage (Article 113 of the Criminal Code). The amendments to Part 4 of Article 86 of the Criminal Code limit the application of amnesty to persons who have committed treason and sabotage.

Attention should also be paid to the criminalization of "acts of wartime collaboration" (Article 111-1 of the Criminal Code) in accordance with the Law On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Acts of Wartime Collaboration No. 2108-IX of 3 March 2022. In particular, according to Part 1 of Article 111-1 of the Criminal Code of Ukraine, a citizen of Ukraine is subject to criminal liability for public denial of armed aggression against Ukraine; establishment and approval of the temporary occupation of part of the territory of Ukraine;public calls to support the decisions and/or actions of the aggressor state, its armed formations and/or administration of the occupied territories; collaborating with the aggressor state, its armed formations and/or administration of the occupied territories; non-recognition of the extension of the state sovereignty of Ukraine to the temporarily occupied territories of Ukraine. The existence of this article does not allow for distancing oneself from the events taking place, continuing doing business with the Russian Federationor maintaining other ties with the aggressor country, including informational ones.

Many articles of the Criminal Code of Ukraine include the qualifier "in conditions of martial law or a state of emergency in accordance with the Law On Amendments to the Criminal Code of Ukraine on Toughening Liability for Looting No. 2117-IX of 3 March 2022." At the same time, these are important changes, since in many Internet sources theft during the war is defined as "looting." Looting is provided for in Article 432 of the Criminal Code of Ukraine.

The Law of Ukraine On Amendments to the Criminal Code of Ukraine No. 2155-IX of 24 March 2022 criminalized acts defined in Article 201-2 Illegal Profiting from Humanitarian Aid, Charitable Donations or Charitable Aid. In connection with martial law, the cases of fraud in the scope of collecting charitable aid allegedly

for the needs of the Armed Forces, the resale of goods obtained as humanitarian aid, etc., have become more frequent. This article provides for criminal liability for the sale of items obtained as humanitarian aid, the use of charitable donations or the conclusion of other transactions related to the disposal of such items for the purpose of obtaining profit, committed on a large scale. Penalties are provided for such actions committed repeatedly, by prior collusion by a group of persons, by an official using an official position (Part 2 of Article 201-2 of the Criminal Code of Ukraine), committed by an organized group or on a particularly large scale, or during a state of emergency or martial law (Part 3 of Article 201-2 of the Criminal Code of Ukraine).

According to the resolution of the Cabinet of Ministers of Ukraine of 20 March 2022 No. 329, the procedure for importing humanitarian aid into the territory of Ukraine has been simplified, and the declarative principle of its customs clearance has been introduced, however, although such measures significantly facilitate and optimize logistical procedures, they also increase the risk that the humanitarian aid will be used illegally. The Law of Ukraine On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Regarding Individual Aspects of Taxation and Financial Reporting During Martial Law simplified the procedure for recognizing goods that are socially important as humanitarian aid, the list of which is approved by the Cabinet of Ministers of Ukraine, without the adoption of relevant decisions on recognizing them as humanitarian aid help.

Resolution No. 224 of the Cabinet of Ministers of Ukraine dated 7 March 2022 approved the list of categories of goods recognized as humanitarian aid without carrying out the procedure for recognizing such goods as humanitarian aid in each specific case, for the period of the martial law. Electronic declarations for the custom clearance of imported humanitarian aid at the border crossings have become operational. On 4 May 2022, electronic customs declarations for humanitarian aid became available, and now, in any country of the world, e-declarations for humanitarian cargo can be filled out in advance, speeding up the customs clearance and helping reduce queues at border crossings. At the same time, taking into account the positive changes in the legislation, there are numerous cases of the use of humanitarian aid goods for purposes other than their intended purpose and for illegal profit, which in fact became the reason for the introduction of criminal liability for such actions.

In connection with a significant increase in prices of primary use products, with wages remaining at the pre-war level, the buying power of individuals has decreased considerably. Poverty is a significant factor in the committing of criminal offenses for personal motives. It is also time to return to penalizing traders for cheating and illegal markups on essential goods. Especially today, it is necessary to cultivate trust in the state. Taxes, fees and donations should be transparent. Every citizen should

see the movement of humanitarian and material aid. Corruption practices slow down these processes, and also slow down the process of accepting European values and accession to the EU.

Law of Ukraine No. 2149-IX of 24 March 2022 On Amendments to the Criminal Code of Ukraine Regarding Increasing the Effectiveness of Combating Cybercrime under Martial Law amended Article 361 and Article 361-1 of the Criminal Code of Ukraine Development for the Purpose of Illegal Use, Distribution or Sale, of Harmful Software or Technical Means, as Well as Their Distribution or Sales.

The Law of Ukraine On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine No. 2160-IX of 24 March 2022 introduced Article 114-2 about unauthorized dissemination of information about movement of weapons and other military supplies to Ukraine, movement, transfer or location of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, committed in conditions of war or the state of emergency.

Many "bloggers" have begun to post photos and videos of such movements, air defense operations, explosions, etc. Criminal law of Ukraine, in the present realities of information war and information warfare, has received a completely updated content.

The principle of humanism is expressed in the fact that a person who commits a crime, including a war crime—ora crime against humanity—is still a human who possesses rights and freedoms. When thelaw has been broken, the state must react. But such a reaction should not turn into a crime. Moreover, the state aims (Article 50 of the Criminal Code) to correct such a person using the means provided for by criminal law, and not only punish him or her.

No person should be subjected to torture, inhuman or degrading treatment (Part 3, Article 50 of the Criminal Code). Torture and inhumane treatment are expressly prohibited by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Correction reflects the implementation of the principle of humanism in relation to the perpetrator, as the state gives him or her a chance to be a law-abiding member of the society (working, studying, engaging in legal activities); takes into account mitigating circumstances when sentencing; makes it possible to lessen the severity of punishment if relevant conditions are met (Article 82 of the Criminal Code); grants parole (Article 81 of the Criminal Code), etc. Preventing new crimes involves the manifestation of the principle of humanism in relation to the victim and third parties; ensures their safety; contributes to the prevention of crimes committed by victims who, due to their dissatisfaction with the administration of justice, are ready to commit crimes in order to restore what they perceive to be justice.

In reality, punishment, especially life imprisonment, causes suffering to the perpetrators. The effectiveness of the modern penitentiary system (based on the results of observation and statistical data) does not contribute to the correction of inmates, and neither does it contribute to (or aim at) compensating theirvictims. Therefore, it seems that the current conditions of serving life imprisonment sentencedo not contribute to the achievement of the established goals.

A human being should not be used for achieving political goals, and criminal law should not be a means of revenge.

The provisions of the Geneva Convention also follow from this principle. According to Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949,

> persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples (Geneva Convention, 1949).

According to Article 3 of the Regulations concerning the Laws and Customs of War on Land of 1907, the armed forces of the warring parties may consist of combatants and non-combatants. In case of capture by the enemy, both enjoy the rights of prisoners of war. According to Article 4 of the Regulations on the Laws and Customs of War on Land, prisoners of war are under the authority of the government of the opposing side, and not of individuals or units that captured them. They should be treated humanely. All their personal belongings, with the exception of weapons, horses and military documents, remain their property. According to Article 7 of these Regulations, the maintenance of prisoners of war is entrusted to the government in whose hands they are. In the absence of a special agreement between the warring parties, prisoners of war enjoy the same board, lodging and clothing as the troops of the government that captured them.

Participants in hostilities in Ukraine must strictly observe the current norms of international humanitarian law. Wars are unacceptable to a civilized society, but they happen. And although it is difficult to talk about the justice and expediency

of war, about the bloodshed, it is the observance of the previously accepted rules and agreements that puts the parties in equal positions. That is why international humanitarian law exists.

No one has the right to commit crimes under the jurisdiction of the International Criminal Court, including Ukraine, on the territory of which these terrible events are taking place, and the citizens of this country. Ukrainians often show dissatisfaction with the humane treatment of prisoners of war, with regard to the provision of food, hygienic standards, necessary clothing and medicines. But if Ukrainians treat them cruelly, their countrywill also violate international norms, in particular the Geneva Convention ratified by Ukraine.

In addition, there are plenty of problems connected with following the requirements of the Geneva Convention, because the funds available for this goal are not sufficient. However, under no circumstances the prohibition of torture could be abandoned. In the context of inhuman treatment, the interpretation of which is expanded from time to time taking into account the dynamic nature of the Convention, it is necessary to ensure the provision of necessary medical care, nutrition and hygiene items. It should also be taken into account that, in fact, military personnel of the Russian Federation commit the criminal offense provided for in Article 332-2 of the Criminal Code, namely the illegal crossing of the state border of Ukraine. V.O. Navrotsky noted that they can be held criminally liable under this article. It seems that this will not violate any of the principles of criminal law and ensure implementation of the inevitability of criminal law response, even if it seems unusual from the point of view of the principles of international humanitarian law. Their liability must be approached individually, in compliance with the principle of personal culpability and guarantees of protection.

A valid argument regarding the formulation of the principle of humanism in the draft of the new Criminal Code of Ukraine is given by O.O. Dudorov and O.O. Pys′mens′kyy. Part 3 of Article 1.2.7 of the draft law states that the exercise of the rights of a person to whom this Code applies must not violate the rights of the victim. This provision lacks proper clarity and comprehensibility, and therefore it constitutes a violation of the mentioned principle of legal certainty, besides raising doubts about the direct connection with the principle of humanism. A more global question arises here: is the targeting of this principle precisely and only at the victim justified? (With the exception of Part 2, according to which punishment and other criminal law measures are not intended to cause physical suffering or degrade human dignity.) However, the principle of humanism should not be understood unilaterally (Dudorov, 2022, p. 17).

The realization of the principle of humanism in criminal legislation is aimed at: applying sufficient and necessary punishment, taking into account the principles,

goals, tasks and functions of criminal lawand methods of criminal law regulation; as mild or severe a punishment as corresponds to the nature and behavior of the person at the time of the crime; socio-demographic characteristics of a person; the nature of the damage caused to the victim, third parties and the state; other circumstances of the case, including the nature and severity of the crime, as well as pre-criminal and post-criminal behavior.

It should be noted that the humanistic paradigm provides for a balance in the realization of the principle of humanism both in relation to the person who committed the crime and the victim, as well as to society as a whole and the state. In practice, victim are frequently not notified about the application of post-criminal incentives to the perpetrator (in particular, exemption from criminal responsibility, parole, amnesty, pardon, etc.).

The Principle of Stimulating Lawful Behavior

This principle is considered only by some researchers of the criminal justicecycle. At the same time, a number of provisions of the criminal legislation are related to its implementation.

It seems that this principle, like other principles, must be considered at different levels of law enforcement. In particular, a problem arises at the level of execution of the sentence, notably in connection with the lack of review of life imprisonment. Based on the fact that inmates serving such a sentence do not actually have a "right to hope," their legitimate behavior is not encouraged (cases of Winter v. Great Britain, complaints Nos. 66069/09, 130/10 and 3896/10 of 09 July 2013, László Magyar v. Hungary, application No. 73593/93 of 20 August 2014, Hutchinson v. Great Britain No. 57592/08 17 of January 2017, Petukhov v. Ukraine (No. 2), application No. 41216/13 of 12 March 2019). No matter what criminal offense they commit in the future, they still face nothing more than life imprisonment.

Individuals who have committed serious crimes remains human beings and possess certain rights that do not relieve them of responsibility for violating the rights and freedoms of other persons. For violent crimes, for crimes that are committed repeatedly, strict measures of criminal law impact should be provided, but not so much that the punishment itself becomes a crime against humanity. Ensuring the security of society and the state is an extremely important task, but in balance with ensuring the freedom of a person and a citizen. Ensuring the safety of society cannot be the basis for excluding personal responsibility of everyone and violating the rights and freedoms of the person who committed the crime. Otherwise, the meaning of punishment is lost.

In the "case of German generals," the attorney at law L.A. Vitvinsky defended two German officers, in the armed forces since 1898, who were subsequently hanged at the end of January 1946 on Kalinin Square (now Independence Square). They were charged under Article 1 of the Decree of the Presidium of the Supreme Soviet of the USSR dated 19 April 1943, which provided for the death penalty by hanging or hard labor for 15 to 20 years for nazicriminals who committed murders and tortures of the civilian population and prisoners. The lawyer said: "…the accused, Chammer, did not show any special personal diligence in cruelty and atrocity, and mainly acted as an automatic executor of the orders and directives of his higher command … from the age of 13 he lived, grew and was brought up in a specific spirit of strict discipline and drill of the German army … All this does not remove responsibility, but, of course, it should be weighed and also taken into account…" (*Sudova promova chlena Kyyivs'koyi kolehiyi advokativ O. L. Vytvins'koho*, 2000).

This also applies to life imprisonment in the context of ensuring adequate protection. And protection is not about excusing the inmates, but about ensuring compliance with their rights and freedoms, helping to take into account the circumstances that can improve their situation.

In conditions of martial law, protection of homeland is added to provisions related to the necessary defense.

According to Part 5 of Article 36 of the Criminal Code of Ukraine: "It is not considered as exceeding the limits of necessary defense and does not result in criminal liability to use weapons or any other means or objects to protect oneself or other person against an attack by an armed person or an attack by a group of persons, as well as to fight off an illegal and violent invasion of a dwelling, regardless of the severity of the damage caused to the aggressor." Therefore, in the listed cases, a person can defend himself or herself and exericize the right to the necessary defense in any way.

In addition, these exclusions are related to inflicting death during war. Therefore, criminal liability is excluded for inflicting death during war if the customs of war and other international norms regarding the conduct of war have been observed.

In accordance with Article 1 of the Law of Ukraine On Ensuring Participation of Civilians in Defense of Ukraine No. 2114-IX of 3 March 2022, during the martial law, citizens of Ukraine, as well as foreigners and stateless persons who are legally present on the territory of Ukraine (civilians), may participate in repelling and deterring armed aggression of the Russian Federation and/or other states, including obtaining firearms and ammunition in accordance with the procedure and requirements established by the Ministry of Internal Affairs of Ukraine "On ensuring the participation of civilians in the defense of Ukraine" 2114-IX, 2022). According to Article 5 of this law, civilians are not responsible for the use of firearms against persons who commit armed aggression against Ukraine, if such weapons are used on

the basis and in the manner specified in Article 1 and Article 4 thereof. Chapter II of the Criminal Code of Ukraine, Final and Transitional Provisions, is supplemented with Clause 22 with similar provisions. At the same time, there are questions about the reasons for the lack of such responsibility.

Moreover, the Criminal Code of Ukraine was amended with Article 43-1 "Exercising the duty to protect the homeland, independence and territorial integrity of Ukraine as a circumstance that excludes the criminal illegality of an act" in accordance with Law No. 2124-IX 15 March, 2022. According to this article, an act (or omission) committed under martial law or during armed conflict and aimed at repelling and deterring the armed aggression of the Russian Federation or another country against Ukraine is not a criminal offense if it inflicts harm or death on an individual who participates in such an aggression.

According to Part 2 of Article 43-1 of the Criminal Code, every person has the right to protect the independence and territorial integrity of Ukraine. According to Part 3 of Article 43-1 of the Criminal Code, no one can be subject to criminal liability for the use of weapons, ammunition or explosives against individuals who participate in the armed aggression against Ukraine, or for damage or destruction of property in connection with this.

As Y.A. Ponomarenko said,

> The question of the legality of causing other damage to the aggressor state, such as, in particular, undermining its economic or banking system, information security, food security, creating or stimulating social conflicts on its territory, etc., seems ambiguous. Such actions, although they harm the aggressor, are clearly not covered by Article 43-1 and point. 22 of the Final and transitional provisions of the Criminal Code of Ukraine. Therefore, the question of their legality should be determined on the basis of Article 36 (necessity defense), Article 39 (extreme necessity) and other articles of the Criminal Code, as well as in accordance with other norms, national or international, written or natural (Ponomarenko, 2022, p. 12).

O.M. Sharmar also draws attention to the issue of fulfilling the duty to protect independence and territorial integrity of Ukraine as a circumstance that excludes criminal liability (Sharmar, 2022).

According to the Law of Ukraine amending Article 263 of the Criminal Code of Ukraine No. 2150-IX of 24 March 2022 and regarding the release from liability in cases of voluntary surrender of weapons, military supplies, explosives or devices, a person who voluntarily handed over weapons, ammunition, explosives or explosive devices to the authorities, is not subject to criminal liability ("not subject to criminal liability" instead of "released from criminal liability"—note by T.L.) for committing actions provided for in part 1 and 2 of Article 263 of the Criminal Code

of Ukraine. If a person is "realeased from criminal responsibility," then the court states that he or she committed a criminal offense, but is exempted, by virtue of law, from such responsibility. If a person is "not subject to criminal liability," he or she should not be subject to criminal prosecution at all.

The Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (date of entry into force for Ukraine: 24 August 1991). In particular, the criteria for being recognized as a warring party are important. Article 1 of the Annex states that military laws, rights and duties apply not only to armies, but also to militia and volunteer units, provided that they meet the following conditions: 1. they are under the command of a person responsible for their subordinates; 2. they have a fixed distinctive emblem that can be recognized from a distance; 3. they openly carry weapons; and 4. they conduct hostilities in accordance with the laws and customs of war.

In the countries in which militias or volunteer units constitute or are part of the army, they are included in the category "army."

According to Article 2 of the Regulations concerning the Laws and Customs of War on Land. 18 October 1907, the inhabitants of a territory that was not occupied, who, upon the approach of the enemy, voluntarily take up arms in order to resist the invading troops, but did not have time to organize themselves in accordance with Article 1, are considered belligerents if they openly bear arms and observe the laws and customs of war.

The Principle of Legality

The concept of crime and punishment is conditional and changes over time. The main idea is that the list of crimes and punishments for them should be clearly and unambiguously formulated in relevant laws. Everyone should be able to know which actions result in criminal liability.

Also related to this is the approach of the classical school of criminal law "punishment for a crime." It is based on the fact that the state reacts with criminal law measures precisely adequate to the committed act considered a crime in the current criminal law. No one can be punished for thoughts, for feelings or for thinking as such.

Only a person who has committed a criminal act, which is defined as a crime in the criminal law, can be held criminally liable. Everyone must be clearly and unambiguously aware of such responsibility. And if an individual has already committed

a crime, then he or she should be held accountable to the law. In modern criminal law, the principle of certainty is one of its main principles.

Wide interpretation of the law can also become a violation of the principle of legality. In Jorgic v. Germany, the ECtHR recognized the wide interpretation as corresponding to Article 7 of the Convention. The applicant was convicted of acts of genocide committed on the territory of the former Yugoslavia, although his actions were aimed not at the physical or biological destruction of a certain ethnic group, but at its destruction as a social unit. The ECtHR stated that at the time of the relevant actions in 1992, many judicial bodies interpreted the concept of genocide narrowly, i.e., as actions aimed at the physical or biological destruction of a certain ethnic group. At the same time, individual scientists, as well as international institutions, gave a broad interpretation of genocide, which covered the actions of the applicant. For the first time, German courts, applying the norm on genocide, took a broad interpretation as a basis. According to the ECtHR, this approach corresponds to the essence of the violation and was reasonably foreseeable (Hylyuk, 2014).

Vasiliauskas vs. Lithuania, in which the European Court of Human Rights recognized Lithuania's violation of Article 7 of the European Convention on Human Rights, is also interesting in the context of the expanded interpretation of genocide. In this case, Lithuania retroactively applied the expanded definition of genocide laid down in national legislation. This definition was created in order to prosecute persons who carried out Soviet repressions in Lithuania occupied by the Soviet Union after the Second World War. However, the ECtHR's decision was accepted by only a minimal margin, and there were many dissenting opinions with the majority criticizing that it chose too formal a path and failed to satisfy the justice that victims of Soviet repression still crave (Žilinskas, 2016, pp. 67-71).

At the same time, in the case of Drelingas v. Lithuania based on application No. 28859/16 of 12 March 2019, the ECtHR decided that the applicant's conviction for the genocide of opponents of the Soviet government can be considered predictable in accordance with Article 7 of the Convention. In the days of the Soviet Union, the applicant was in the service of the MGB and the KGB. In 1956, he took part in an operation to arrest two partisans/oppositionists who were in opposition to the Soviet government in Lithuania. After the arrest, the man was sentenced to death, and the woman was sentenced to imprisonment in a prison camp.

After Lithuania regained independence, criminal proceedings for genocide were opened against the applicant in connection with the participation in the mentioned operation. The applicant was accused of committing genocide. The court noted that the man was a well-known partisan/oppositionist who resisted Soviet power and a representative of the Lithuanian people. The purpose of this operation

was to eliminate a part of the national group, therefore the applicant was guilty of genocide. The legislation did not provide a statute of limitations for genocide.

The court rejected the applicant's remark that he did not personally participate in the arrest of the partisans and did not sentence them to death. The applicant was sentenced to imprisonment. The higher courts upheld the decision of the court of first instance. The Court of Cassation took into account the conclusions of the decision of the Grand Chamber of the ECtHR in the case Vasiliauskas v. Lithuania, as the courts defined the partisans/oppositionists as a separate "political group." However, such a group was not protected under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and the applicant's conviction in that case was not foreseeable.

In the applicant's case, the Court of Cassation explained why the dissidents were to be considered members of a separate national and ethnic group and therefore subject to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Therefore, at the time of the events described at the beginning of the ECtHR's decision in this case, the applicant should have been aware of his criminal liability for genocide.

Analyzing the practice of the ECtHR, P.V. Hylyuk concludes that in making decisions on substantive and legal issues, the ECtHR prefers a meaningful approach, rather than a formal one, and is guided by the logic inherent in the Anglo-American legal system—normative legal acts are mandatory, but they can be adjusted by the courts (Hylyuk, 2014, p. 96).

The principle of legality also has other manifestations, in particular the requirement to *prohibit the retroactive application of the criminal law*. In the decision of the ECtHR in the case of Maktouf and Damjanovic v. Bosnia and Herzegovina No. 2312/08 and 34179/08 of 18 July 2013, the court of Bosnia and Herzegovina found Maktouf guilty and sentenced him under the 2003 Criminal Code of Bosnia and Herzegovina for aiding the taking of two civilian hostages, a war criminal offense committed during the war of 1992-1995, to five years in prison, applying the provisions of reduction of punishment. According to Maktouf, the Criminal Code of 1976, which was in effect at the time of the commission of the crime, provides for milder sanctions. However, it cannot be argued that any applicant could have received a less severe sentence under the application of the 1976 Criminal Code. What is most important is that Maktouf could have been given a lighter sentence. The complaint was declared inadmissible (manifestly ill-founded). The Criminal Code of Bosnia and Herzegovina of 1976 cannot be considered as a less stringent law (*Maktouf and Damjanovic v. Bosnia and Herzegovina*, 2013).

In the history of the application of criminal law in the Soviet era, there are cases concerning the retroactive application of the criminal law, for example, the cases of

Rokotov and Neyland, in which the Court unreasonably violated the prohibition of the retroactive effect of the criminal law, and, accordingly, the principle of humanism towards the person who committed a criminal offense.

According to the Decree On Fighting Embezzlers of Socialist Property and Violators of the Rules on Foreign Currency Transactions of 5 May 1961, Y.T. Rokotov and V.P. Faybyshenko were sentenced by the court to 15 years imprisonment without the possibility of parole and replacing the unserved part of the sentence with a lighter one on 15 June 1961. The decree was issued after the arrest of Y.T. Rokotova and V.P. Faybyshenko. The term of imprisonment for these criminal offenses was increased from three to fifteen years. The Decree of 5 May 1961 specifically stated that in this case the law had retroactive effect, so, it had applied to already committed offenses. But it did not stop there. M.S. Khrushchev, at a meeting of the Presidium of the Central Committee of the CPSU on 17 June 1961 expressed the opinion that foreign currency holders deserve an exceptional measure (execution). On 6 July 1961, the article of the Criminal Code on violation of the provisions related to foreign currency transactions was amended again. Similar to the articles on bribes and particularly grave embezzlement, it provided for the death penalty as an exceptional measure. On 27 July, Rokotov and Faybyshenko were executed by shooting. This process became a signal for the initiation of other similar court cases concerning the theft of socialist property. Hundreds of people were executed by shooting.

Part 2 of Article 7 of the Convention says that the article is not an obstacle to the judicial punishment of any person for any act or omission which at the time when it was committed constituted a criminal offense in accordance with the general principles of law recognized by civilized countries.

Interestingly, these rules also apply to judicial interpretation. Legal positions must meet the quality criteria that the ECtHR sets for the sources of criminal law, i.e., the legal positions set forth in them must be clear, accessible and reasonably predictable. Legal positions that worsen the situation of a person cannot be applied in cases where they were issued after the committing of a crime by a person whose actions are subject to criminal law (Hylyuk, 2014, p. 98).

Part 4 of Article 3 of the Criminal Code of Ukraine prohibits the application of criminal law by analogy, but there is no prohibition of the interpretation of criminal law provisions by analogy.

Y.A. Ponomarenko provides examples of how the Supreme Court of Ukraine has been filling gaps in the Criminal Code of Ukraine in the matters relating to the determining of the rules for the application of criminal liability measures by analogy (Ponomarenko, 2006, pp. 9-16).

In accordance with Article 8 of the Constitution of Ukraine, the criminal law of Ukraine is based on the Basic Law of the state, as well as on generally recognized

principles and norms of international law. Moreover, it must comply with the provisions contained in current international treaties ratified by the Verkhovna Rada of Ukraine. It is obvious that in the event of a conflict between the provisions of the Criminal Code and the provisions of the Constitution or international law, the latter prevail. In connection with this, the question arises as to the impact of the specified acts on solving issues of criminal law, and whether they can be considered sources of the criminal law of Ukraine. Taking into account the extremely general and declarative nature of the provisions of the Constitution and international legal acts, and the lack of a description of specific signs of socially dangerous acts and sanctions, it can be stated that neither the Constitution of Ukraine nor the majority of international legal acts are sources of criminal legislation in the sense indicated above. On their basis, it is impossible to prosecute and impose punishment. International legal acts of direct effect are the only exception. However, none of them, including the Statute of the International Criminal Court, has been ratified by Ukraine to this day, and their classification as sources of criminal legislation is rather hypothetical. They act as "sources of sources" for the criminal law of Ukraine, addressed not to law enforcement or potential offenders, but to the legislator (Navrotsky, 2006, pp. 116-125). But to this end, judicial practice should also be published in relevant collections. In today's reality, with the Supreme Court's decisions often reflecting different positions, it is extremely difficult to follow them and find a suitable decision.

The Principle of Humanism in Relation to the Victim

Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, which introduces minimum standards for the rights, support and protection of victims of crimes, states that victims of crimes require respectful, fair and professional treatment, which excludes any discrimination. Victims must be protected from secondary and repeated victimization, from intimidation and revenge, receive appropriate support, have access to justice (9). Victims should be given information about the offender's release or escape from prison (32). At the same time, such rights and guarantees of the victim are not taken into account either by legislation or practice.

This is more relevant than ever in connection with war, as victims must receive appropriate compensation and restitution. In particular, we are talking about the families of the dead, people who lost their homes or whose homes were destroyed, or whose property was stolen or damaged. Raped women and children also need appropriate psychological help. Compensation for lost housing should be received not

only by those citizens who lost it after the events of 24 February 2022, but also by forced migrants from Luhansk and Donetsk Provinces that lost their homes in 2014.

Besides, attention should be paid not only to war crimes committed by the aggressor, but also to other crimes. Their numbers do not decrease during war. Nevertheless, they require careful recording and investigating.

There are numerous problems related to ensuring the genuine participation of victims at the pre-trial stages, as well as at the stage of execution of the sentence. The victims are not informed about the consideration of issues related to parole of the person who committed the crime, amnesty, pardon, etc. Moreover, they are not asked about their opinion. Compensation for damage to the injured person by the person who committed the criminal offense is not taken into account.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985, enshrines that victims should be treated with compassion and respect for their dignity. They have the right to access to justice and compensation for the harm that they have suffered (clause 4). In addition, the need to include restitution as one of the measures of punishment in criminal cases in addition to other criminal sanctions is indicated. In the Ukrainian practice of criminal law, if the person who committed a criminal offense does not have funds or property to compensate for the damage, this issue remains unresolved, because the state does not compensate for damages.

The issues of criminal compensation and restitution were included in the alternative project of the Criminal Code of 2001, developed by V.N. Smitienko (*Draft of the Criminal Code of Ukraine*, 2001).

However, these ideas were not accepted by the legislator. When developing new criminal legislation, the working group on the development of criminal law also considers the issues of legislative regulation of restitution and compensation, as well as expanding the consideration of the rights and legitimate interests of the victim.

In particular, in Article 1.1.1. it is stated that the Criminal Code of Ukraine is the only law of Ukraine that, on the basis of the rule of law, regulates social relations between the state, victim and criminals. According to Article 1.1.2., the aim of the Criminal Code of Ukraine is to ensure by legal means that the human and civil rights and freedoms, the interests of society, the state and the international community are protected from criminal offenses (*Draft of the Criminal Code of Ukraine*, 2022).

Significantly, it seems that the problem of the victim in criminal law is demonstrated in the implementation of the principle of a humane treatment of victims. Article 1.2.6. of the draft of the new Criminal Code of Ukraine ("Humanism") emphasizes the importance of the role of the victim. In particular, part 2 of this article states that the Criminal Code of Ukraine ensures recognition and observance

of the rights, freedoms and legitimate interests of the victim, including the right to restitution and compensation. Part 4 of this article states that the exercise of rights by a person who has committed an act stipulated by the Criminal Code should not harm the rights of the victim and the interests of society. Perhaps this time these ideas will be accepted not only by the legislator, but also in practice.

It should also be noted that problems related to victims are particularly evident in emergency situations, in particular during the martial law. Such situations demonstrate the unpreparedness of the state for the challenges related to ensuring the rights and freedoms of human and citizen in unpredictable conditions, the state's perception of a victim and the damage caused to him or herin the process of committing a criminal offense. Compensation measures for war victims require special attention.

As V.O. Tulyakov said, if the state failed to protect a citizen from criminal acts, then it must bear responsibility for the damages. Such a provision reflects the real expectations of the population interested in effective protection of their constitutional rights and freedoms (Tulyakov, 2000, p. 5).

In such circumstances, it seems that the law enforcement agencies would treat the victim more carefully, provide the victim with the procedural status in a timely manner, and contribute to the compensation for his or her damages, restoration of rights, and comprehensive psychological assistance from competent authorities or volunteer organizations. If the role of the victims in criminal law and their needs are not taken into account, this may further increase the number of crimes committed by "former victims" and cases of lynching, and also affect the level of trust in government and its effectiveness. In addition, attention should also be paid to the level of state compensation to victims within the framework of the decisions of the European Court of Human Rights. Restorative justice would help ensure humane treatment of victims, provide an opportunity to meet their needs, and also contribute to the restoration of social justice.

In Recommendation No. R(99)19 of the Committee of Ministers to member States of the Council concerning mediation in penal matters of 15 September 1999, attention is drawn to the recognition of the legitimate interest of the victim in the possible consequences of victimization, interest in dialogue with the offender in order to obtain an apology and certain compensation for the damages, i.e., what classic criminal justice cannot provide. This is also noted in later recommendations. According to Recommendation CM/Rec(2018)8 of 3 October 2018, it is necessary to strengthen the participation of stakeholders, including the victim and the offender, other affected parties and the wider community, in addressing and eliminating the harm caused by crime. Thus, restorative justice is recognized as a method. Thanks to this method, the needs and interests of these parties can be identified and met in

a balanced, fair and collaborative manner. In addition, it is necessary to pay more attention to the legitimate interest of victims, in particular, regarding responding to their victimization, dialogue with the offender and receiving compensation for damage in the court.

As V.O. Tulyakov said, improving access of crime victims to the criminal justice system and fair and humane treatment of them can to some extent reduce fear of crime (Tulyakov, 2018). According to S.G. Mason, true reform requires paying attention to the lived experiences of those directly affected (Mayson, 2020).

Inhumane treatment of victims is especially reflected in practice, because they had no real opportunity to exercise their rights. Illegal protection mechanisms (in particular, blog posts, blacklists on websites, use of personal connections, etc.) are more effective. However the problem is in violating principles in this way. In such circumstances, only the illusion of justice is created.

The victims have procedural opportunities to familiarize themselves with the materials of the criminal proceedings. At the same time, responsibility for not providing access to the materials of criminal proceedings that directly concern the victim is not provided for. However, such violations are rare. In addition, there is no requirement to justify not conducting investigative actions initiated by the defense attorneys, to inform them about the impracticality of conducting such investigative actions, etc. Accordingly, the Criminal Procedure Code of Ukraine provides for such a right of a defender, but there is no responsibility for unjustified disregard of such a right and corresponding initiatives of a lawyer, in particular as a representative of a victim.

In particular, Article 374 of the Criminal Code of Ukraine provides for criminal liability for violation of the right to defense. The article does not mention the victim, nor is there a criminal law rule that would provide for responsibility for violating the victim's right to representation. Article 397 of the Criminal Code of Ukraine provides for criminal liability for interfering with the activities of a defense attorney or a person's representative. At the same time, this corpus delicti covers only active actions and does not cover the violation of the right to protection of the victim in the form of inaction, or rather the violation of the right to representation. Therefore, it is impossible to bring perpetrators of such actions to justice.

This situation vividly reflects the problems of humane treatment of the victim, in particular, in conditions of quarantine. Victims find themselves alone with the experience of violence, the possibility of repeatedly encountering the offender, as well as the arbitrariness, inaction, and formalized approach of law enforcement agencies. This results in mistrust towards the authorities, the law enforcement system and the system of justice, and, consequently, in despair and further criminal offenses.

Impunity corrupts. Problems also arise when exercising the rights of a suspected, accused, or convicted person.

Of course, this is not only a problem of the letter of the law, but, essentially, of the work organization of the law enforcement agencies. At the same time, the work of criminal justice should be perceived holistically. Therefore, attention should also be paid to the need of reforming not only criminal law, but also criminal procedural and penitentiary legislation.

It seems that, taking into account the accompanying circumstances, not giving the victims a real opportunity to participate in the criminal proceedings, as well as not informing the victims about the progress of the investigation, can be considered as inhumane treatment within the meaning of Article 3 of the Convention (ECtHR judgments in Moldova and others v. Romaniaof 12 July 2005, application No. 64320/01; Beketov v. Ukraine of 19 February 2019, application No. 44436/09; Matushevskyi and Matushevska v. Ukraine, application No. 59461/08 of 23 June 2011). In this context, the positive obligations of the state in connection with the ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms consist not only in the legislative provision of the protection of human rights, but also in the effective investigation of violations of such rights.

Realization of Principles During Implementation of Restorative and Transitional Justice

It is extremely important that restorative practices enable subjects to directly participate in solving important issues in their lives. The dialogue promotes the acceptance of the diversity of people, different perceptions of reality and decisions regarding one's own behavior, optimizes the discussion of important issues related to committing a criminal offense, in particular, regarding compensation for damage, assistance to the victim, restitution, etc.

In addition to material compensation, perhaps even more important is the "effect of presence" when meeting with the Other *(*H.U. Humbrecht), which is mostly used in restorative and dialogue practices. It is important to acknowledge the experience of violence of another, in particular the victim and the criminal. Presence implies that the parties are able to hear each other, to hear about the reasons for committing the crime and its circumstances, about remorse, about the pain of the victim of the committed crime. Dialogue facilitates the acceptance of the Other through the experience of harm caused by the crime; acceptance of differences between people, different perceptions of reality and decisions concerning one's own behavior.

However, this is not the right time to talk about restorative justice. Specialists in this field talk about transitional justice. It takes many years and a change of generations for people to forgive (if it is possible at all). In particular, this concerns dialogues of understanding with Germany regarding World War II.

Addressing the past during transitions from conflict or repressive rule encompasses various mechanisms or approaches (criminal prosecution, truth-seeking, reparations, legislative and institutional reform); highly contested and often fragile contexts ("transitions"); rapid growth of measures, goals and expectations. Scholars highlight contradictions within transitional justice, such as between the goal of justice for victims and "causal beliefs" about promoting democratic transition, as well as between "incompatible goals", such as maintaining order and promoting transformation. Broad concepts such as justice, truth, reconciliation, peace, and democracy, while controversial, require a certain degree of clarity and focus, and the relationship between the concepts also requires clearer theorization (Gready Paul and Robins Simon, 2020, p. 292).

An ecological model of social reconstruction was developed by Fletcher and Weinstein and Stover and Weinstein based on research in Rwanda and the former Yugoslavia. The authors question the role of individual criminal processes in promoting social repair and reconstruction in the context of community violence. They argue that people use war crimes trials in such settings to assert the collective innocence and victimization of their particular group. Alternatively, they propose that community violence requires a collective response that emphasizes collective guilt and responsibility for the violence. Such an approach would make it possible to recognize and start solving the problem of a deep social disorder. The "ecological" model of social reconstruction understands community and society as a social system. It is necessary to understand all aspects (social, economic, political) of this system, as well as the fact that a change in one place causes changes in another place of the system. Specifically, the authors propose a multi-layered intervention that targets individuals, families, communities, and the state to ensure social reconstruction. Interventions include: interventions at the state level; criminal proceedings (national or international); historical record commissions (truth commissions); individual and/or family psychosocial support; intervention of the community from outside; and community-based responses, among others (Fletcher, 2002).

According to the draft law On the Principles of the State Policy of the Transition Period No. 5844 of 9 August 2021, published by the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine (Proyekt Zakonu 5844, 2021), the transition period is aperiod of time when state policy is implemented, aimed at countering the armed aggression of the Russian Federation against Ukraine, restoring the territorial integrity of Ukraine and ensuring the state sovereignty of Ukraine

in the temporarily occupied territories, overcoming the consequences of the armed aggression of the Russian Federation against Ukraine, reintegration of temporarily occupied (de-occupied) territories and their inhabitants, building sustainable peace and non-repetition of occupation. The transitional justice is described as a set of measures defined by the present law and other laws aimed at overcoming the consequences of violations of the law, rights and freedoms of a human and a citizen caused by the armed aggression of the Russian Federation against Ukraine, including their restoration and compensation for the damages, ensuring accountability, justice and reconciliation, as well as protecting from similar aggression and occupation in the future.

Article 18 proposes to enshrine "Other measures carried out throughout the transition period". They include, in particular, the following: 1) search for missing persons in accordance with the Law of Ukraine On the Legal Status of Missing Persons; 2) implementation of a set of mine action measures in accordance with international humanitarian law, the International Mine Action Standards (IMAS) and the Law of Ukraine On Mine Action in Ukraine aimed at reducing the social, economic and environmental consequences caused by the armed aggression of the Russian Federation against Ukraine, which are an integral part of the state policy of reintegration of temporarily occupied (de-occupied) territories and their inhabitants, provision of their humanitarian needs; 3) commemoration of the victims of the armed aggression of the Russian Federation against Ukraine; 4) ensuring information security and overcoming the consequences of propaganda; 5) activation of national and patriotic education, primarily among children and youth; 6) protection of cultural values; 7) implementation of systematic measures for the resocialization of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine; 8) overcoming the environmental consequences of the armed aggression of the Russian Federation against Ukraine; 9) national dialogue and other dialogue processes.

The war with the Russian Federation is still going on. Therefore, it is not the right time to talk about such dialogues. However, one of the principles of restorative justice, which requires for the victim to be heard, is already being implemented. The whole world can see it, the whole world is helping. The investigation of war crimes and the work of international institutions are not progressing equally fast. Besides, the world has already done a lot.

We proceed from the fact that the victim belongs to the subjects of criminal legal relations, because the criminal offense causes damage to them. According to a broad approach, natural persons, legal entities, the state and society as a whole are considered as victims, since every criminal offense creates fear among the law-abiding part

of the population, undermines the authority of the state. Every person can become a victim.

The victim, as well as the person who committed a criminal offense (as well as the suspect, accused, convicted person) needs human treatment on the part of the state. It is especially crucial to provide the victim status in a timely manner, to provide a real opportunity to get acquainted with the progress of the proceedings, adapting to the current conditions. At the same time, the process and the law cannot be separated. The realization of procedural possibilities is a guarantee of the realization of material rights, protection and security.

However, the above does not mean equaling the role of the person who committed a criminal offense with the violation of his or her rights and guarantees. The enforcing of criminal law and protection of the rights of victims should not turn into a criminal offense against other persons. In order for the changes to occur, the state must realistically review its approaches to ensuring human security and freedom, and ensuring a balance between the rights and freedoms of the victim and the person who committed a criminal offense, as well as review its opportunities to popularize and expand alternative means of responding to criminal offenses and deviations, means of restoration of victims' rights, provision of compensation and restitution, as well as legislative regulation of these issues. In addition, it is necessary to establish the status of the victim in the Criminal Code of Ukraine. It seems that it is advisable to spread restorative, dialogue, mediation approaches and practices, as well as other forms of peaceful conflict resolution for certain categories of cases. They can become effective means of criminal law regulation.

The Principle of Personal Culpability

This principle is also called the principle of personal responsibility (*nulla poena sine culpa*). In the criminal law of Ukraine, it is closely related to the need to establish guilt and other signs of the subjective side of the crime. In the Anglo-Saxon legal system, it is related to the requirements of *mens rea*. It is important that each action and the actions of each person are qualified separately. The crimes committed by the Russian Federation in Ukraine are not the crimes of Putin alone, not only of the commanders who gave the orders. Each act has its own characteristics, so it must be evaluated individually and in accordance with the principle of personal culpable responsibility. According to the current Criminal Code of Ukraine, there is no collective responsibility. Each action is committed by a specific person.

Human behavior depends on both external (for example, an order) and internal factors. Internal (subjective) factors include the presence of guilt, i.e., the capacity to be aware of the criminal wrongfulness of an act.

The specifics of the commander-in-chief's responsibility are also interesting. As aptly noted by V.O. Navrotsky back in 2014, "It is not so important for a legal assessment that Mr. Putin personally did not cross the borders of Ukraine as part of Russian military units. After all, this does not mean that he did not plan, prepare or solve an aggressive war or military conflict. The actions of the commander-in-chief are different from those of privates and sergeants, officers and generals. Moreover, according to a rule known since the days of the Roman law, the one who should have stopped another and failed to do so is liable to the same extent as the one who acted. Therefore, Putin is responsible as an executor for the actions committed by his subordinates" (Navrotsky, 2014).

The criminalization of wartime collaboration (Article 111-1 of the Criminal Code) in accordance with Law No. 2108-IX of 3 March 2022 also does not contradict this principle, since a person must be aware that such activities contribute to the war crimes committed by the aggressor country. Criminal liability for wartime collaborationis provided for in the criminal legislation of other countries, in particular the Criminal Code of Lithuania.

When determining the degree of punishment for a war crime, the court must take into account that any punishment must first of all "reflect the guilt of the convicted." At the same time, the court, in addition to the guilt and gravity of the crime, takes into account: the degree of damage caused to the victims and their families; the nature of "illegal conduct" and the means used to commit the war crime; "degree of intention"; factors related to the method, time and place of the crime; age, level of education, social and economic status of the person found guilty; mitigating and aggravating circumstances. According to E.S. Logvinenko, the provisions of the Rome Statute of the International Criminal Court clearly demonstrate the development of international criminal law and the qualitative improvement of the legal certainty of its norms in terms of not only the criminalization of acts (in this case—war crimes), but also the establishment of punishments for their commission, as well as in determining the circumstances which are to be taken into account when sentencing, in other words—in the format of the generally recognized principle of criminal law *nullum crimen sine lege – nulla poena sine lege* (Logvinenko, 2019, p. 272).

As Stephanie Block points out, some jurisdictions, including the United States, England and Wales, France, and Denmark, provide for some form of strict liability, which allows a person to be held criminally liable without having to prove their guilt. The European Court of Human Rights accepts such restrictions on the basis of the presumption of innocence if they are limited to "reasonable limits of the restric-

tion that take into account the importance of what is at stake and preserve the rights of the defence" (Stefanie Bock, 2013). Given that international criminal tribunals are tasked with prosecuting the "most serious" crimes of concern to the international community as a whole, this would be disproportionate and therefore incompatible with the rights of the accused to establish a form of strict liability in international criminal law. In accordance with these considerations, the International Criminal Tribunal for the former Yugoslavia qualified *nulla poena sine culpa* as a "basic presumption," "the basis of criminal responsibility" and "a general principle of law." According to the Nuremberg International Military Tribunal, the principle of personal guilt serves two main functions: (1) to avoid mass punishment, i.e., to individualize guilt and responsibility, (2) to "ensure that innocent people are not punished," i.e., to protect and complement the presumption of innocence (Stefanie Bock, 2013, p. 186).

The presumption of personal guilt and the duty to know the law in light of Article 32 of the ICC Statute regarding criminal conduct is not required. In other words, "knowledge of the law defining the offense is not in itself an element of the crime." Returning to the ICC Statute, Article 30 requires that the material elements of the crime are committed with intent and knowledge, and thus links the mental element to the *actus reus*, i.e., the objective elements of the crimes, as set out in Articles 6-8 bis of the ICC Statute. Accordingly, knowledge is defined as "awareness that a circumstance exists or a consequence will occur in the ordinary course of event," which clearly refers to a factual, not legal, situation.

For example, a soldier shoots at a person he believes to be an enemy combatant, but who is actually a civilian. Because he does not know the civil status of the victim, he is not actually aware that he is shooting at a protected person and therefore does not meet the mental element required by Article 8(2)(a)(i) of the ICC Statute. If, on the other hand, a soldier shoots at a civilian with his full knowledge of the actual situation, but mistakenly believes that the law of armed conflict allows him to do so, he nevertheless knows that he is shooting at a civilian. His error of law does not affect his *mens rea* and thus does not exempt him from criminal liability.

I wonder if the rule of *error iuris nocet* can still be reasonably applied in international criminal law. On the face of it, it seems obvious that everyone should be aware that they are committing a legal crime when they commit the *actus reus* of one of the "worst crimes known to mankind." While it is true that no one can reasonably claim that they did not know that the systematic killing of innocent civilians is a criminal act, the provisions on war crimes—in particular, their complex interplay with the often rather imprecise rules of international humanitarian law—are much more difficult to assess.

Closely related to the principle of personal culpability is the issue of collective responsibility, especially in wartime conditions.

The Disciplinary Statute of the Armed Forces of Ukraine, approved by the Law of Ukraine of 24 March 1999 No. 551-XIV provides for certain features of the commander's responsibility for the actions of subordinates, but this is not criminal responsibility. The draft of the new Criminal Code of Ukraine solves this issue in a different way.

The Nuremberg trials have already dealt with cases of crimes against humanity. Officials and military personnel must understand the concept of a criminal order, and therefore they must not carry it out. For the sake of justice, it should also be noted that the servicemen of the Russian Federation carry out criminal orders not only out of fear for their own lives and future, but also for their families. The government of the Russian Federation has all the information about them and their relatives, and therefore it can coerce them in this way.

Hence, in addition to offering an opportunity of surrendering safely instead of carrying out criminal orders, it is also necessary to think about guarantees for the families of such servicemen.

Presumption of innocence. The Supreme Court, in its decision (7 June 2022, case No. 461/4421/18, proceeding No. 51-2847km21), formed a legal position regarding perjury (Article 384 of the Criminal Code). PERSON_1 was accused of giving false testimony regarding the circumstances of aroad accident involving Mercedes and Opel cars, in which one of the drivers was killed. The testimony was false in the scope that, during the interrogations as a witness, PERSON_1 reported the circumstances which suggested that PERSON_3 was driving the Mercedes car at the time of the accident, and not PERSON_2, as the pre-trial investigators believed. In paragraph 14 of the decision of the Supreme Court, it is noted that in order to be found guilty of the crime provided for in Article 384 of the Criminal Code, the prosecution must prove that the testimony of the witness (1) is unreliable, i.e., that it contains false information about the event that is the subject of the investigation and/or trial, and (2) the witness gave such information knowing it to be false.

According to Article 6 § 3(d) of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone charged with a criminal offense has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

On 7 December 2021 the Supreme Court of Ukraine (case No. 461/4425/18, proceedings No. 51-2424km21) considered the issue of the prosecution of a person suspected of a crime provided for in the Article 384 of the Criminal Code of Ukraine. The Supreme Court concluded that the courts' evaluation of evidence relating to the guilt or innocence of a person in other criminal proceedings contradicts the principle of presumption of innocence.

According to Part 3 of Article 62 of the Constitution of Ukraine, and the provisions of Article 17 of the Criminal Procedure Code, the prosecution cannot be based on evidence obtained illegally, as well as on assumptions; all doubts regarding the guilt of a person are interpreted in his or her favor.

Regardless of the seriousness of the charges and the principle of presumption of innocence, the requirements for the examination of evidence must be carefully addressed. Ensuring a fair trial is an indispensable requirement of any trial in a legal democratic country.

The Principle of Inevitability of Criminal Liability

On 11 April 2022, the information about using chemical weapons in Mariupol was confirmed. On 23 April 2022, on Easter Saturday, rockets were fired at Odesa. As a result, nine civilians died, including a three-month-old baby, and apartments were destroyed. On 24 April, Easter Sunday, Donetsk and Luhansk Provinces were also shelled, including churches there. On 9 May, a rocket hit a shopping mall in Odesa. Due to the curfew, there were security guards in it who were injured, windows were blown out by the blast wave in residential buildings near the shopping mall. Russian leadership called it fake news.

International institutions and the state must respond appropriately to all these crimes.

On 28 February 2022, the Office of the Prosecutor of the International Criminal Court began an investigation into the situation in Ukraine. On 13 April 2022, the prosecutor of the International Criminal Court visited Bucha in Kyiv Province as a place where war crimes were committed. But the Russian government continues to insist that the footage showing the corpses in Bucha has been staged by the United States.

The Ukrainian Helsinki Human Rights Union (UHHRU) summarized the events that took place in Odesa Province during the 121 days of the full-scale Russian-Ukrainian war, from 24 February to 24 June 2022. During the four months, Russian missiles damaged at least 210 objects of civilian infrastructure in Odesa. Almost half were residential buildings. 131 episodes were documented and entered into the database. Such data, as part of the global initiative "Tribunal for Putin" (T4P), was collected for the period from 24 February to 24 June 2022 by the Odesa regional organization of the NGO Committee of Voters of Ukraine, which documents international crimes (genocide, crimes against humanity, war crimes), probably committed by the Russian occupants in Odesa Province. The vast majority of events are missile strikes by various types of land-based missiles, as well as using warships and

strategic aircraft. It is worth noting separately the mine-lying in the Black Sea by the Russian military. After a storm, sea mines are torn from their mounts and driven to the coast, where they self-detonate or are detonated by explosive devices. During the 121 days of the war, there were already 12 such episodes, and one person died as a result. As of 24 June, 12 people were killed and 60 injured (*UGSPL*, 2022).

According to operational data, 39 people (including four children) were killed and more than 100 injured as a result of the missile attack on the Kramatorsk train station on 8 April 2022. This was a targeted attack on the passenger railway infrastructure, the residents of the city, as well as people who were awaiting evacuation.

On 27 June 2022, the Amstor shopping center in the city of Kremenchuk, in Poltava Province, came under rocket fire. The enemy hit with a Kh-22 missile. Several hundred people were in the shopping and entertainment center at that time. As a result of the shelling, 18 of them died, 59 sought medical help, and 25 were hospitalized (Zaborona, 2022). This once again confirms the terrorist orientation of the Russian Federation, the motivation to commit war crimes, violation of the customs of war and extermination of the Ukrainian people.

In the eveningof 1 July 2022, the occupiers launched a rocket attack on the village of Serhiivka in Bilhorod-Dnistrovsky District, Odesa Province. One of the rockets hit a nine-story building, others destroyed a recreation center. According to the Operational Command "South," Russian invaders hit the Belgorod-Dniester District of Odesa Province with three Kh-22 missiles launched from the Black Sea. As a result of the attack in Serhiivka, 21 people died. On 7 July, a 53-year-old employee of a recreation center who was injured during a Russian missile attack on Serhiivka died in hospital. Thus, the number of death sincreased to 22. The Security Service of Ukraine has launched an investigation into the rocket attack on civilian objects in Odesa Province. Proceedings have been opened under Part 2 of Article 438 of the Criminal Code of Ukraine (violation of the laws and customs of war) (Kivva, 2022).

On 14 July 2022, rockets were fired at the downtown of Vinnytsia. It is known that the office center and a parking lot were hit with Russian 3M-14E Kalibr cruise missiles. As a result of the attack, 25 people died, 197 were injured and eight were missing (Zaborona, 2022).

All committed crimes must be carefully registered and qualified in accordance with other principles of criminal law.

In the literature, the question of the "main principle" often arises. It seems that there is no such principle, because the main idea is their complex and balanced application to subjects of criminal law relations. But the working group on the development of criminal law of the Commission on Legal Reform under the President of Ukraine formulated this provision as a principle. In particular, M.I. Khavroniuk notes that "The main principle should be considered in the provisions of the draft

of the Criminal Code of Ukraine: 'this Code is applied in accordance with the principles defined in its articles 1.2.1–1.2.9,' and 'the draft of the Law on Amendments to this Code is considered by the Verkhovna Rada of Ukraine only in the presence of the conclusion of the Plenum of the Supreme Court of Ukraine regarding its accordance with the requirements of Articles 1.2.1–1.2.9 of this Code'" (Khavroniuk, 2020). One can fully agree with this, because this provision reflects the need for systematic application of principles both in law-making and law enforcement, in peacetime and wartime alike.

The Principle of Equality and Non-Discrimination

According to Article 24 of the Constitution of Ukraine, "citizens have equal constitutional rights and freedoms and are equal before the law. There can be no privileges or restrictions based on race, skin color, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, language or other characteristics." The prohibition of discrimination is provided for in Article 14 of the ECHR, which guarantees equality in the use of other convention rights.

In 2000, Protocol No. 12 to the Convention was opened for signature. It extends the prohibition of discrimination and creates guarantees of equality in the enjoyment of any rights, including the rights provided for by the national laws of member states. For today, not all EU member states have ratified this Protocol. The explanatory note to the Protocol states that its task is to strengthen protection against discrimination as a basic component of human rights guarantees. The protocol was the result of a discussion of ways to ensure, in particular, gender and racial equality (*Posibnyk z yevropeys'koho antydyskryminatsiynoho prava*, 2011).

Although equality is proclaimed by the Constitution, people are not equal in their rights and access to justice. Inequality is manifested in age, gender, social status, place of residence, etc. Regarding this issue, in particular, the following directives were adopted: the Employment Equality Directive, which introduced a ban on discrimination in employment on the basis of sexual orientation, religious beliefs, age and limited physical capabilities, and the Racial Equality Directive, which established a ban on discrimination on the basis of race and ethnic origin in the context of employment, as well as in matters of access to the welfare system, social protection, goods and services.

These directives significantly expanded the scope of EU anti-discrimination law and confirmed that guarantees of equal access to areas such as health care, education, and housing are necessary for individuals to fully use their opportunities on the labor market. In 2004, with the adoption of the EU Gender Directive on equal-

ity in access to goods and services, the prohibition of discrimination on the basis of gender extended to the sphere of goods and services.

At the same time, with the passage of time, other manifestations of inequality are also considered as forms of discrimination, in particular discrimination based on age (ageism), sex or gender (women and men), poverty, origin, language, appearance, etc. Article 161 of the current Criminal Code of Ukraine provides for criminal liability for violating the equality of citizens despite their race, nationality, religious beliefs, disability and other grounds.

Women have been given the opportunity to be conscripted and take direct part in hostilities. According to the Law of Ukraine On Amendments to Certain Laws of Ukraine Regarding Ensuring Equal Rights and Opportunities for Women and Men During Military Service in the Armed Forces of Ukraine and Other Military Formations No. 2523-VIII of 6 September 2018, part 12 of Article 1 of the Law of Ukraine On Military Duty, Communications and Military Service No. 2232-XII of 25 March 1992 was supplemented with Paragraph 2 of the following content: "Women perform military duty on an equal basis with men (except for cases provided for by legislation on maternity and childhood protection, as well as the prohibition of discrimination on the basis of gender).

However, it is important to leave it as an option and a right, not an obligation, for every woman. A person must have a choice in this respect.

Article 4.12.4 of the draft of the new Criminal Code of Ukraine proposes to provide for criminal liability for discrimination. According to this article, "person who directly or indirectly on the basis of race, skin color, political, religious or other beliefs, gender, disability or state of health, ethnic or social origin, property status, place of residence, language or on other basis: a) limited the equal right to access to public service or service in local self-government bodies, b) violated the equality of the rights of women and men, c) limited another constitutional right of a person or citizen, or d) established direct or indirect privileges for a person, commits a crime" (*Draft of the new Criminal Code of Ukraine*, 2022).

Criminalization of the above mentioned acts is a positive step. Various types of discriminatory treatment are also reflected in the current practice of the ECtHR. In the case Moldova and Others v. Romania (application No. 64320/01 of 12 July 2005), the ECtHR noted that discrimination on the basis of race itself can be considered as treatment that degrades human dignity, and therefore such discrimination is a violation of Article 3 of the Convention. In Lăcătuş v. Switzerland, the Court found that the city of Geneva had violated Article 8 of the ECtHR (respect for private and family life) against a young Roma woman by fining and eventually imprisoning her for begging. In weighing the interests, the Court found that the applicant was

in a clearly vulnerable position as a person who was poor, illiterate and completely without income. Therefore:

> the Court considered that the penalty imposed on the applicant had not been proportionate either to the aim of combating organised crime or to the aim of protecting the rights of passers-by, residents and shopkeepers. The applicant was an extremely vulnerable person who had been punished for her actions in a situation in which she had in all likelihood had no choice other than to beg in order to survive. In the Court's view, the penalty imposed had infringed the applicant's human dignity and impaired the very essence of the rights protected by Article 8, and the State had thus overstepped its margin of appreciation in the present case.

In considering the state's argument to protect the rights of passers-by and business owners, the Court ruled that "the motivation to make poverty less visible in the city and attract investment" is not a legitimate motivation for measures that limit human rights (Timofieieva, 2022). Ineffectiveness of less restrictive means convincingly was not demonstrated, either. In fact, this case demonstrated poverty discrimination. Ageism—discrimination on the basis of belonging to a certain age group, widespread in both formal and informal spheres of social life—manifests itself in the willingness to adequately perceive and cooperate only with people who meet certain age criteria. The concept of ageism was proposed by the American gerontologist Robert Butler (National Institute on Aging) in 1969 and was initially associated with age stratification and the normative values of society—productivity and effectiveness. Ageism is accompanied by the following processes: 1) labeling (identification of a person and an age group); 2) stereotyping, i.e., a negative assessment of the personal qualities of a certain age group; 3) discrimination (violating a person's rights and freedoms due to his or her belonging to an age group).

Ageism is based on the concept of norm and deviation; representatives of a certain age group consider themselves to be the norm, and others to be a deviation. Such discrimination, like any delinquent behavior, often escalates into criminal offenses. Discrimination against youth is connected, in particular, with the fact that youth is associated in other age groups with immaturity, oppositionality, irresponsibility, inexperience, lack of culture, etc. Labeling and stereotyping in this case causes the perception of young people as not fully capable, which leads to a lower level of remuneration (for example, searching for employees "under 25 years of age with work experience" in recruitment agencies, etc.).

This leads to the fact that excluded groups look for other ways of earning, including shadowy and criminalones.

Discrimination is mostly related to the rejection of the Other. But national legislation does not exhaustively reflect modern forms of discrimination.

It is important to use and popularize mediation and restorative practices to establish dialogue between different generations. Taking into account differences between people, their natural and social characteristics is not discrimination. The difference between people must be taken into account in criminal-legal qualification of an offence or in punishment. This is achieved, in particular, by implementing the principles of individualization and differentiation of criminal responsibility, humanism and other principles of criminal law.

Proportionality

Since the active phase of the war was not expected by the Government, after the full-scale invasion, a number of changes began to be made in the legislation, including the criminal one.

According to the Law On Amendments to the Criminal Code of Ukraine on Increasing Liability for Looting No. 2117-IX of 3 March 2022, the qualifier "in conditions of war or a state of emergency" was added to some articles of the Criminal Code. This, in particular, concerns the acts of theft (part 4 of Article 185 of the Criminal Code), robbery (Part 4 of Article 186, Part 4 of Article 187 of the Criminal Code), extortion (Part 4 of Article 189 of the Criminal Code), appropriation and wasting property or acquiring it by abuse of one's official position (Part 4 of Article 191 of the Criminal Code), etc. Here, we should once again refer to the expediency of introducing standard sanctions and placing qualifying features precisely in the General part of the Criminal Procedure Code of Ukraine, proposed by the draftspersons of the Criminal Procedure Code. If the General Part were structured in this way, changes would be much easier to make and it would be easier to track the impact of certain qualifying features on specific groups of articles. Likewise, it would be more logical to explain the purpose of this or that punishment.

These are important changes, since in many Internet sources theft during war is classified as *looting*. Looting is provided for in Article 432 of the Criminal Code of Ukraine. It involves stealing things from the killed or wounded on the battlefield. But such amendments contradict the title of the Law on Increasing Liability for Looting. After all, such amendments refer not only to looting, but also to ordinary criminal offenses against property, but "in conditions of war or a state of emergency." Article 432 of the Criminal Code of Ukraine was also amended pursuant to the Law No. 2117-IX of 3 March 2022. Before these amendments, the sanction of this

article provided for penalty of imprisonment for a term of 3-10 years, as compared to 5-10 years now.

Such changes violate the principle of proportionality, because theft value exceeding the minimum amount (0.2 non-taxable minimum income of citizens, which as of 2022 is equal to UAH 248.10) already qualifies as a crime in accordance with Part 4 of Article 185 of the Criminal Code of Ukraine. Obviously, it is disproportionate. In fact, the justice system is ignoring the corpus delicti provided for in parts 2 and 3 of that article, because in the reality of martial law, theft, regardless of whether it was committed repeatedly or by a group of persons, or involved breaking into someone's home, or caused significant damage—meets the criteria of Part 4 of Article 185 of the Criminal Code of Ukraine. This is also a violation of the principle of *differentiation of criminal liability***.** Ukrainian researchers are also paying attention to this problem, in particular Y.A. Ponomarenko.

As it seems, in order to solve this situation, it is necessary to provide this corpus delicti with additional circumstances, in particular, the commition of such a crime by a military serviceman, or the damage of a certain value, or other aggravating circumstances.

According to B. Bernard, the codification of the principle of proportionality will be an important step in the development of the law of war, filling a significant gap in the existing legislation on civil protection. Although the commanders will sometimes find it difficult to apply the principle of proportionality during wartime, they will generally be well informed about the desired military advantage, the means of warfare, and the military objectives, and this information will enable them to weigh the expected military gains against the likely civilian casualties. All commanders should be criminally liable for disproportionate acts committed as a result of their failure to exercise due care or willful or reckless conduct. If violations of proportionality are treated as war crimes and actively prosecuted, there is a reason to hope that proportionality can become integral part of military decision-making rather than an abstract principle of civilian protection (Brown, Bernard, 1976).

The Verdict of the Primorsky District Court of Odesa of 12 July 2022, Case No. 522/7115/22, Proceedings No. 1-kp/522/1823/22, approved the agreement concluded on 3 June 2022 on the admission of guilt between the suspect PERSON_1 and the prosecutor in criminal proceedings, registered in the Unified Register of Pretrial Investigations under No. 22022160000000105 dated 26 May 2022. PERSON_1 was found guilty of committing criminal offenses provided for in Part 2 of Article 109 and Part 1 of Article 110 of the Criminal Code of Ukraine for the distribution of posts on the *Odnoklassniki* social network service with calls for the overthrow of the constitutional order and non-recognition of the Ukrainian government. The posts also contained a map of Ukraine with certain territories of Ukraine, namely Odesa,

Mykolaiv, Kherson, Donetsk, Luhansk, Zaporizhzhia, Dnipropetrovsk, and Kharkiv provinces and the Autonomous Republic of Crimea, depicted as parts of the Russian Federation, and public calls for the overthrow of the constitutional order. On the user's profile, under the specified publication, which he made available from 30 March 2022 to 19 May 2022, there were multiple views, comments, etc., which indicates that other persons have read the mentioned information.

Taking into account the fact that there are circumstances mitigating the punishment, namely, his genuine remorse, no previous convictions, and absence of circumstances aggravating the punishment, the court imposed punishment for the criminal acts provided for in Part 2 of Article 109 of the Criminal Code of Ukraine—two years of imprisonment without confiscation of property and Part 1 of Article 110 of the Criminal Code of Ukraine—four years of imprisonment without confiscation of property. According to Article 75 of the Criminal Code of Ukraine, the court set a probationary period of two years. In accordance with Part 1 of Article 76 of the Criminal Code of Ukraine, the court imposed the following duties on PERSON_1: "to periodically report to the authorized probation body; notify the authorized probation body about changing place of residence, work or study; reading the book *History of Ukraine-Rus*' by Mykhailo Hrushevskyi."

It seems that the verdict is quite individualized. Perhaps this person came under the influence of propagandists, of whom there are many on the Internet. Also, he made only a few posts, and according to the opinion of the court, he expressed remorse. Perhaps the reading of the book will bring more benefit than the actual punishment in the form of imprisonment.

The verdict of Primorsky District Court of Odesa of 4 July 2022, Case No. 522/5652/22, Proceedings No. 1-kp/522/1583/22 was similar. The court sentenced a man to a suspended sentence and to reading the works of Ukrainian writers about Soviet repressions for advocating the occupation of the south of Ukraine and the creation of "Novorossiya." Starting from 14 February 2022, the man was spreading pro-Russian propaganda on the Russian social network *Odnoklassniki*, which is blocked in Ukraine, publishing calls to fight against the "Kyiv Nazi government of drug addicts" and to unify the southern and eastern provinces into "Novorossiya." He was charged with publishing calls to violently overthrow the government of Ukraine and to encroach on its territorial integrity.

During the court hearings, the accused admitted his guilt, and had no prior criminal record. The court did not establish any aggravating circumstances. However, as noted by the court, shortly after the publication, in connection with the military aggression of the Russian Federation against Ukraine, the Decree of the President of Ukraine No. 64/2022 of 24 February 2022 imposed the martial law. Currently, the military aggression continues, and in the specified conditions, the imposition of

the least severe punishment cannot be appropriate for the committed act. The task of criminal proceedings is to protect the individual, society and the state. However, criminal proceedings cannot have the character of persecution. The Constitution of Ukraine guarantees the right of a person to freely choose his or her views, but their expression can take place only within the limits that are not prohibited by law. The court believes that the main purpose of imposing punishment for crimes against the state is the education of a person as a part of this society. Excessively severe punishment will not have the consequences that would lead to a decrease in the number of ideologically motivated crimes. Taking into account the above and the gravity of the crime, the court believes that the goal of punishment can be achieved by probation. As one of his main duties during the probation, the court obliged PERSON_1 to read the works of Ukrainian writers, namely *Tigrolovi* by Ivan Bagryany, *Yellow Prince* by Vasyl Barka and *Maria* by Ulas Samchuk. All of them are about the Soviet repressions against Ukrainians.

In the opinion of the court, this will bring the required educational effect, and will be necessary and sufficient for the correction and prevention of new crimes on the part of the accused. Considering the difficult financial situation of the accused and taking into account the requirements of Article 77 of the Criminal Code of Ukraine, the court decided against additional punishment in the form of confiscation of property.

These are not isolated examples of judicial practice regarding the imposition of obligation on the accused to read books under Article 76 of the Criminal Code of Ukraine. It seems that it might have a good remedial potential. But I would also like to see analytics on these issues: How successful such requirements were in the opinion of the probation authority? Did the accused really read the relevant books? Did they understand what they read? How did it affect them later and how did the probation authority check it?

Non bis in idem

Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms says: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State." According to Article 61 of the Constitution of Ukraine, "No one can be brought twice to criminal responsibility of the same type for the same offense." In accordance with Part 3 of Article 2 of the Criminal Code of Ukraine, this principle is enshrined in relation to criminal liability.

The principle of *non bis in idem* (*ne bis in idem*) should be considered in three aspects: as a prohibition of repeated criminal prosecution and punishment of a person on the territory of the same state; as a prohibition of criminal prosecution of a person on the territory of one state, if such a person was convicted or acquitted for the same act on the territory of another state; and as a prohibition of trial in a national court (and in some cases—in an international one), if such a person has been convicted or acquitted of the same act by an international criminal court or tribunal, and vice versa. In the first aspect, it will not be considered a violation of the principle of *non bis in idem*, if the facts upon which a person was convicted or acquitted indicate the presence of signs of another crime; if the person was not convicted or acquitted in criminal proceedings; if there is a reopening of a trial due to exceptional circumstances, such as the discovery of evidence that did not exist or was not known at the time of the acquittal.

The application of the international principle of *non bis in idem* is largely limited by the sovereignty of each state, when a certain state considers it necessary to apply its own criminal law as the best means of protecting its own interests. The principle of *non bis in idem* is applied in the International Tribunal for the former Yugoslavia and the International Criminal Court in relation to its own decisions (prohibition of retrial if a person is convicted or acquitted of the same acts by the ICTY or the ICC, respectively), and regarding decisions of national courts (prohibition of retrial if a person is convicted or acquitted of the same acts by a national court). It is similarly applied by national courts in the presence of a verdict of the ICTY or the ICC (Gutnic, 2009, p. 37).

The implementation of the principle *non bis in idem* is quite complex and is also related to other principles, for instance the principle of accuracy. One of the main requirements in implementation of the principle of ***accuracy*** is correctly choose the criminal law norm.

First, military and war crimes should be distinguished, as well as crimes committed under martial law. According to Article 401 of the Criminal Code of Ukraine, criminal offenses provided for by the Criminal Code of Ukraine against the procedure established by law for carrying out or completing military service, committed by military personnel, as well as conscripts and reservists during military service, are recognized as military criminal offenses.

The concept of war crimes, as mentioned before, is defined by international treaties, in particular the Rome Statute. Therefore, war crimes concern not only a separate state, but the entire international legal order.

The Rome Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) contains provisions for crimes against humanity, war crimes, and crimes

against aggression. In particular, war crimes are provided for in Article 8 of the Rome Statute of 17 July 1998.

Chapter XX of the Criminal Code of Ukraine provides for liability for criminal offenses against peace, human security and international legal order (Articles 436-447 of the Criminal Code). Among them, in particular: propaganda for war (Article 436 of the Criminal Code), planning, preparation, initiation and waging of an aggressive war (Article 437 of the Criminal Code), violation of the laws and customs of war (Article 438), use of weapons of mass destruction (Article 439), genocide (Article 442), ecocide (Article 441), etc. The draft of the new Criminal Code of Ukraine (as of 18 May 2022), which has been developed by a group of experts since 2019, also provides for criminal liability for crimes against the foundations of international law and the international legal order, in Chapter XI. It is structured as follows: Section 11.1. Genocide, Section 11.2. Crimes Against Humanity, Section 11.3. Crime of Aggression, Section 11.4. War Crimes, Section 11.5. Crimes Against the International Legal Order (*Proyekt tekstu novoho KK Ukrayiny*, 2022). The draft Law on Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine No. 7290 of 15 April 2022 contains important provisions regarding the criminalization of certain war crimes, crimes against humanity, crimes of aggression, and criminal omissions by military commanders, however, the state has not accepted it (as of 29 June 2022) (Proyekt Zakonu pro vnesennyazmin do KK Ukrayiny No 7290, 2022).

According to Article 438 of the Criminal Code (Violations of the Laws and Customs of War), cruel treatment of prisoners of war or the civilian population, deportation of the civilian population for forced labor, looting of national assets in the occupied territory, use of means of warfare prohibited by international law, and other violations of the laws and customs of warprovided for by international treaties ratified by the Verkhovna Rada of Ukraine, as well as issuing the order to commit such actions, are punishable by a term of imprisonment of 8-12 years.

This article is quite complex and includes a number of general crimes, including rape, torture and robbery. Problems arise regarding the solution of the competition between these criminal law norms.

Rape. Although rape is one of the most common war crimes, it is rarely dealt with by international courts. Around 20,000 rapes of Kosovo women were carried out by Serbian soldiers and police during the conflict, but only one has been prosecuted to date and is currently on appeal (Karcic, Domi, 2022). Viewing rape in the context of wartime genocide has to do with reflecting on women's desire to reproduce in the future. However, only six men were found guilty of crimes committed during the Kosovo war by the International Criminal Tribunal for the former Yugoslavia (ICTY).

The first international treaty to explicitly prohibit sexual violence was the Hague Convention of 1907. The Statute of the International Criminal Tribunal for the former Yugoslavia (1993) included rape as a crime against humanity alongside other crimes such as torture and extermination when committed during armed conflict and directed against the civilian population. In 2001, the ICTY became the first international court to convict a person charged with rape as a crime against humanity. The International Criminal Tribunal for Rwanda (ICTR, 1994) also recognized rape as a war crime and a crime against humanity. The Rome Statute of the International Criminal Court, in force since July 2002, defines rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or "any other form of sexual violence of comparable gravity" as crimes against humanity when committed as a widespread or systematic attack.

It is encouraging that such a provision is included in Clause 6 of Article 11.4.5. of the draft of the new Criminal Code of Ukraine (as of 18 May 2022). In particular, a person who, in accordance with the policy of a party to an armed conflict that provided for a large-scale or systematic violation of the norms of international humanitarian law, seriously violated such norms that apply both in international armed conflicts and in armed conflicts of a non-international nature: 1) tortured a person or carried out other inhuman treatment of that person, 2) inflicted severe violence against a person, 6) raped, forced into sexual slavery, forced into prostitution, forced pregnancy, forced sterilization or other form of sexual violence, which constitutes a serious violation of Article 3 common to the four Geneva Conventions.

Since the beginning of Russia's armed aggression against Ukraine, the hotline of the Commissioner for Human Rights has received information about violent crimes committed by the Russian Federation, including those against sexual freedom and sexual integrity of a person (Mazurenko, 2022). In February 2022, the ICC announced that it would begin an investigation into alleged war crimes, including rape, committed in Ukraine since 2013.

Secretary General of the Council of Europe Marija Pejčinović Burić emphasized the need to protect women and girls during the war in Ukraine. She stressed that trying to escape conflicts, women and girls become even more vulnerable and at risk of violence, sexual violence and rape. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) complements the 1951 Geneva Convention relating to the Status of Refugees and requires its 35 member states to develop gender-sensitive reception and support services for asylum seekers (*Newsroom*, 2022). This situation calls for viable humanitarian corridors, which are essential for the safe passage of thousands of displaced persons fleeing death and destruction. These are mainly women and

children. Also, the government should focus its attention on the implementation of international standards in this area.

In the context of this principle, the ECtHR decided in the case Tsonyo Tsonev v. Bulgaria (application no. 35623/11). In November 1999, a fight broke out between Tsonyo Ivanov Tsonev and G.I. in the latter's house. Administrative proceedings were immediately opened and ultimately a fine of 50 Bulgarian levs was imposed. But criminal proceedings were also opened against Tsonev, and only in December 2010 he was sentenced by a court to 18 months of imprisonment. The prosecution assumed that the criminal proceedings were conducted in relation to the physical injuries the man inflicted on the victim, while the administrative proceedings were opened in connection with the fact that he entered the victim's house and physically assaulted him. The prosecutor believed that this was not duplication, but rather a double proceeding in connection with the combination of the two crimes. Mr. Tsonev contested such decisions and appealed to the ECtHR. Referring to Article 4 of Protocol No. 7 (right not to be tried and punished twice), he complained that he had been tried and punished twice for the same crime.

The ECtHR drew attention to the fact that the administrative and criminal proceedings essentially pursued the same goal, namely, punishment for the applicant's socially unacceptable behavior in the context of the dispute. The facts established as part of the administrative offense proceedings were not taken into account in the criminal proceedings. Only evidence gathered during the criminal investigation was used there. The administrative fine was also not taken into account by the criminal courts when sentencing. Therefore, the ECtHR found that there was not a sufficiently close connection between the administrative and criminal proceedings. Therefore, they cannot be considered as part of an integrated scheme of sanctions in domestic legislation to punish the socially unacceptable behavior of the applicant. Thus, Mr. Tsonev was brought to court and punished twice for the same offense in violation of his right in accordance with the principle of *ne bis in idem* and the authorities did not admit their inability to protect this right. Thus, Article 4 of Protocol No. 7 of the Convention on the Protection of Human Rights and Fundamental Freedoms was violated.

The classification of an act simultaneously as a general and a war crime may also result in similar problems. Therefore, it is necessary to determine the qualifications and jurisdictional powers of the relevant institution.

Article 20(1) of the Statute of the ICC prohibits a new trial by the ICC against a person for an act for which such a person was found guilty or acquitted by the ICC (a similar article of the Statute of the Tribunal (Article 10) does not prohibit the Tribunal from re-prosecuting a person who was convicted or acquitted. Thus, the Statute of the Court, in comparison with the Statute of the Tribunal, relates another

component to the principle of *ne bis in idem*: the prohibition of retrial by the Court of a case against a person who was convicted or acquitted by the Court for the same act). Such re-examination is allowed only in the case of appeal and revision of the decisions of the International Court of Justice on the grounds and in the manner provided for in Part 8 of the Statute of the International Court of Justice. In the event that a person was found guilty of committing a crime or was acquitted by the ICC for the crime provided for in Article 5 of the Statute of the ICC (this article provides for a list of crimes that fall under the jurisdiction of the Court; such crimes include: a) the crime of genocide; b) crimes against humanity; c) war crimes; and d) a crime of aggression), then the case against such a person cannot be further considered by another court. It should be emphasized that, unlike the Statute of the ICTY, which provides for the prohibition of repeated criminal prosecution by a "national court" (Article 10(1)), the Statute of the ICC (Article 20(2)) establishes the prohibition of repeated criminal prosecution "by another court." The latter category, in addition to national courts, should also include international criminal courts and tribunals. Clause 3 of Article 20 of the Statute of the International Court of Justice provides for the application of the principle of *ne bis in idem* of the International Court of Justice in the event that a person has been convicted or acquitted by "another court." According to Article 20(3) of the Statute of the International Criminal Court, if a person was convicted or acquitted by another court for an act that is also prohibited by the content of Article 6 (genocide), Article 7 (crimes against humanity) and Article 8 (war crimes) of the Statute of the ICC, then the case against such a person cannot be considered by the ICC for the same act. An exception to this norm is provided for those cases where the proceedings in another court: a) were intended to insulate the relevant person from criminal liability for crimes falling under the jurisdiction of the ICC or b) for other reasons, were not conducted independently and impartially, in accordance with norms of due process of law, recognized by international law, and were conducted in such a way that, under the existing circumstances, did not meet the purpose of bringing the person in question to justice (Gutnik, 2009, p. 37).

O.I. Moiseev claimed that the repeated prosecution of a person under the Criminal Code of Ukraine for crimes committed outside its borders does not contradict national and international law. At the same time, the expediency of this is indicated only in those cases where such crimes encroach on the interests of Ukraine or legal entities registered in Ukraine, or the rights and freedoms of citizens of Ukraine and stateless persons permanently residing in Ukraine, and if the final decision, which was adopted in relation to these persons by the competent body of a foreign state, clearly does not correspond to the severity of the committed act (Moiseev, 2007, p. 11).

It also does not correspond to the principle of individualization of criminal responsibility. It is necessary to be careful with implementation of the principle of qualification accuracy. Legal qualification directly affects the issue of bringing the perpetrators to justice, and the use of incentives and post-criminal measures. It is necessary to distinguish between theft in the conditions of martial law and looting. Rape during war must be seen in the context of genocide of a nation in connection with the purpose of denying women the desire to give birth in the future, with the intention of terrorizing the population, destroying communities and changing the ethnic composition of the next generation. Forced sexual intercourse during war is also used to deliberately infect women with life-threatening diseases. It is also a tactical measure during war aimed at achieving the goals of the aggressor. It is not only about direct sexual violence, but also about the psychological violence of children, in front of whom their mothers were raped. Therefore, such acts should not be classified as crimes against sexual freedom and integrity, but as crimes against humanity (Timofieieva, 2022).

Non-observance of the principle of accuracy of criminal-legal qualifications and the legal nature of the act are the factors that affect the implementation of a number of other provisions.

In particular, such articles have different sanctions, different conditions for compensating victims, different conditions for the use of post-criminal means, in particular incentives (terms of conviction, use of parole, etc.). In particular, according to part 5 of Article 49 of the Criminal Code, the statute of limitations does not apply in the case of criminal offenses against the foundations of national security, peace and security of mankind.

There are also different guarantees for protection. In particular, the protection of sexual freedom is not a reason for applying Part 5 of Article 36 of the Criminal Code of Ukraine.

4. Interpretation of the Principles in the Practice of the ECtHR

The practice of the ECtHR includes both general-law and special-branch principles. In particular, the practice of the ECtHR reflects the principles of subsidiarity (the cases of Siredzuk v. Ukraine, Volovik v. Ukraine, Mala v. Ukraine, Menshakova v. Ukraine), legality and legal certainty (the cases of *lex certa*), non-retroactivity and *lex mitior* (the cases of Maktouf and Damjanović v. Bosnia and Herzegovina), *nulla poena sine lege parlamentaria* (Article 7 of the Convention), *non bis in idem* (Article 4 Protocol 7, the cases of Melnyk v. Ukraine, Serkov v. Ukraine, Koretsky and

Others v. Ukraine), the principle of proportionality and necessity, the principle of presumption of innocence (Part 2, Article 8 of the Convention, the cases of Garnaga v. Ukraine, Kotiy v. Ukraine), the principle of dynamic interpretation of the Convention and the principle of autonomy of interpretation (Petrova and Chornobryvets v. Ukraine, Zubko and others v. Ukraine, Zamula and Others v. Ukraine, Suk v. Ukraine, Luchaninova v. Ukraine) and others.

Criminal law has been repeatedly called a negative constitution (V.O. Navrotskyi, V.O. Tulyakov). It is fair enough, because constitutions, conventions and international documents provide for fundamental rights that require protection. In particular, this refers to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Criminal law provides such protection, provides criminal liability for violations of fundamental rights.

The Principle of Necessity and Expediency

One of the components of ensuring the right to privacy is the degree of informing the population about the real state of combating terrorism and its risks and dangers for the population. In accordance with Part 4 of Article 3 of the Council of Europe Convention On the Prevention of Terrorism of 16 May 2005, each part seeks to promote the development of public awareness of the existence, causes, and seriousness of terrorist crimes, the threat they—as well as other crimes set forth in the Convention—pose, and to take into account the encouragement of the public to the provision of actual, specific assistance to its competent authorities, which may contribute to the prevention of terrorist crimes.

At the same time, in matters of combating terrorism, transnational crimes, and especially war crimes, international crimes, crimes against humanity ora crime of aggression, it is necessary to pay attention to ensuring a balance between security and freedom.

As noted by V.O. Tulyakov, the pathological fear of crime and terrorism is expressed in panic, obsessive phobias of becoming a victim, in the perception of any environment as socially dangerous, in aggressive reactions, in the privatization of the security industry, in the formation of a shadow arms market. Cultivation of pathological reactions of this kind is quite important both for certain circles of the political elite and for criminality, since this is what determinesthe adoption of any laws that limit the rights and freedoms of citizens in favor of public security, diverts the eyes of the people from the real state of affairs, allows manipulation of public consciousness. Vague and inconsistent views, readiness to agree with any extreme measures of the government to protect personal integrity, forming an image of the enemy—

this is far from a complete list of typical situations promoted by fear of terrorism (Tulyakov, 2000, pp. 205-209). The question is: what are we willing to agree to in order to ensure security from terrorism and other crimes of an international nature?

In particular, in the appalling conditions of the war in which Ukraine has found itself, almost any mistake of the law enforcement system, abuse or negligence can be attributed to the war. This is unacceptable in a legal state. In particular, there are a number of cases where the court gives permission to search a person if he or she has made calls to Russian phone numbers. Crimea AR is not under Ukrainian control since 2014, the territories of the so-called DPR and LPR and the city of Kherson also remain outside of its control. The networks of Russian mobile operators are used in these territories. But Ukraine has not given up these territories. They are Ukrainian and Ukrainians live on them. This means that the search is carried out on the basis of calls to Ukrainian relatives who are unable to leave the said territories. Even if no confirmation of terrorist activity is found, the person does not receive any compensation, not to mention the issues of reputation, particularly in the eyes of neighbors, colleagues, etc.

The category "security" is relative. Potential victims may subjectively feel safe, but this only means that they, consciously or no, simply set an acceptable level of danger or threat for themselves. When the threat seems acceptable to them, they simply feel safe.

As noted by V.S. Kantsir, determining the specific limit of the terrorist threat to people is a rather complex and vitally important task, and it is solved by each specific subject—a person, society or state, primarily based on accumulated previous experience, forecasting the development of a particular real situation, available resources and means to deal with a specific threat, the possibility or absence of outside help. A special role in this situation is played by the risk perception developed in people. An error in the assessment of the terrorist threat (overestimation or underestimation) is the main prelude to catastrophic errors in decision-making (Kantsir, 2011, p. 268).

The state is even now ready to give up the fundamental human rights, freedom and security of its citizens, and morality for the sake of safety from certain crimes, in particular, from especially serious crimes of a cross-border dimension. They include, for example, terrorism, human trafficking, sexual exploitation of women and children, illegal drug and weapons trafficking, money laundering and counterfeiting, corruption, computer and organized crime.

In order to prevent crime, the state, at the level of the law, allows to deviate from the absolute prohibitions of encroachments on property, health and even human life, as well as privacy. The state justifies such steps by the lack of other means to counter crime. At the same time, it is necessary to remember that such concessions are al-

lowed for the purpose of ensuring human rights and freedoms, and not the other way around.

When applying repressive measures, it is necessary to maintain an appropriate balance between the need to take protective measures and the preservation of human rights and freedoms. There is no democracy without them. Democracy, if it is worth anything, has no right to use unacceptable methods in the fight against its opponents (Skomorokha, 2002, p. 38).

At the same time, I.M. Gromovchuk believes that states, for anti-terrorist purposes, often ignore or even violate human rights' standards stipulated by international law regarding the limitation and deviation of human rights provisions from human rights standards, and there is also a violation of the principle of proportionality. According to Gromovchuk, if anti-terrorist measures can violate the human rights for the protection of which they are used, their effectiveness and expediency are reduced. In addition, the fight against terrorism organized in this way increases the criminal motivation of the organizers and perpetrators of terrorist acts (Gromovchuk, 2014, pp. 10-11). And one can fully agree with this view.

The European Convention has developed its jurisprudence to meet the requirements of the fight against terrorism. The Court clearly expressed the view that it is the duty of governments to fight terrorism because it is a fundamental attack on democracy and the rule of law. States must have the capability to effectively defend themselves against terrorism, and human rights law must respond to this need. The European Convention must be applied in such a way as to allow states to take reasonable and proportionate measures to protect democracy and the rule of law. The role of the European Court of Human Rights strikes the right balance between the need to take all appropriate safeguards and the duty of all to avoid undermining the rights and freedoms that underlie and are a "prerequisite" for democracy. The Court showed that it is possible to successfully fight terrorism while at the same time protecting those rights that characterize states as democratic (Hedigan, 2004, pp. 431-432).

In particular, in the case of Maskhadov and others v. Russia, application No. 18071/05 of 6 June 2013, the European Court of Human Rights recognized a violation by the Russian Federation, which refused to hand over the body of Aslan Maskhadov, one of the leaders of the Chechen separatists, to his relatives in the unrecognized Chechen Republic of Ichkeria (ChRI). The widow Maskhadova and her two children filed a complaint with the ECtHR. According to the applicants, the anti-terrorist legislation, on the basis of which Moscow refused to hand over the body of the deceased Aslan Maskhadov, is discriminatory, as it is applied exclusively to Chechens and other Muslims.

The authorities refused to hand over the terrorist's body because it could cause riots. The state chose security with such actions. At the same time, such actions had a punitive nature and shifted the burden of responsibility of the deceased to the relatives. This violates the principle of proportionality.

The ECtHR supported the applicants, recognizing that the Russian Federation violated several articles of the European Convention on Human Rights—right to respect for private and family life (Article 8), freedom of religion (Article 9), and prohibition of discrimination (Article 13 and Article 14).

In countering any crime, including terrorism, the values of a legal democratic state must be preserved. It seems that the decision regarding the unhindered removal of the bodies of Russian soldiers from the territory of Ukraine, giving the relatives of these soldiers the opportunity to know about their death or that they are prisoners of war, etc., is absolutely correct.

According to the decision of the ECtHR in the case of Del Río Prada v. Spain No. 42750/09 of 21 October 2013, the sentence for sixteen persons convicted of terrorism was reduced due to the work performed by them in prison, although they were sentenced to a total of over one hundred years in prison. The interpretation of the law to the detriment of the convicted was based on a policy of full execution, not inherent in the Criminal Code of 1973. Some judges recognized that the reasons of criminal policy could not in any case justify a departure from the principle of legality, even in the case of a terrorist and an unrepentant murderer (*Del Río Prada v. Spain*, 2013). No matter what serious crime a person commits, the law should provide for a procedure for reducing the term on the basis of the person's post-criminal behavior. Long terms of imprisonment, including life imprisonment, without a legal procedure for reducing the term are not humane and contradict fundamental human rights as provided for in the ECHR. In addition, they do not encourage correction. A person who received a life sentence and cannot count on early release seems to be given permission to commit other crimes. There will be no more lifetimes after all.

The main means of achieving security should be the care for the integrity and stability of society, and therefore the fight against any manifestations of discrimination and injustice. Without the unity of society, there can be no effective fight against terrorism (Skomoroha, 2002, p. 42).

The Right to Life (Article 2 of the Convention)

Article 2 of the Convention enshrines the right to life and most vividly reflects the principle of respect for human rights, the principle of humanism that perceives human life as a value. But this right is not absolute. It has certain exceptions.

Deprivation of life shall not be considered as committed in violation of this article if it results from the use of force strictly necessary: a) to protect any person from unlawful violence; b) to make a lawful arrest or to prevent the escape of a person lawfully detained; c) when taking lawful actions to suppress a riot or insurrection.

Certain aspects of these exclusions in the context of paragraph a), in particular, the right to necessary defense (Part 5 of Article 36 of the Criminal Code), as well as the right to protect the homeland, are considered in the context of the implementation of the principle of encouraging lawful behavior. At the same time, there are still enough questions regarding the compliance with such provisions of Article 2 of the Convention.

I.V. Hloviuk has already published her opinion regarding this questions (Hloviuk, Zavtur, 2022). For instance, harming a civilian who received a weapon could present difficulties in terms of qualification. Would the person still be a civilian and an attack on him or her would be considered as a war crime under Article 8 of the Rome Statute or (since the person was armed) were these acts compliant with the customs of war? In accordance with Article 2 of the Law of Ukraine On Ensuring the Participation of Civilians in the Defense of Ukraine No. 2114-IX of 3 March 2022, the use of firearms obtained in accordance with this Law by civilians is carried out similarly to the use of weapons by military personnel during their performance of tasks in repelling armed aggression against Ukraine in accordance with the procedure approved by the Cabinet of Ministers of Ukraine. According to Article 4 of the Law, during the martial law, citizens of Ukraine may participate in repelling and deterring the armed aggression of the Russian Federation and/or other states, using their own weapons, sports weapons (pistols, revolvers, rifles, smoothbore firearms), hunting rifles, and ammunition for them.

At the same time, in such circumstances, they lose their civilian status and are perceived by the aggressor as a legitimate target. Of course, in the situation that has developed in Ukraine, any means should be used to repel aggression and bring our victory closer. But this does not relieve the state of responsibility for involving untrained civilians in military operations, exposing them to even greater danger.

Also, in this context, attention should be paid to the involvement of actually untrained people in military service and territorial defense, and the lack of possibility to be discharged from the Armed Forces of Ukraine on the basis of a serious combat wound.

In particular, 2 March 2022 was one of the most appallingdays in Kharkiv. Throughout the day, the city was subjected to rocket attacks. An enemy plane dropped two bombs over one of the locations of military personnel in the city. As a result, several soldiers died and many were wounded. One of the injured is a young man (29 years old). He lost a critical amount of blood and was operated on. As a re-

sult, he lost an eye and suffered many other injuries classified as causing disability. After the operation, he was granted a one-month leave. After the short reabilitation, the man continued to serve in unsanitary conditions. He was transferred to another unit, then to the front line. The commanders did not explain anything.

According to the current legislation, namely in accordance with Decree No. 402 on Approval of the Regulation on Military Medical Examination in the Armed Forces of Ukraine of 14 August 2008, servicemen who were injured or suffered injuries that led to disability, for example, the loss of one of the limbs (Article 63b) or the loss of an eye (Article 31b), cannot be released from military service during martial law. Instead, such servicemen receive the status of limited suitability for military service and remain in the ranks of the Armed Forces of Ukraine.

On the basis of this case, petition No. 22/148470-ep was written with a request to provide an opportunity for servicemen who became disabled during hostilities and during the service related to the defense of the homeland to be discharged from military service upon their request. People cannot continue to serve in such a situation. This is certain death, if not from bullets, then from health complications. Moreover, it constitutes a violation of Article 2, as well as a manifestation of inhuman treatment in the context of Article 3 of the Convention.

In addition, according to the Prosecutor General's Office, on 2 March, as a result of shelling, the building of the State Gymnasium providing enhanced physical training "Cadet Corps" and three cars were damaged. During the airstrike, two people were killed and nine injured. A three-story residential building was also damaged, and five damaged cars were found near it.

Also on 2 March, four policemen were killed and dozens injured when a Russian rocket hit the police headquarters. According to data collected by a Kharkiv human rights group, 10 civilians were killed, 39 civilians were injured, and more than 20 houses were damaged (*Kharkiv human rights group*, 2022).

Ensuring the Inadmissibility of the Death Penalty and Preventing Inhumane Treatment of Prisoners of War

The European Court of Human Rights decided on provisional measures in the case of Saadoun v. Russia and Ukraine (application no. 28944/22) concerning a citizen of Morocco and a serviceman of the Armed Forces of Ukraine who surrendered to Russian forces during the recent hostilities and have since been sentenced to death in the so called "Donetsk People's Republic" (DPR). The court, in particular, indicated to the Government of the Russian Federation in accordance with Rule 39 of

the Rules of Court that they must ensure that the death penalty imposed on the applicant is not carried out; to ensure proper conditions of his detention; and provide him with the necessary medical care and medication. The court also instructed the Government of Ukraine to ensure, as far as possible, respect for the applicant's Convention rights.

According to Rule 39 of the Court's Rules of Procedure, the Court may order provisional measures against any state party to the European Convention on Human Rights. The court grants such requests only on exceptional grounds where the applicants otherwise face a real risk of irreparable harm. The applicant, Brahim Saadoun, is a citizen of Morocco who was born in 2000 and moved to Ukraine in 2019 to study in Kyiv. In November 2021, he left Kyiv to undergo military training, and later was assigned to military service in the 36th separate marine brigade of the Armed Forces of Ukraine in Mariupol, Donetsk Province. Against the backdrop of the war in Ukraine, the Russian authorities announced on 13 April 2022 that 1,026 Ukrainian servicemen from the applicant's brigade had voluntarily laid down their weapons and surrendered to Russian forces in Mariupol.

Since then, the applicant has been charged with crimes under Article 323 (forcible removal of government or retention of power), Article 430 (participation in armed conflict or hostilities as mercenaries) and Article 232 (facilitating the training in terrorist activities) of the Criminal Code of the DPR. On 9 June 2022, a "court" of the DPR sentenced him to death. Two more individuals, British citizens, were also sentenced to death by the same "court," on the same day.

On 14 June 2022, the applicant's representative applied to the Court under Rule 39 with a request to ensure his Convention rights. Hearing the application for interim measures on 16 June 2022, the European Court decided to instruct the Russian government that they must: "(a) ensure that the death sentence imposed on the applicant is not carried out; (b) ensure respect for the Convention rights of Mr. Brahim Saadun, in particular compliance with Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment and punishment) of the Convention, ensure proper conditions of his detention and provide him with necessary medical care and medication." The Court emphasized that the question of jurisdiction in the area where the applicant is detained is under active consideration by the Grand Chamber of the Court in the case of Ukraine and the Netherlands v. Russia (applications Nos. 8019/16, 43800/14 and 28525/20).

The court asked the Russian government to provide information within two weeks to show what actions and measures their authorities have taken to ensure respect for Mr. Brahim Saadun's Convention rights. In this context, it reminded the Russian government that the provisional measure granted on 1 March 2022 in

the case of Ukraine v. Russia (X) (No. 11055/22) remained in force (*European Court grants urgent measures…* Press Release, 2022).

The issue of implementation of national legislation and provisions of the Convention in *non-controlled territories* is also interesting. According to the Resolution of the Grand Chamber of the Supreme Court of 12 May 2022 in the case No. 635/6172/17 (proceedings No. 14-167ts20), the state does not bear property liability to the victims for all crimes that remained unsolved. In order to satisfy a claim for compensation by Ukraine for damage (property, moral) caused by terrorist acts, the court should establish a violation by Ukraine of its specific obligation under the Convention. And to this end, the court should find out: a) the grounds of the claim (circumstances that justify the claim); b) whether Ukraine had, within the meaning of Article 1 of the Convention, jurisdiction over the guarantee of rights and freedoms in the territory where, according to the claimant, the violation occurred; c) in the case it had the jurisdiction, whether it fulfilled its contractual obligations from such a guarantee in the relevant territory (if non-fulfillment or improper fulfillment of a specific obligation occurred, what it was, what the consequences of this were and whether the cause-and-effect relationship between them and non-performance or improper performance of the corresponding duty occurred); d) whether there is a confirmation of all these facts (proper, admissible, reliable and sufficient evidence). In this case, a woman died in the temporarily occupied territory of Ukraine in Donetsk Province in 2015. The cause of her death was identified as multiple blast injuries to the body as a result of the hostilities. In 2017, the son of the deceased filed a lawsuit against Ukraine for compensation for moral damage caused by the death of his mother as a result of a terrorist act. The key issues of the case were to establish whether the plaintiff's mother was under the jurisdiction of Ukraine in the sense of Article 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms and whether the state has violated some of its obligations arising from the right to life. Courts of the first and appellate instances considered that it was Ukraine that was responsible for causing moral damage to the plaintiff. Therefore, the lawsuit was partially satisfied. The Supreme Court observed that Ukraine did not control this part of its territory to the extent to prevent the death of the applicant's mother, even if it could and should have done so.

Due to a number of factors, the view and level of tolerance regarding violations of the right to life has changed, as well as the understanding of the right to life not only as a possibility of certain human behavior enshrined in domestic legislation and international legal acts, aimed at ensuring the inviolability of one's life, but also as the freedom of a person to directly realize the opportunities connected with belonging to the species Homo Sapiens, and to satisfy the necessary biological, social, spiritual, economic and other needs inseparable of a person, objectively determined by the

achievement of the level of development of humanity (broad understanding) (Yagunov, 2010, p. 10). In this context, the standard of living in the country, the quality of water, air, medicine, etc., should also be taken into account.

In particular, in the case Sufi and Elmi v. the United Kingdom applications No. 8319/07 and 11449/07 of 28 June 2011, when deciding on the issue of the impossibility of expulsion to Somalia, the ECtHR also took into account the standard of living in relatively peaceful territories.

Prohibition of Torture and Inhuman treatment (Article 3 of the Convention).

According to Article 3 of the Convention (Prohibition of Torture), no one *shall be subjected to torture or to inhuman or degrading treatment or punishment*.

This article enshrines an absolute right, that is, the state cannot under any circumstances deviate from the provisions of Article 3 of the Convention. This means that torture cannot be committed for the purpose of investigating other criminal offenses or preventing new criminal offenses, etc. Torture or inhumane treatment is unacceptable in a democratic state under any circumstances. According to this article, derogation is not possible in time of emergency (Article 15 of the Convention).

At the same time, there are certain differences in the understanding of torture by the Ukrainian legislator and in the practice of the ECtHR.

Criminal liability for torture is provided for in Article 127 of the Criminal Code of Ukraine. G.N. Telesnytskyi notes that according to the Criminal Code of Ukraine, torture can be committed only by action, while the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984 uses the phrase "or with the consent or acquiescence of a public official or other person acting in an official capacity," that is, it points to the fact that the analyzed offense can also be committed by inaction (Telesnytskyi, 2013, 241). Torture can also be committed through inaction because torture (for example, deprivation of food, drink, etc.) is one of the signs of the objective side of this act and is reflected in the practice of the ECtHR. These provisions are not taken into account by the Ukrainian legislator despite numerous changes to Article 127 of the Criminal Code of Ukraine and bringing it into line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment of December 10, 1984.

Threats to citizens. The state must respond not only to direct torture, but also to threats to citizens. The mere threat of torture already constitutes inhuman treatment. A threat by the police to torture a detained person violates Article 3 of the ECtHR and can be considered as inhuman treatment. In addition, when establishing

a violation of Article 3 of the ECHR in the form of degrading treatment, the presence of an intention to offend or humiliate the victim is also taken into account.

In the practice of the ECtHR, one can find a reflection of various manifestations of violation of Article 3 of the Convention. The model case Ireland v. United Kingdom of 1978 established techniques that could be considered torture or inhuman treatment in the context of Article 3 of the Convention.

The case Cyprus v. Turkey, Application No. 25781/94 of 10 May 2001: the military operations resulted in significant casualties, widespread arrests and detentions, and the separation of families. The atrocities of those days still live in the memory of the relatives of the victims. The Court considers that the silence of the respondent government, taking into account the real concern of the relatives of the missing persons, is rather cruel, which can be qualified as inhuman treatment under Article 3 (paragraph 157 of the decision). The court also reminds that the essence of the violation lies not so much in the fact of the disappearance of a family member, but in the reaction of the authorities and their attitude to the situation that arose when they were informed of this fact (see the decision of the Grand Chamber of the ECtHR in the case of Çakici v. Turkey, application No. 23657/94, § 98, 1999-IV, p. 156 of the decision). That is, in some cases, silence is a citizen's right. In the case of the state's obligation to inform citizens about certain events, silence and failure to provide information incertain conditions is a violation of the provisions of the Convention (Timofeyeva, 2020, pp. 136-153).

Effective investigation of violations. The positive obligations of the state consist not only in the legislative provision of the protection of human rights, but also in the effective investigation of violations of such rights. That is, the procedural and the material contexts of the Convention are closely interrelated. The ECtHR derived the obligation to effectively investigate torture from Articles 3 and 13.

The state's obligation to investigate is not so much about the result as the procedure and means used by the state to investigate (*EdEra course*, 2018). In this case, compliance with the legal procedure is a component and integral part of the principle of legality.

If the torture was carried out under the supervision of the state, the state must investigate, identify and prosecute the perpetrators, as well as compensate the victim.

The situation of limiting the investigation in the cases of allegations of ill-treatment, failure to conduct an investigation, termination, and delay is unacceptable. The investigation must be swift and independent. In addition, there should be public scrutiny of such an investigation. The victim must have a real opportunity to participate in the investigation of the criminal offense.

This issue also concerns the treatment of convicts in prisons and prisoners of war. This is one of the most controversial issues in connection with the lack of funds for their maintenance, in particular with prisoners of war.

The problems of observing the rights of convicts, ensuring proper treatment and Standard Minimum Rules for the treatment of prisoners have always existed. This is confirmed by the extensive practice of the ECtHR regarding violations of Article 3 in the context of inhumane treatment (the cases of Beketov v. Ukraine, 2019, Petukhov (2) v. Ukraine, 2019, Matushevsky and Matushevska v. Ukraine, 2011 etc.). There are also many reasons for this, from objective ones related to the limited state budget to subjective ones related to personal attitudes, prejudiced attitudes of the administration and employees of correctional facilities and pre-trial detention centers. In my opinion, more problems arise with subjective reasons.

These issues have become more acute in connection with quarantine restrictions, since it is objectively impossible to ensure appropriate conditions of isolation, hygienic conditions, etc. Moreover, this issue has become more acute in connection with the war.

Many problems arise, in particular with prisoners of war, if the requirements of the Geneva Convention are met. However, we cannot deviate from the prohibition of torture in any case. In the context of inhumane treatment, we must ensure the provision of necessary medical care, food, and hygiene products. It should also be taken into account that, in fact, military personnel of the Russian Federation commit the criminal offense provided for in Article 332-2 of the Criminal Code, "illegal crossing of the state border of Ukraine." Therefore, they can be brought to justice under this article and this will not violate any of the principles of criminal law, as well as ensure the implementation of the inevitability of criminal law responsibility. In addition, it is necessary to approach such responsibility on an individual basis, in compliance with the principle of personal *culpable responsibility and guarantees of protection*.

The Right to a Fair Trial (Article 6 of the European Convention on Human Rights)

The general requirements of fairness contained in Article 6 of the **European Convention on Human Rights** apply to all criminal proceedings regardless of the type of offense being considered. However, in determining whether the proceedings as a whole were fair, it is possible to take into account the importance of the public interest in the investigation and punishment of a particular criminal offence. In addition, Article 6 of the **European Convention on Human Rights** should not be applied in such a way as to create disproportionate difficulties for police authori-

ties in the application of effective measures to combat terrorism or other serious crimes in the performance of their duties in accordance with Articles 2, 3 and 5 § 1 of the **European Convention on Human Rights.** In the case of Engel and others against the Netherlands (§§ 82-83), the criteria for the possibility of applying the criminal law aspect of Article 6 of the **European Convention on Human Rights** were taken into account, in particular, the following: 1. domestic legal qualification, 2. nature of the offense, 3. severity of the punishment.

The first criterion is related to the possibility of qualifying offense as criminal under national law. For the examination of the second criterion (Jusilla v. Finland [GC], § 38), the following factors may be taken into account: whether a given legal provision applies exclusively to a certain group of persons, or by its nature applies to all (Bandenun v. France, § 47); whether the proceedings are brought by a representative of a public authority in accordance with his or her legal authority (Benham v. the United Kingdom, § 56); whether the legal norm has a repressive or deterrent function (Ozturk v. Germany, § 53; Bandenun v. France, § 47); whether the established legal rule attempts to protect the general interests of society, which are usually protected by criminal law (Produkcija Plus Stivtvenopodjetje d.o.o. v. Slovenia); whether sentencing to any punishment depends on proof of guilt (Benham v. the United Kingdom, § 56); how similar proceedings are qualified in other member states of the Council of Europe (Ozturk v. Germany, § 53).

The third criterion is determined by reference to the maximum possible penalty provided for by the applicable law (Campbell and Fell v. the United Kingdom, § 72; Demicoli v. Malta, § 34).

The second and third criteria enumerated in Engel and Others v. the Netherlands are alternative and not necessarily complementary: in order to decide whether Article 6 should be applied, it is sufficient that the offense in question is "criminal" in nature from the point of view of the Convention, or that this offense resulted in a penalty which, by its nature and degree of severity, usually belonged to the "criminal" category (Lutz v. Germany, § 55; Öztürk v. Germany, § 54). The fact that the offense is not punishable by imprisonment is not in itself determinative, since the relative weakness of the sanction does not deprive the offense of its inherent criminal character (ibid., § 53; Nicoleta Gheorghe v. Romania, § 26). However, the cumulative approach can also be applied if a separate analysis of each criterion does not allow reaching a clear conclusion about the existence of a criminal charge (Bandenun v. France, § 47) (*Dovidnyk iz zastosuvannya statti 6 Konventsiyi*, 2019).

The duration of strict arrest of two days was recognized as too short to belong to the category of "criminal law."

Access to court. The state can limit access to court to a certain group of persons, or protect a certain group from lawsuits against them, so that no one can chal-

lenge their actions. So, for example, in the case Stanev v. Bulgaria, the applicant claimed that, contrary to Article 6 of the Convention, the Bulgarian legislation did not give him the opportunity to apply to the court for the renewal of his legal capacity. The court noted that the restriction of the procedural rights of a person who has limited legal capacity may be justified for the protection of the person, the protection of the interests of other persons and the proper administration of justice. However, such a restriction on all rights cannot be absolute.

A similar complaint was considered against Ukraine in the case Natalia Mykhaylenko v. Ukraine. The ECtHR noted that the absence of a judicial review of this issue, which seriously affected numerous aspects of the applicant's life, cannot be justified by the legitimate goals underlying the restriction of access to court for persons recognized as incompetent.

As for situations where it is impossible to challenge the actions or inaction of certain persons, this is called immunity from lawsuits.

For example, the issue of immunity of judges from lawsuits was considered by the European Court in the case Ernst and others v. Belgium. The Court concluded in it that such immunity had a legitimate purpose—to protect members of the judiciary from groundless prosecution and to enable them to perform their official duties independently and impartially. Since the applicants had exercised their right to bring a civil action against the Belgian State, the Court concluded that the requirement of reasonable proportionality had been met. However, the limitation may not be directly established by law, as in the above-mentioned cases. Such a limitation may be the result of the interpretation of laws in practice.

Court established by law. The analysis of the practice of the European Court regarding this aspect makes it possible to distinguish two conditions of compliance with the criterion "a court established by law": organizational (the organization of the judicial system must be regulated by laws) and jurisdictional (the court must act in the manner and in accordance with the powers provided for by law, within the limits of its competence).

Publicity of trial. The administration of justice and, in particular, the judicial process gain legitimacy thanks to publicity. By ensuring the transparency of the administration of justice, publicity thus contributes to the realization of the purpose of paragraph 1 of Article 6: a fair trial, whose provision is one of the fundamental principles of a democratic society within the meaning of the Convention (Belashev v. Russia, No. 2861703, decision of 4 December 2008) (*EdEra*, 2017).

Reasonable term of court proceedings. In its practice, the European Court defined the criteria that must be taken into account when assessing the compliance of the duration of the trial with the requirement of a reasonable period. Such criteria include the complexity of the case, the behavior of the applicant, the behavior of the

judiciary and public authorities, as well as the degree of importance of the case for the applicant (the case of Frydlender v. France, application no. 30979/96 of 27 June 2000).

It is also necessary to pay attention to guarantees of protection, in particular, for representatives of the aggressor's side brought to justice in Ukraine.

Moreover, it is necessary to pay attention to guarantees of protection for victims of war crimes. After all, when qualifying under Article 438 of the Criminal Code, in particular, relatives of the deceased are denied the status of a victim, as well as access to the materials of criminal proceedings, initiation of certain investigative actions, etc.

Property Rights (Protocol 1 of the Convention). Correlation with the principle of presumption of innocence.

According to Article 1 of Protocol No 1 to the Convention (Protection of Property), every natural or legal person is entitled to the peaceful enjoyment of his or her possessions. No one can be deprived of his or her property except in the interests of society and under conditions provided for by law and general principles of international law. However, the foregoing provisions shall in no way limit the right of the state to enact such laws as it deems necessary to control the use of property in accordance with the general interest or to enforce the payment of taxes or other charges or penalties (*Protocol No. 1 to the Convention*, 1952).

According to Article 17 of the Universal Declaration of Human Rights dated 10 December 1948, every person has the right to own property both individually and jointly with others. No one can be deprived of his or her property without reason. According to Article 13 of the Constitution of Ukraine, property should not be used to the detriment of people and society. According to Article 317 of the Civil Code of Ukraine, the owner has the right to possess, use and dispose of his or her property. The owner's place of residence and the location of the property do not affect the content of the property right.

According to Article 321 of the Civil Code of Ukraine, the right of ownership is inviolable. No one can be unlawfully deprived of this right or limited in its exercise. A person may be deprived of the right to property or limited in its exercise only in the cases and in the manner established by law. Forced expropriation of property rights may be applied only as an exception for reasons of public necessity on the basis and in the manner established by law, and on the condition of prior and full

compensation of their value, except for the cases established by Part 2 of Article 353 of the Civil Code.

Among other things, the EU sanctions were connected with freezing the assets of Russian banks, freezing the assets of high-ranking officials of the Russian Federation, diplomats, and oligarchs. In total, six packages of sanctions were adopted. Does this not contradict the principle of presumption of innocence? The legal mechanisms for ensuring the protection of European values are clear and provide specific response mechanisms in relevant decisions, directives and other documents.

The Right to Respect for Personal and Family Life (Article 8)

According to Article 8 of the Convention, everyone has the right to respect for his or her private and family life, home and correspondence. State authorities may not interfere with the exercise of this right, except when the interference is carried out legally and is necessary in a democratic society in the interests of national and public security or economic well-being of the country, to prevent riots or criminal offenses, to protect health or morality or to protect the rights and freedoms of others.

The Criminal Code of Ukraine provides for criminal liability for violation of the inviolability of the home (Article 162 of the Criminal Code of Ukraine), violation of the confidentiality of correspondence, telephone conversations, telegraphic or other correspondence transmitted by means of communication or through a computer (Article 163 of the Criminal Code of Ukraine).

There may be questions about the expediency of wiretapping telephone conversations, interception of these conversations by the SBU in the aspect of compliance with the provisions of Article 8. According to the security requirements in the situation that arose in connection with the war, this is absolutely justified. The issue of the work of Anonymus regarding the hacking of Russian sites, sending spam, etc., can become problematic.

The intervention does not violate Article 8, if it is carried out "in accordance with the law," pursues a legitimate goal in accordance with Paragraph 2 and is necessary in a democratic society to achieve this goal (Volokhi v. Ukraine, application No. 23543/02, decision of 2 November 2006, p. 44).

The purpose of Article 8 of the Convention is primarily to protect an individual from arbitrary interference by state authorities in his or her affairs. But here it is necessary to talk not only about negative obligations, that is, the duty of the state to refrain from such interference, but also about positive obligations. These obligations may include taking measures designed to ensure respect for private life even in the sphere of individuals' relationships with each other (Guide on Article 8, 2021).

Children and other vulnerable persons, in particular, have the right to effective protection (X and Y v. the Netherlands, §§ 23-24 and 27, Austria v. the United Kingdom (Dec.), M.C. v. Bulgaria). Furthermore, the State's positive obligation under Article 8 to protect the physical integrity of a person may extend to matters related to the effectiveness of criminal investigations (Osman v. the United Kingdom, § 128, M. C. v. Bulgaria, § 150). Thus, states have a positive obligation inherent in Articles 3 and 8 of the Convention to adopt criminal law provisions that effectively punish rape and to put them into practice through effective investigation and prosecution. The state is obliged to protect a minor from malicious mutilation (K.U. v. Finland, §§ 45-49).

Of interest is the ruling on wearing garment that covers the face, particularly religious one (S.A.S. v. France). The ECtHR took into account the respondent state's argument that the face plays an important role in social interaction. People present in places open to the public probably do not wish to see the promotion of customs or approaches that, in fact, call into question the possibility of open interpersonal relations, which—based on an established consensus—is one of the essential conditions of cohabitation in the French society. The Court may agree that the barrier against others created by clothing concealing the face is perceived by the respondent state as a violation of the right of others to live in a space of socialization in which living together is easier. However, given the flexibility of the concept of "living together" and the associated risk of abuse, the Court must carefully examine the necessity of the contested restrictive measure (S.A.S. v. France [GC], § 122). At the same time, in connection with the coronavirus pandemic, covering the face with a mask is already considered a necessity for ensuring the safety of society, minimizing mass infections, etc. The need to identify a person has receded into the background. Although the impossibility of identification creates real terrorist and corruption threats, as well as—which is especially relevant in the reality of war in Ukraine—threats to national security.

Also, a number of problems arise in connection with the observance of environmental rights. For a long time, the violation of environmental rights was not considered within the framework of the Convention, but since 2000, relevant cases have appeared. This issue is especially relevant in connection with the damages caused by the war.

On the initiative of the "Tribunal for Putin," the partner of the Ukrainian Helsinki Union for Human Rights, the International Charitable Organization "Ecology-Law-Human" issued an analysis "Planning for the Restoration of the Environment" with the main guidelines and legislative foundations for the post-war reconstruction of Ukraine's economy, taking into account the need to preserve the environment (*Ekolohiya-Pravo-Lyudyna*, 2022). According to the authors of the analysis, the key

reforms include the reform of state environmental control and the reform of legal responsibility for environmental offenses.

The reform of state environmental control is designed to make control modern, effective and transparent with the highest possible reduction of corruption-related risks, and elimination of duplication of functions of central executive bodies in the field of environmental protection.

The reform of legal liability is designed to make such liability real, proportionate and adequate to the damage caused to the environment. The ultimate goal of legal responsibility is the preservation or restoration of the public good, for the protection of which the legal regulation is established, in this case—the environment.

An overview of the damage caused to the environment of Ukraine by the armed aggression of the Russian Federation is given, and attention is focused on the fundamental role of a healthy environment in ensuring the well-being of the population. The analysis addresses, in particular, the problem of the pollution of air (both as a result of hostilities and as a result of fires caused by them), water (surface and underground, as well as due to the destruction of water management infrastructure, from dams to treatment plants), soils (from contamination with heavy metals as a result of shelling and bombing to mechanical disruption of the soil structure), as well as the problem of the mined territories (the area of which can reach up to 15% of the territory of Ukraine, and removing the land mines, at a cost of 250 billion dollars, can last up to 70 years).

Attention is focused on the need to improve coordination between policy goals, so that biodiversity, climate change mitigation, and post-war economic recovery can be addressed simultaneously. This will increase the efficiency of the use of resources, contribute to the achievement of the goals of preserving biodiversity in compliance with the principles of sustainable development.

At the same time, in the realities of the war, when almost all countries of the world send humanitarian aid, Ukrainian supermarkets dispose of expired products. This seems to be unacceptable. There is a successful experience of using such products in other countries. In particular, one of the restaurants in Sweden, K-Märkt has launched an interesting startup. The restaurant uses products that are edible, but would spoil if not used. The restaurant does not have a menu, and the cooks use whatever is available.

Statehood andsovereignty are the values that requireone to care about the state. Not only about preserving borders, but also about preserving ecology, the quality of land, water, and air. Regarding the discussion of many such problems, an objection is often voiced that they are not urgent in the face of the war. However, it seems that environmental issues and the threat of ecological disaster are of the highest urgency now.

A ban on providing free plastic bags in stores certainly does not solve the problem, which is much more complex. At the same time, mass disposing of expired products by supermarkets across the country adds to the problem of waste disposal. A systematic solution to this issue is necessary. In particular, such measures can include: a significant reduction in the price of products as they approach their expiration date; benefits for networks that donate such products to charity or to animal shelters where they definitely need these products; processing them into fertilizers, etc.

This also primarily concerns criminal law, because it is connected with mass pollution of the sea, air, etc. One of the problems of bringing the perpetrators of such actions to justice is that Ukrainian legislation does not recognize collective responsibility.

The main principles on which the development of strategic recovery plans will be based are specified. Thus, the main principles of the post-war reconstruction of Ukraine should be as follows: 1) comprehensiveness of environmental policy and development of the country on the basis of the European Green Deal; 2) recovery that should serve the needs of Ukrainians and contribute to the sustainable development of Ukraine; 3) environmental standards at all levels of policy formation and implementation in the field of environmental protection; 4) compliance with European environmental planning tools in the development of Ukraine; 5) effective functioning and use of target/donor funds for post-war recovery and development of the green economy.

The document describes the essence of the necessary sectoral reforms in various branches of the economythat will pave the way for solving problems in the field of environmental protection during the planning of post-war reconstruction and during its implementation. The main tasks of sectoral reforms, which are an integral condition for restoring the environment to its natural state, are the changes in the field of subsoil water use. In particular, ensuring a transparent system of subsoil water use: distribution of special permits and carrying out an environmental impact assessment.

The problem of waste management is acute and is increasing every day, including due to the specific waste generated by military operations. In order to reduce the impact of this waste on the environment, it is necessary to first organize places for temporary storage of waste, divide this waste into categories, pay special attention to hazardous waste, ensure separate collection and storage, endeavor to ensure the collection of solid household waste by local self-governments, conduct an inventory of objects where waste is stored, update waste management plans in major economic regions, and to search for financing measures for safe waste management at the level of territorial communities. The main step in this direction should be the adoption of the framework law On Waste Management.

Thematic examples highlight the practice of environmental restoration and environmental preservation. Thus, the experience of Albania in the demining is described, in particular, the mechanisms of demining and the main principles of their implementation aimed at preserving the environment. The process of demining is long, so one of the quick solutions for settling the issue of mined, contaminated lands is their preserving.

In addition, the question of the feasibility of restoring infrastructure was raised using the example of a dam on the Oskil River. The expediency of rebuilding metallurgical enterprises with a focus on the introduction of decarbonization technologies, the competitive advantages of such rebuilding of enterprises as opposed to their reconstruction with previously used mechanisms, processes and technologies in the industry were noted. An example of an economically and ecologically more expedient method of restoration of war-affected landscapes is presented using the example of "approaching the natural state" of forest landscapes of Luhansk Province affected by fires.

The Right to Express Views (Article 10 of the Convention)

According to Article 10 of the Convention, everyone has the right to freedom of expression. This right includes freedom to hold opinions, receive and impart information and ideas without interference from public authorities and regardless of frontiers. This article does not prevent states from the licensing of radio broadcasting, television or cinematographic companies.

The exercise of these freedoms, as it is associated with duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions as are prescribed by law and necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent disturbances or crime, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or to maintain the authority and impartiality of the court.

Features of the information age are related to the simplification of recording and transmission of information. Consequently, many bloggers began to post relevant photos and videos of troop movements, air defense operations, explosions, etc. Information war and information defense in the modern realities of criminal law of Ukraine has received a completely new dimension.

According to Law of Ukraine No. 2160-IX of 24 March 2022, the Criminal Code of Ukraine was supplemented by Article 114-2 Unauthorized Dissemination of Information about the Transfer of Weapons, Armaments and War Supplies to Ukraine,

the Movement, Deployment or Location of the Armed Forces of Ukraine or Other Military Formations Formed in Accordance with the Laws of Ukraine, Committed in Conditions of War or a State of Emergency.

Is it justified to limit posts on the Internet that show military equipment, air defense, and the consequences of missile attacks immediately after they have happened. It seems that this is completely justified and expedient, since in this situation the issue of security prevails over the issue of freedom of expression.

Such actions can be committed either carelessly, without fully realizing the danger of such actions and their possible consequences (Part 1 of Article 114-2 of the Criminal Code of Ukraine), or with a direct intent (Part 3 of Article 114-2 of the Criminal Code of Ukraine), which is connected with the commission of such actions as a result of conspiracy or for selfish motives, or with the purpose of providing such information to the state carrying out armed aggression against Ukraine, or to an illegal armed formation. If such actions caused serious consequences (Part 3 of Article 114-2 of the Criminal Code of Ukraine), then the actions themselves could be committed both intentionally and negligently.

The attitude towards the consequences could also be intentional or negligent, depending on the person's intentions. However, taking into account the public danger of such acts for the entire country, the individual's lack of awareness and desire for such consequences or indifferent attitude towards them cannot be considered as the grounds for exemption from criminal liability or non-attribution of guilt under Part 3 of Article 114-2 of the Criminal Code of Ukraine.

According to the established practice of the Court, freedom of expression, guaranteed by clause 1 of Article 10 of the Convention, is one of the important foundations of a democratic society and one of the basic conditions of the progress of the society as a whole and the self-realization of each individual. According to Article 10(2) of the Convention, freedom of expression extends not only to "information" or "ideas" that are accepted with approval or regarded as inoffensive or irrelevant, but also to those that may offend, shock or disturb. Such are the requirements of pluralism, tolerance and broadmindedness, without which there is no "democratic society." In addition, Article 10 protects not only the content of ideas and information expressed, but also the form of their dissemination (Shydka v. Ukraine).

In the case Siryk v. Ukraine (Application No. 6428/07), the ECtHR noted (paragraph 34 of the decision) that the first and most important requirement of Article 10 of the Convention is that any interference by a state authority in the exercise of freedom of expression must be lawful: the first sentence of the second paragraph essentially provides that any restriction of expression must be "established by law." In order to comply with this requirement, the intervention must not simply be based on national legislation; the legislation itself must meet certain conditions of "qual-

ity." In particular, a norm cannot be considered a law until it is formulated with sufficient precision to give the citizen the opportunity to regulate his or her behavior: one must be able—if necessary, with appropriate consultation—to foresee to the extent that is reasonable for relevant circumstances, the consequences that his or her action may entail (see, for example, the decision in the case of Lindon, Otchakovsky-Laurens and July v. France [HR], application no. 21279/02 and 36448/02, § 41, ECHR 2007-XI).

The level of precision largely depends on the content of the norm in question, the scope of its regulation, and the number and status of those to whom it is addressed (see the decision of 28 March 1990 in the case of GropperaRadio AG and others v. Switzerland, p. 68, Series A, No. 173). The concept of foreseeability refers not only to actions whose consequences the applicant must be able to reasonably foresee, but also to the "formalities, conditions, restrictions or sanctions" that may apply to such conduct if it is found to be in breach of domestic law (see mutatis mutandis, decision in the case Kafkaris v. Cyprus, application No. 21906/04, paragraph 140).

Thus, all these criteria must also be taken into account during wartime.

According to the provisions of paragraph 1 of the Recommendation of the Parliamentary Assembly of the Council of Europe 1506 (2001) Freedom of Expression of Views and Information in the Mass Media in Europe, the right to freedom of expression of views and information is inextricably linked with the right of citizens to be informed and is a prerequisite for making decisions on the basis of reliable information. The ability to freely express ideas and opinions encourages public dialogue and, thus, stimulates the development of democratic processes in society.

Also, the right to express views, especially during wartime, is related to the issues of television and radio broadcasting, since the reliability of information in such conditions is extremely important. One of the requirements for Ukraine to obtain EU candidate status is "to overcome the influence of vested interests by adopting a law on mass media which harmonizes the legislation of Ukraine with Directive 2010/13/EU of the European Parliament and the Council of Europe of 10 March 2010 on the harmonization of certain provisions defined by laws, by-laws and administrative provisions in member states regarding the provision of audiovisual media services (*Directive on Audiovisual Media Services*) and empowers an independent media regulator."

TV channels and radio in Ukraine belong to oligarchs and cover events with their permission and according to their orders. In such conditions, it is difficult to talk about the realization of the right to information, the right to express views.

Legislative Activity. The draft of the new criminal legislation of Ukraine, which is being developed by the Working Group since 2019, should also take into account the peculiarities of European law, but also preserve national peculiarities. In particu-

lar, the developers of the new Criminal Code propose to enshrine in the Criminal Code a requirement for its mandatory compliance with the practice of the ECtHR in cases against Ukraine.

It should be noted that the approach to the development of the Criminal Code of Ukraine itself is European, democratic and in accordance with the spirit of the Convention. During the work on the new Criminal Code of Ukraine, the working group reports on social networks and on the official website of the working group, holds conferences and webinars on specific issues of the new Criminal Code of Ukraine, and takes into account the suggestions of experts. This is very revealing, since such a public discussion of the draft law, as well as the possibility of a genuine impacton the legislation (at least on the draft), has never happened before in Ukraine.

According to Article 1.2.8, the draft of the new Criminal Code of Ukraine takes into account the practice of the European Court of Human Rights. This is quite justified, because according to Article 2 of the Law of Ukraine On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights of 23 February 2006, the practice of the ECtHR is part of the legislation of Ukraine and is mandatory for application on the territory of Ukraine. The Convention and the practice of the ECtHR are an example of unification, of universal norms for all countries that have ratified it.

In addition, it is very appropriate in this context to criminalize failure to comply with a decision of the European Court of Human Rights or the International Criminal Court (Article 7.6.6). It is proposed to prosecute an official who has not complied with: a) a decision of the European Court of Human Rights, or b) a verdict, resolution or decision on a fundamental issue of the International Criminal Court (*Proyekt tekstu novoho Kryminal'noho kodeksu Ukrayiny*, 2022). There is no mention yet of legal responsibility for not taking into account EU regulations. But it is a matter of time.

International standards, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, were adopted in response to the experience of war. They are always a guide in deciding what is fair and what is not. At the same time, given the dynamic nature of the Convention, these rights acquire new meanings and new aspects of interpretation. Many of these aspects arise in connection with war.

Conclusions

After the aggressive military actions against Ukraine, the security of other countries is endangered if an effective countermeasure mechanism is not developed. It has been established that any armed invasion of the territory of another state in the 21st century is an encroachment not only on its territorial integrity but also on European values. These values have been developed over centuries as a response to the experience of war.

The law itself is a value. When the law is codified, structured, understandable and clear, a person can compare his or her behavior with this law. If a person chooses to commit a crime, he or she does it taking into account the awareness of the illegality of such an act and the inevitability of an appropriate punishment or measures for a criminal offence as provided for by the law. Therefore, the government in such a case has all the moral and legal grounds to prosecute such a person.

It is proposed to provide additional guarantees for the implementation of the decisions of international institutions against the aggressor state and to improve the mechanism of imposing sanctions against the state that has violated international agreements.

The necessity of observing human rights standards when bringing to justice persons who have committed crimes against humanity and were involved in it has been established. The civilized world must respond and provide security in civilized ways.

The concept of war crimes, genocide, murder, rape, theft is clearly provided for in international treaties and national legislations of both Ukraine and the Russian Federation. Therefore, every soldier who pulled the trigger, who used a weapon of mass destruction on residential buildings, and every commander who gave the corresponding order, should bear criminal responsibility.

It is necessary to observe the principles of criminal law. The principles of criminal law must be observed both at the level of law enforcement and law-making, as well as at the level of interpretation of normative legal acts. This is important both in peacetime and in war. However, there are certain features of this implementation. And this applies to both general legal and special branch principles.

The realization of the principle of humanism in criminal legislation is aimed at applying sufficient and necessary punishment, taking into account the principles, goals, tasks and functions of criminal law, as well as methods of criminal law regulation; as mild or severe a punishment as corresponds to the nature and behavior of the person at the time of the crime; the socio-demographic characteristics of a person; the nature of the damage caused to the victim, third parties and the state. Other circumstances of the case, including the nature and severity of the crime, as well

as pre-criminal and post-criminal behavior, are also taken into account. A balance must be observed in the implementation of the principle of humanism in relation to all subjects of criminal legal relations (the victim, the criminal, society as a whole and the state). No matter how difficult it is, it should also be implemented when qualifying and imposing punishment for crimes committed by the aggressor. This also applies to the human treatment of prisoners of war in accordance with international standards.

In the situation that has developed in Ukraine, any available methods should be used to repel aggression and bring victory closer. But this does not absolve the state of responsibility for enlisting virtually untrained military personnel in military service and territorial defense, involving untrained civilians in armed conflict, exposing them to even greater danger and depriving them of military guarantees. Also, in this context, attention should be paid to ensuring the real possibility of discharge from the Armed Forces of Ukraine on the basis of a serious combat wound suffered during the martial law.

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Chapter 4

Exchange of Tax Information in the Post War Period in Ukraine

ABSTRACT

Due to Russia's brutal invasion, Ukraine's economy is being severely damaged and according to the World Bank's forecast, Ukraine's economy will contract by up 45% in 2022. Therefore, the visionary recovery plan should address all areas of state policy, including taxation. Transformation of the tax control system of Ukraine is required for the post war period. The risk-oriented approach should be strengthened, focus should be put on voluntary compliance improvement, and cooperative compliance should be introduced. This will made tax control measures more efficient, while contributing to the investment climate. This study aims to analyze the significance of the introduction of exchange of tax information in Ukraine in the post-war period focusing on the process of Ukraine's integration with the EU. The research methods include systematic and comparative analysis of scientific literature, deduction, induction, analysis, synthesis and systems approach. This study examined automatic exchange of tax information (AEOI) from the Ukrainian perspective – expectation for the legal framework, responsible and competent authorities, business processes functioning and application of Common Reporting standard, DAC2, DAC3 and DAC7. The study examined tax acts, their implementation status and how the challenge of AEOI should be addressed. The study results provide solutions for the effective use of the AEOI data, including risk assessment and control procedures. The results show that assurance of data quality is crucial at the stage of AEOI implementation.

Keywords: automatic exchange of tax information; Common Reporting Standard, tax control

International Exchange of Tax Information

Different tax administrations have asymmetric information about the taxpayers' incomes and assets, which often creates prerequisites for tax evasion in the countries of tax residency (Darmanti, Mangkan, 2020). Thus, Keen M. and Ligthart J. E. consider that the exchange of information between tax authorities is one of the most important measures to detect the threat of cross-border tax evasion (Keen, Ligthart, 2006). Kuznietsov K. V. proposed to apply new approaches to issues of cooperation between tax authorities, including automatic exchange of information (Kuznietsov, 2006).

Taxation is one of the key elements of a country's sovereign policy. However, independent countries may not sufficiently take into account the tax rules of other countries, so it leads to gaps and frictions in the regulation of tax rules, which further creates favorable opportunities for minimizing tax liabilities of taxpayers. It is obvious that countries must join their efforts in order to successfully fight against tax abuse.

The Organization for Economic Co-operation and Development (herein "OECD") is the main international body that regulates the rules of international taxation (OECD, 2022c). OECD activities in the field of taxation are focused on the following areas:

- improvement of tax administration, tax compliance and certainty;
- economic analysis and advice on tax policy;
- exchange of tax information and ensuring tax transparency;
- procedures for the settlement of international tax disputes;
- development of instructions for the application of bilateral Conventions on the avoidance of double taxation;
- development of transfer pricing (herein "TP") rules and recommendations for their application;
- study of problems of international tax evasion, identification of schemes of tax fraud, preparation of relevant recommendations;
- determination of the ways of countries' tax modernization systems in order to adapt to the new global financial and capital markets.

According to OECD assessment, the total loss of state budgets due to tax evasion is 10% of all income tax revenues (OECD, 2022c). The global economic crisis in 2008 encouraged the governments to look for ways to increase budget revenues and stimulate economic development. Therefore, the fight against profit shifting and tax base erosion has become very important.

The OECD developed the BEPS Extended Cooperation Program to comprehensively eliminate inconsistencies and gaps in international tax legislation. Its purpose is to create unified international tax rules to solve the problem of tax base erosion

and profit shifting, to protect tax bases, and to guarantee taxpayers a high level of tax certainty and predictability. In 2016, the OECD and the G20 countries developed the BEPS Plan – Action Plan on Base Erosion and Profit Shifting. It identifies 15 actions to eliminate gaps in international tax regulation that enable hiding of corporate profits and their artificial relocation to low-tax jurisdictions where companies do not carry out economic activities (OECD, 2022b).

Many scientists studied the history and prerequisites of the BEPS Plan development and analyzed its measures. Thus, Hernández González-Barreda P. A. examined historical prerequisites of the Plan development and emphasized the need for its renewal, which should be based on a deep analysis of the tax system structure, the tax base and tax jurisdictions rules regarding the principles of taxation source and residency (Hernández González-Barreda, 2018). American scientist Brauner J. noted that the BEPS Plan initiative could change the paradigm of international tax system by introducing a transition from competition between governments to cooperation within the framework of international tax regime and provided proposals to achieve this goal (Brauner, 2014).

The BEPS Plan initiatives became cornerstones in transformation of the modern international tax system. Table 1 shows the BEPS Plan Actions. The minimum standard of the BEPS Action Plan includes mandatory four steps.

Table 1. The BEPS Plan actions from the OECD

Action	Measures
1	Tax challenges of the digital economy
2	Neutralizing the effects of hybrid mismatch arrangements
3	Designing effective rules on controlled foreign companies (CFC) rules
4	Limit base erosion via interest deductions and other financial payments relates to excessive intra-group deductions
5	Countering harmful tax practices more effectively, taking into account transparency and essence principles
6	Preventing treaty abuse so as to address treaty-shopping resulting in double non-taxation
7	Preventing the artificial avoidance of permanent establishment status
8–10	Ensure that transfer-pricing outcomes are in line with value creation
	They respectively cover intangibles, risks and capital and other high-risk transactions
11	Methodologies to collect and analyze data

Action	Measures
12	Require taxpayers to disclose their aggressive tax-planning arrangements (mandatory disclosure) to enable countries to obtain early information on potentially aggressive or abusive tax planning schemes
13	Transfer-pricing documentation and country-by-country reporting (CBCR)
14	Increasing the efficiency of tax dispute settlement mechanisms
15	Development of a multilateral document to amend bilateral tax agreements to avoid double taxation

Note: The measures included in the minimum standard for the BEPS Plan implementation are highlighted.
Source: BEPS Actions by OECD (OCED, 2022b).

As of November 2021, over 135 countries and jurisdictions are implementing 15 Actions of the BEPS Plan to tackle tax avoidance and ensure more transparent tax environment (OECD, 2021j). On 1 January 2017, Ukraine joined the Enhanced Cooperation Program within the OECD and committed to implement the four minimum steps of the BEPS Action Plan (BEPSinUA; On making changes to the Tax Code of Ukraine for the purpose of implementing the Plan to combat the erosion of the tax base and the withdrawal of income from taxation). We believe the implementation of the BEPS Plan initiatives will allow Ukraine to prevent capital shifting and set equal and transparent conditions for businesses.

The implementation of the international exchange of tax information—exchange on request and automatic exchange—is also among the OECD initiatives. Transparency and exchange of information are the basis of global efforts aimed at combating aggressive tax planning activities of multinationals (Joshi et al., 2020).

The Global Forum on Transparency and Exchange of Information for Tax Purposes (hereinafter referred to as the Global Forum) is the international body that coordinates introduction and implementation of the international exchange of tax information and ensures its effectiveness. It was reorganized in September 2009 in order to accelerate and strengthen the exchange of tax information in response to the call of the G20 Leaders (OECD, 2021h). Today, 165 countries are equal members of the Global Forum (OECD, 2021a). Ukraine became a member of the Global Forum in 2013. The Global Forum is a leading international body that ensures the implementation of internationally agreed standards of transparency and information exchange in the tax area. The Global Forum also tries to establish unified rules for all states, including non-member countries.

To support an automatic exchange of information between tax administrations on Common Reporting Standard, Country-by-Country Reporting and Tax Rulings,

the OECD launched the IT-platform OECD Common Transmission System (herein the "CTS"), whose functionality was extended for other exchanges, including on--request and spontaneous exchanges (Olenzak, 2020).

Ukraine first declared its European integration direction of development in 1993 (Decree of the Verkhovna Rada of Ukraine On the Main Directions of Ukraine's Foreign Policy) (On the Main Directions of Ukraine's Foreign Policy № 3360-XII, 1993). This decision was consolidated in the Law of Ukraine On the Basics of Domestic and Foreign Policy No. 32411-VI dated 01 July 2010 (Law of Ukraine № 2469-VIII, 2018). Article 11 determines the "Ukraine's integration into the European political, economic, and legal areas with the aim of gaining membership in the European Union" (Law of Ukraine № 2469-VIII, 2018) as one of the main priorities in foreign policy. In fact, the intensification of adjusting domestic socio-economic processes to European standards began with the adoption of this law. The Association Agreement between Ukraine and the EU was signed and ratified in 2014 (Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, 2014). In 2017, the Agreement between Ukraine and the European Community on the simplification of visa issuance was concluded and a visa-free regime with the EU was signed (*SchengenVisaNews*, 2017). The functioning of the Deep and Comprehensive Free Trade Area (DCFTA) between Ukraine and the EU began in 2016 (*Yevropeiska Pravda*, 2016). Cooperation takes place in many areas, including digitization and information society development.

Russia's aggression, the annexation and occupation of part of the territory in 2014 had a negative impact on Ukraine's significant progress towards European integration. Despite the hostilities in the eastern part of Ukraine, the Government continued to work on improving and adapting state institutions to EU rules and requirements. On 24 February 2022, the aggressor country began a full-scale military invasion of Ukraine's territory, which initiated the severance of diplomatic, trade and other relations with the aggressor state and strengthened cooperation with the European Union. In light of the Russian escalation, cooperation has increased primarily in the military sphere. However, as it is important to support the European integration strategy for Ukraine, some cooperation areas have been restored.

On 23 June 2022, the European Council granted candidate status to Ukraine, which marked the official first step toward eventual EU membership, beginning of the country's massive transformation, increased availability of financing and investments, and development of cooperation. The candidate status involves the fulfillment of a number of priority tasks, such as strengthening the fight against corruption and money laundering, carrying out the reform of the Constitutional Court of Ukraine, completing the judicial reform, adopting a number of important laws (the anti-oligarchic law, the law on media, changing the legislation on national minorities). In addition, the candidate status obliges Ukraine to harmonize legislation, including tax

law, with the legal framework of the EU. During the preparation of the Recovery Plan of Ukraine, which was presented and approved at the Ukraine Recovery Conference in Lugano, Switzerland (*Plan vidnovlennia Ukrainy*), an analysis of the EU regulatory legal acts on taxation, which must be implemented in order for Ukraine to become a member of the EU, was carried out (Annex 1) (*Priamuiemo Razom*, EU4PFM).

It is also necessary to change legislation, to build appropriate business processes in the government institutions, including the tax authorities, and provide necessary material and technical support. The EU membership does not imply any limitations on the state's autonomy in the tax policy implementation, however, mutual integration of tax authorities should be established according to the requirements of the Community. According to the EU practice, the tax authorities of the member states cooperate to exchange information, carry out joint control measures and facilitate the collection of debts owed to the state. In this aspect, the development of a legal and institutional framework for the automatic exchange of tax information (herein "AEOI") with EU member states is extremely important.

By advancing the OECD developments, the EU countries agreed to establish a procedure for the automatic exchange of information in the field of taxation between EU member states. In the EU, the exchange of tax information is regulated by Directive 2011/16/EU on administrative cooperation (herein «the DAC»), which provides the rules for spontaneous exchange, automatic exchange and exchange of tax information upon request (Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, 2011). The DAC establishes mechanisms for the participation of member state authorities in administrative investigations, mutual notification on tax rulings and exchange standardization. The DAC also provides for the designing of a secure IT system for the exchange of tax information. According to the DAC, the exchange of tax information between the competent authorities of the EU is carried out through a special joint protected IT platform CCN/CSI (Figure 1).

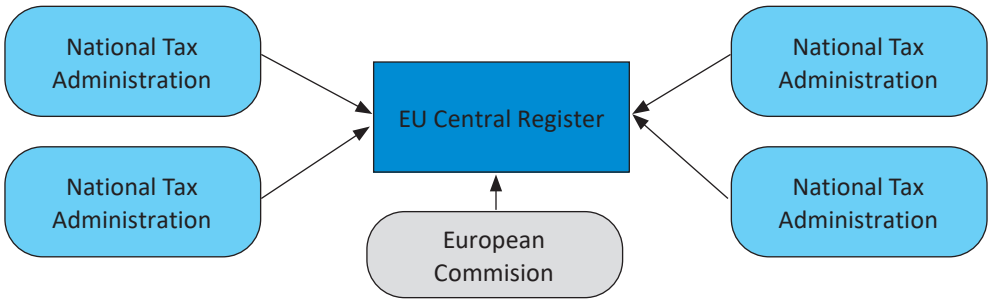

Figure 1. The process of automatic exchange of tax information in the EU according to DAC
Source: (Van Driessche, 2012).

The DAC has been amended six times through the adoption of other EU Directives, which provide the introduction of automatic exchange of certain categories of tax information:

– DAC1: introduces mandatory automatic exchange of tax information for five categories of income and capital (European Union. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC);
– DAC2: extends the area of mandatory AEOI on financial accounts (Council Directive (EU) 2014/107 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2014);
– DAC3: introduces mandatory AEOI for cross-border advance tax rulings and advance pricing agreements (Council Directive (EU) 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2015);
– DAC4: introduces mandatory reporting of international groups of companies (Country by Country Report) and exchange of such reports (Council Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2016);
– DAC5: provides tax authorities with access to beneficial ownership information collected under anti-money laundering legislation (Council Directive (EU) 2016/2258 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, 2016);
– DAC6: requires EU intermediaries to file information on Reportable Cross Border Arrangements to their home tax authorities (Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 2018);
– DAC7: provides for the exchange of information on the reporting of taxes by operators of digital platforms on the amounts of income paid to sellers who provide services or sell goods through the platforms (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

Accordingly, Ukraine will implement automatic tax information exchange procedures that function in the EU by harmonizing domestic tax legislation with the above-listed Directives, and creating institutional and technical capabilities. In addition to preparations at the state level, businesses should also take appropriate measures.

The authors of the research have considered the issues of the BEPS Plan implementation in Ukraine, which provide for the exchange of tax information in the

context of Ukraine's European integration processes: the automatic exchange of tax information regarding tax decisions (rulings) that relate to favorable taxation conditions (BEPS Action 5) (OECD, 2015a) and exchange of information according to the Country-by-Country Reporting standard (BEPS Action 13) (OECD, 2015c). The subject of the study is also the OECD Standards implementation of the automatic exchange of information on financial accounts in Ukraine and reporting platform operators with respect to sellers.

Exchange According to the CRS/ DAC 2. Objectives and International Practice of CRS Implementation

In the years that followed the global economic crisis of 2008-2009, it became necessary to finance the deficits of the state budgets by state governments; at the same time, huge amounts of financial assets, either untaxed or derived from corruption, were hidden by wealthy individuals abroad. Taxpayers widely used opportunities to shift funds to low-tax or offshore jurisdictions and hid their funds from taxation by referring to bank secrecy.

For decades, tax havens have been used to hide money derived from corruption and provide an easy way to hide tax revenues for the elites of poor countries (Actionaid, 2013). Thus, Alstadsæter A., Johannesen N. Zucman G. consider that tax evasion contributes to income and wealth inequality, since very rich individuals carry out such activities (Alstadsæter, Niels, Zucman, 2019). It is estimated that more than eight percent of global household financial wealth remained unregistered in tax havens between 2001 and 2008, which corresponds to ten percent of total global GDP (Zucman, 2013). At the same time, according to experts, it is necessary to globally make additional investments in agriculture in the amount of 0.15 percent of the average world GDP in order to overcome hunger in the world for the time period from 2016 to 2030 (Schmidhuber, Bruinsma, 2011).

To overcome this problem, the G20 countries and the OECD platform initiated the introduction of the Common Standard on Reporting and Due Diligence for Financial Account Information (herein the "CRS") (OECD, 2014). The CRS provides for the automatic exchange of information between tax administrations of jurisdictions about financial accounts that were opened by a non-resident in another country. Thus, tax authorities receive information about the financial accounts of their tax residents in other countries and send data about non-residents to other countries.

The first automatic exchange of information on financial accounts was in September 2017 between 49 jurisdictions (OECD, 2022a).

According to the Global Forum 2021 report, 102 jurisdictions exchanged information on 75 million financial accounts with a total asset value of more than EUR nine trillion in 2020 (OECD, 2021f). Today, the exchange is carried out not only by OECD member countries, but also by most of the states that were considered offshore jurisdictions (OECD, 2022a). 120 tax jurisdictions have made a commitment to implement the exchange of information on financial accounts by 2024 (OECD, 2022a). Therefore, the introduction of the CRS Standard has increased tax transparency in the world.

It should be noted that the CRS Standard provisions are not applied in the USA and that country is not planning to join the exchange procedure (Bloomberg, 2017). However, the USA is the largest financial center for now, so the exchange of tax information according to the CRS would be more effective if all attractive tax jurisdictions joined it.

CRS implementation and effective automatic exchange of information on financial accounts should ensure:

– taxation of offshore assets in the jurisdiction of their owner's tax residence;
– protection of the tax base of the exchange participating countries;
– more opportunities for domestic revenue mobilization for developing countries.

According to the Global Forum, the implementation of the CRS exchange resulted in EUR 112 billion of additional revenues (tax, interest, penalties), thanks to voluntary declaration programs and similar initiatives and offshore investigations; more than EUR three billion of additional tax revenue was received through direct information as part of the exchange procedure (OECD, 2021f).

The implementation of the CRS exchange has led to a 20-25 percent reduction in bank deposits in the countries recognized as international financial centers, according to preliminary OECD data (OECD, 2019). Scientists consider this significant decrease as direct evidence that the automatic exchange of tax information on financial accounts improves compliance of tax legislation (O'Reilly, Ramírez, Stemmer, 2021).

Today, the exchange of tax information according to the CRS standard is one of the most effective measures against tax evasion and profit shifting. Knobel A. and Mainzer M. consider that the automatic exchange of information about financial accounts does not solve all the problems caused by bank secrecy, but is an important step in the fight against tax evasion, corruption and money laundering (Knobel, Meinzer, 2014).

Many scientists have studied the reasons and consequences of the CRS introduction. In particular, Highfield R. believed that the introduction of the Standard may provide the tax administrations with an opportunity to improve tax compliance within the country through easy access to information about the accounts of financial institutions of national and foreign residents (Highfield, 2017). Ahrens L.

and others (Ahrens et al., 2021) have investigated the impact of the introduction of automatic exchange of information on financial accounts on the tax policy of the countries' governments regarding the reduction of tax competition between jurisdictions. Casi L. and Nenadic S. studied the peculiarities of the national legislation of the countries that implemented the CRS standard and provided recommendations for countries' preparation for the CRS introduction (Casi et al., 2019). Niels J. and Zucman G. think the OECD initiative to share information about accounts was the reason to stop the practice of using bank secrecy in order to avoid paying taxes (Niels, Zucman, 2014). Knobel A., Mainzer M. studied the importance of introducing automatic exchange for developing countries (Knobel, Meinzer, 2014). Darmanti. R. M. and Mangkan D. highlighted the difficulties faced by jurisdictions when implementing the Standard (Darmanti, Mangkan, 2020).

The strategic goals of using the information received under the framework of the CRS exchange are:

– increasing voluntary tax compliance;
– disclosure of information about foreign assets and sources of income;
– reducing the possibility of using local financial institutions to avoid international taxation.

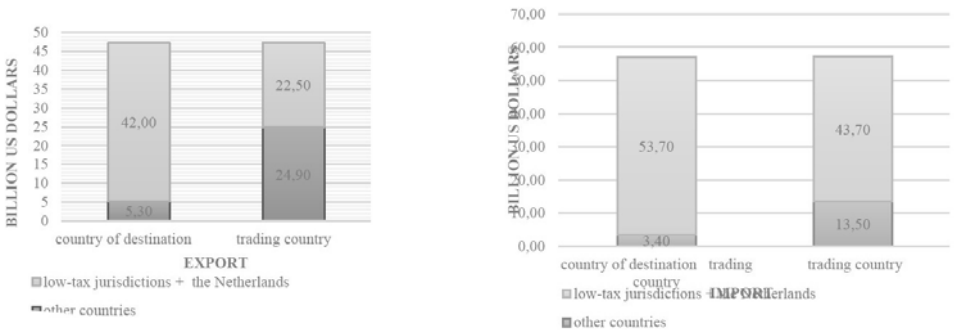

Figure 2. Structure of Ukrainian companies' payments under foreign economic contracts in 2018
Source: (Stepaniuk, Strynzha, 2019).

According to this source, two thirds of unsecured long-term loans raised by the non-financial sector of the Ukrainian economy were granted by non-resident companies registered in the Netherlands, Cyprus and the British Virgin Islands (Figure 3). Therefore, we consider that Ukrainian companies continue to widely use schemes for profit shifting.

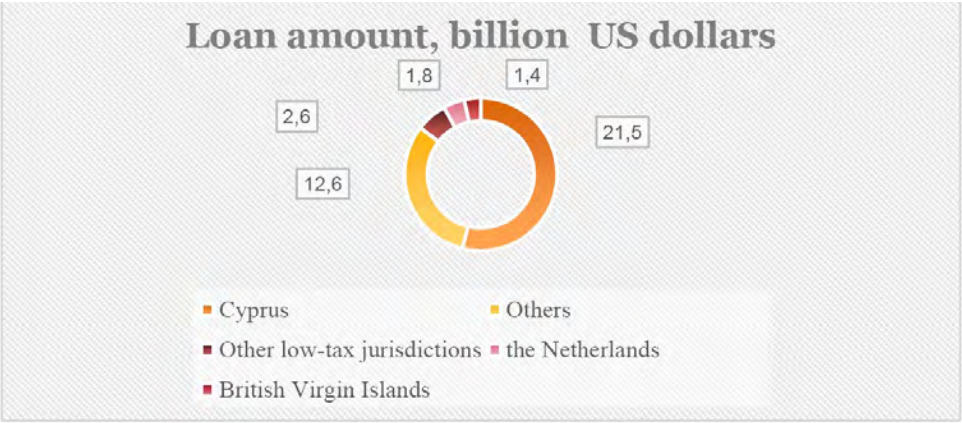

Figure 3. Amount of unsecured long-term loans, non-financial sector, in billion USD as of 1 April 2019
Source: (Stepaniuk, Strynzha, 2019).

Accordingly, it is important for Ukraine to introduce tools to find the funds moved offshore.

Rushchyshyn N. and Halko N. have proved the necessity of automatic exchange introduction of tax information in Ukraine (Rushchyshyn, Halko, 2016). They research the principles and current status of tax information exchange and emphasize the importance of regulation of this process by international organizations and legal instruments such as bilateral tax conventions based on the OECD and UN standard conventions on the avoidance of double taxation regarding taxes on income and capital; international instruments specially developed for the purposes of administrative mutual assistance in tax matters (Rushchyshyn, Halko, 2016). Kosse D. analyzed the implementation of the CRS Standard (Kosse, 2020). Halchynskyi A. S. (Halchynskyi, Haiets, 2004), Monaienko A. O. and Atamanchuk N. I. (Monaienko, Atamanchuk, 2022), Melnychenko R. V. (Melnychenko, 2020) and Gerasymenko N. M. (Gerasymenko, 2014) emphasized the importance of introduction of the automatic exchange of tax information in Ukraine.

The Ukrainian government started the CRS implementation in 2017. The preliminary roadmap for the CRS implementation in Ukraine was developed by specialists of the Ministry of Finance of Ukraine (herein the "MoF") in 2017 (AEOI CRS. Implementation guide, 2017).

In 2021, Ukraine undertook an international commitment to implement the CRS and exchange of tax information within the framework of this standard in 2023 for 2022 (Ministry of Finance of Ukraine, 2021). This commitment was reflected in the letter sent by the Government to the OECD Secretariat in August 2021. At the same

time, Russian aggression negatively affected the timing of the Standard introduction. Moreover, there may not be adequate opportunities for financial institutions to properly prepare for the Standard implementation under the martial law and there is a risk of ensuring adequate protection of information by the tax authorities. Due to the full-scale invasion of the country and the introduction of the martial law in Ukraine, the decision has been made to postpone the introduction of the CRS for one year.

However, despite the ongoing war, the Ukrainian government is continuing to work on important tax reforms. The implementation of the CRS Standard is provided for in the Recovery Plan of Ukraine, which was presented and approved at the Ukraine Recovery Conference, in Lugano, Switzerland, on 4-5 July 2022 (*Reliefweb*, 2022).

The CRS introduction is of particular importance now, as Ukraine is gaining the EU candidate status (*European Council Conclusions*, 2022). In particular, the EU Directive On Administrative Cooperation in the Field of Taxation 2011/16/EU (Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, 2011) corresponds with the provisions of the CRS. Enactment of the CRS law brings the Ukrainian tax legislation closer to the EU acquis in international administrative cooperation in the tax area: all Member States enacted CRS legislation in 2015. Therefore, Ukraine will be ready to implement European legislation in this area by building appropriate capacities within the State Tax Service of Ukraine (herein "the STS") and establishing exchange processes.

The experts consider that the CRS Standard introduction demonstrates a constant commitment to transparency and the fight against tax evasion and profit shifting, indicates a willingness to improve tax compliance at the national and international levels, and confirms the quality and capacity of the institutions (Highfield, 2017).

Researchers emphasize that the implementation of automatic exchange of tax information by developing countries is very important, because they are facing problems in the scope of providing revenues for their state budgets (Darmanti, Mangkan, 2020). Knobel A. and Mainzer M. believe that developing countries have additional obstacles in implementation of exchange procedures, as they have more needs for capacity development (Knobel, Meinzer, 2014). We consider that the post-war period in Ukraine may be more difficult and the government will have to overcome more serious challenges during the country's recovery. Therefore, it is important that the introduced exchange procedure meets the set goals and contributes to ensuring transparency and fair payment of taxes for the country's recovery from the consequences of the Russian aggression.

Today, it is crucial for Ukraine to accumulate budget revenues by implementing measures for broadening taxation base without increasing tax rates, in this case—revealing tax evasion and corruption schemes of wealthy individuals.

According to the Draft Law On Amendments to the Tax Code of Ukraine and some Legislative Acts of Ukraine Regarding the Implementation of the International Standard for the Automatic Exchange of Information on Financial Accounts (herein the Draft Law on the Implementation of CRS), the introduction of the CRS is planned for 1 July 2023, thus the financial institutions will submit their first reports in 2024 for 2023, and the first Ukraine's exchange will be in 2024 for 2023 (Figure 4).

Figure 4. Basic dates of CRS implementation in Ukraine
Source: (Draft Law On amendments to the Tax Code of Ukraine and some legislative acts of Ukraine regarding the implementation of the international standard of automatic exchange of information on financial accounts, 2022).

The OECD has developed and approved regulations and guidelines that make up an international framework regulating the exchange process under the CRS (Table 2).

Table 2. International legal acts regulating exchange under the CRS

International legal act	The content of the document
Model Competent Authority Agreement (MCAA CRS) Multilateral Agreement of Competent Authorities on Automatic Exchange of Information on Financial Accounts	• Provides an international legal framework for the automatic exchange of information according to the CRS standard • Is the legal basis for the CRS introduction at the national level
Common Standard on Reporting and Due Diligence for Financial Account Information (hereinafter referred to as CRS)	• Procedures for due diligence measures for financial accounts • Procedure for submitting reports on reportable accounts
The Commentaries on the Competent Authorities Multilateral Agreement and the CRS Standard	• Additional Guidelines on the application of the provisions of the Multilateral Agreement and the CRS Standard (they are an integral part of the Standard)

International legal act	The content of the document
Common Reporting Standard XML Schema	• Extensible Markup Language (XML) Accounts Payable Report Schema of reportable accounts, which allows to report information in a standardized manner using IT solutions and contains a data structure for storing and transmitting information electronically and in bulk
The CRS Implementation Handbook	• Explains the information that must be included in each CRS data element in order to submit the Report on Reportable Accounts

Source: (OECD, 2014; The CRS Multilateral Competent Authority Agreement; OECD, 2019a, 2018b).

The CRS is the main document that defines the rules for implementing the exchange procedure. The overview of the CRS is presented in Table 3.

Table 3. Analysis of the CRS structure

CRS Standard	The main provisions of the Chapter
Chapter I	List of information provided in the reports of financial institutions
Chapter II-VII	Rules for proper verification of financial accounts by financial institutions (due diligence procedure)
Chapter VIII	Definitions of the terms: „Financial Institutions," and their types, „Financial Accounts," and their types, „Excluded Accounts"
Chapter IX	Minimum requirements for compliance control of financial institutions by the tax authorities

Source: (OECD, 2014).

The OECD developed and approved the CRS Implementation Guidance, which is a practical handbook of the CRS implementation for tax administrations and financial institutions (OECD, 2018).

The Global Forum has also established an AEOI peer review mechanism to ensure the maintenance of exchange efficiency and monitoring of compliance with the Standard principles, as well as review of practice and improvement (Figure 5).

The Global Forum annually assesses the status of the implementation of the automatic exchange of tax information and its effectiveness, and publishes a report.

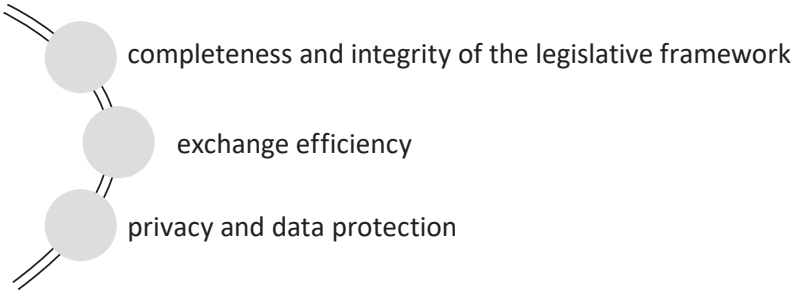

Figure 5. Global Forum expert assessment of the CRS implementation quality by jurisdictions
Source: (Global Forum annual reports).

During the implementation of CRS, there have been publicly voiced concerns that any data leakage could lead to problems with identity fraud and facilitate other criminal activities. Therefore, the OECD has developed a number of policies and procedures of information protection, and monitors their compliance.

The information transferred within the framework of the exchange procedure has a confidential status, it must be securely protected, and access must be strictly limited. The OECD has issued Guidance on protecting the confidentiality of information exchanged for tax purposes, which contains practical recommendations and a checklist on implementing procedures to ensure an adequate level of protection, taking into account the possibility of using different approaches by tax administrations (OECD, 2012). Another important document is the Confidentiality and Information Security Management Toolkit, issued by the Global Forum, which provides general guidelines for the implementation of legal and information security management (ISM) systems that ensure the confidentiality of information about taxpayers in accordance with the requirements of the CRS (OECD, 2020b).

At the same time, it should be noted that the EU countries have introduced high standards of personal data protection, which includes the information transmitted within the framework of the CRS exchange procedure. The document that regulates data protection measures is Regulation (EU) 2016/679, which Ukraine will implement in order to harmonize domestic legislation with the EU legal framework (Regulation (EU) 2016/679 of the European Parliament and of the Council 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 (Official Journal of the European Union, 2016, 2016).

In the exchange practice, there was a precedent of data breach from the databases of Bulgaria's tax administration as a result of a hacker attack and publishing them in public domain. The data included information obtained as part of the exchange

procedure. Therefore, the countries continue to work on the strengthening information security together with the OECD (Bloomberg Tax, 2019).

Adoption of the domestic regulatory framework by the jurisdiction is a necessary prerequisite for an effective implementation of the CRS. The following legislative documents will be the legal basis for the introduction of the CRS in Ukraine:

1. Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters "Automatic Exchange of Information" provides for the automatic exchange of tax information with other jurisdictions (OECD/Council of Europe, 2011; Convention on Mutual Administrative Assistance in Tax Matters; Law of Ukraine № 406-VII, 2013).
2. The Multilateral Agreement of the Competent Authorities on the Automatic Exchange of Information on Financial Accounts (herein the "MCAA CRS"), which will be the basis for the exchange and application of the CRS Standard (OECD). The agreement will be concluded on the basis of Article 6 of the Convention on Mutual Administrative Assistance in Tax Matters.
3. Provisions of the domestic national tax legislation regarding the implementation of requirements and procedures CRS.

On 16 April 2022, the MoF approved a new Procedure for Exchanging Tax Information with Competent Authorities of Foreign Countries (On the approval of the Procedure for exchanging tax information with the competent authorities of foreign countries № 118, 2022). The document defines that the STS is the authorized representative of the MoF and Ukraine's competent body for the exchanging tax information in accordance with the Convention on Mutual Administrative Assistance in Tax Matters and Ukraine's international treaties on the avoidance of double taxation.

The basis for signing the MCAA CRS is the norms of paragraph 53^{1} of subsection 10 of chapter XX of the Tax Code of Ukraine (herein the "TCU") (Tax Code of Ukraine № 2755 VI, 2010), which were introduced into the TCU by the adoption by the Ukrainian parliament of the Law of Ukraine On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine on Ensuring Balanced Budget Revenues in 2021 (Law of Ukraine № 1914-IX, 2021). Ukraine signed the MCAA CRS that facilitates the multilateral automatic exchange of financial account information on 19 August 2022 (Ukraine joined the Multilateral Agreement of Competent Authorities on Automatic Exchange of Information on Financial Accounts), and notified the OECD Secretariat on that 2023 will be the first reporting period. Thus, it fulfilled one of the conditions for joining the procedure of the automatic exchange of tax information. Therefore, there is no need to sign individual bilateral international agreements. The STS is the competent authority for the purpose of exchange under the CRS and the MCAA CRS.

According to Ukrainian law, the CRS will be considered an integral part of the MCAA CRS and a basis of tax law. There will be changes to the TCU in order to implement the rules of the CRS Standard in Ukraine (Tax Code of Ukaraine № 2755 VI, 2010). For this purpose, the Draft Law on CRS Implementation (Proekt Zakonu Ukrainy Pro vnesennia zmin do Podatkovoho kodeksu Ukrainy…) has been developed, published for public discussion, approved by the Cabinet of Ministers of Ukraine and registered at the parliament. On 16 November 2022, the Draft Law No. 8131 was approved by the Ukrainian Parliament in the first reading, on 16 March 2023, it was approved in the second reading and on 28 April 2023, it became effective as the Law No. 2970-IX (Draft Law On amendments to the Tax Code of Ukraine and some legislative acts of Ukraine regarding the implementation of the international standard of automatic exchange of information on financial accounts, 2022). The provisions of the TCU will regulate the issue of compliance with the CRS rules (compliance) and the cooperation of financial institutions with the tax bodies. It should be noted that the aspects regulated in the Standard will not be directly transferred to the provisions of the tax law. The provisions of the TCU will directly refer to the Standard as the applicable document. The Procedure for the Application of the CRS, approved by the MoF Order, will define detailed rules for the Standard application. Thus, Ukraine is implementing the CRS using the "by reference" method. The official translation of the CRS is published on the official web portal of the STS, and translations of updated Standard editions will be published therein in the case of any changes to it.

In addition to changes to the TCU, the Draft Law on the Implementation of CRS will introduce an amendment to the Law of Ukraine On Banks and Banking Activity (Law of Ukraine y № 2121-III, 2000). According to these changes, banks will disclose bank secrecy to the tax authority to fulfill the requirements of the CRS. Thus, the legal regime of bank secrecy will be partially eliminated in Ukraine. However, it should be emphasized that for the purposes of the CRS, banks will disclose bank secrecy only in respect of accounts held by tax residents of other jurisdictions (non-residents). Some jurisdictions also oblige banks to provide information to tax administrations about their tax residents for the effective implementation of tax control. Such approach is applied in the Republic of Lithuania (Law on Tax Administration 2005-06-16 IX-2112, 2005).

Implementation of the CRS by the relevant jurisdiction and further administration of the information exchange process requires the state's and financial institutions' resources (human, financial and technical). Therefore, the Plan on implementation of the CRS in Ukraine envisages a number of a legislative, methodical and technical measures. They are presented in Table 4.

Table 4. Plan on implementation of the CRS in Ukraine

Date	Measures
September 2022	signing the MCAA CRS by the STS C
October 2022	sending a request to the Global Forum on the assessment of the maturity of security management systems
November 2022-March 2023	adoption of the Law on the CRS Implementation by the Ukrainian parliament;
May 2023	approval of the MoF Order on detailed requirements for financial institutions in regard to proper verification of financial accounts.
July 2023	launching the IT-solution of the tax administration through which the exchange will be carried out
December 2023	MoF Order approving other regulatory documents that will regulate the exchange process

Source: (Draft Law № 8131, 2022).

To ensure the successfully implementation of the CRS, the Standard requires a jurisdiction to adopt domestic law and introduce the following procedures:

i) prevention of practices intended to circumvent the reporting and due diligence procedures (anti-abuse provisions);
ii) requirements for the reporting financial institutions to keep records regarding the steps undertaken to comply with the CRS and collected evidences (record-keeping requirements);
iii) audit rules for reporting financial institutions in regard to compliance and due diligence procedures and further procedures regarding the including of undocumented accounts in reporting;
iv) ensure that non-reporting financial institutions and non-reporting accounts defined by the national regulatory framework have a low risk of tax evasion;
v) effective legal provisions of coercion regarding violations (OECD, 2014).

Therefore, Ukraine should develop a number of sub-legal acts and regulations, taking into account the peculiarities of the structure of the national tax legislation, and adopt amendments to the TCU in order to fulfill the CRS requirements. We believe the MoF should approve this secondary legislation to regulate the process of reporting financial accounts and control the compliance with the CRS.

Table 5 shows the list of sub-legislation that should be developed for the implementation of the international standard of automatic exchange of information on financial accounts.

Table 5. List of secondary legislation required for the CRS implementation in Ukraine

Sub-legal act	Content of the document
The form of the reporting accounts, the procedure for collecting and reporting	The form of the report, the rules for its filing and submission by financial institutions
The Procedure on the application of the due diligence procedures of financial accounts and other issues of the application of the CRS	• Rules of the CRS application for the due diligence of financial accounts by financial institution; • Details of definitions: Existing and New Accounts, dates of completion of due diligence; • Compliance requirements: (development of internal documents; documents to be requested from clients and kept); • Issues regarding which the Standard provides for the right to choose an approach; • List of Non Reporting Financial Institutions; • List of Excluded Accounts.
The procedure for monitoring the activities of financial institutions and surveys	Rules for the monitoring of financial institutions by the tax administration.
The procedure for conducting audits of financial institutions regarding their compliance with the CRS requirements and the imposing of penalties	Rules for conducting tax audits of financial institutions by the tax administration and imposing sanctions on financial institutions and account holders.
Procedure for registration and de-registration of financial institutions that are reportable financial institutions for the purposes of the CRS Multilateral Agreement and the CRS	Rules for accounting of financial agents at the tax authorities and forms of documents for accounting: • application form of a financial institution; • the form of notification of registration; • form of notification of refusal to be registered.
Notification and decision form for residents for charging penalties under the CRS (amendments to Order of the Ministry of Finance No. 1204 dated 28 December 2015)	The form of documents for the imposing of penalties for violations of the CRS rules.
The procedure for considering a non-resident's complaint against a tax notice to a non-resident for violation of CRS requirements	Rules for an appeal hearing of a non-resident's complaint.

Sub-legal act	Content of the document
Guidance for Financial Institutions on the Application of the CRS	Guidance for the financial institutions on due diligence of the financial accounts, implementation of the CRS procedures to collect information.

Source: developed by the authors.

In order to support tax reforms in Ukraine aimed at improving tax administration and implementation of European integration obligations, the EU provides material and technical assistance. It is provided under the framework of the EU Public Finance Management Support Programme for Ukraine (herein "the EU4PFM Programme") (*Priamuiemo Razom*, EU4PFM), which is implemented under the Financing Agreement No ENI/2017/040-426 73 between the Ukrainian government and the European commission dated 12 December 2018 (Agreement on financing of the program "Support of public financial management for Ukraine – EU4PFM,2022"), and approved by the order of the Cabinet of Ministers of Ukraine dated 5 December 2018 No. 958. The EU4PFM Programme started on 18 June 2019, and among its beneficiaries are the MoF and the STS. The total budget of the EU4PFM Programme is EUR 55 million. The priorities of the EU4PFM Programme are Ukraine's ability to collect taxes through improving the exchange of tax information with other countries and preventing tax evasion, and ongoing harmonization of tax legislation with the EU legal framework and best global practices.

Therefore, the EU4PFM Programme provides support for the implementation of the OECD standards for automatic exchange of information according to the CbC and CRS standards. The EU4PFM Programme includes the following measures:

– presentation of international experience and recommendations which were given by international experts in regard to the building of business processes within the tax administration, the application of IT -solutions, the use of information within the AEOI framework for tax control;
– recommendations on the AEOI implementation in Ukraine and support in the development of a road map for the AEOI implementation;
– methodological support provided for the development of the legal framework for the AEOI implementation;
– preparation of the functional requirements for the development and implementation of the CbC/CRS IT Subsystem for the AEOI;
– funding, procurement and development of the IT subsystem "Automatic exchange of tax information under CbC Standart/CRS" as a component of the IT-System "International automatic exchange of information" (*Priamuiemo Razom*, EU4PFM).

According to the STS reports, the IT subsystem "Automatic exchange of tax information under the CbC Srandart/CRS" is being developed now; its functions include a direct verification of reports received from financial institutions, the formation of packages for exchange with the jurisdictions-participants, and the direct implementation of the exchange through the OECD CTS platform (Common Transmission System). This technical solution will be implemented in July 2023. However, in addition to the development of this IT system, it is also necessary to implement additional IT measures:

– improvement of the STS IT systems and databases to ensure the registration of financial institutions for the purposes of the CRS and administration of the data register of the financial institutions;
– modernization of the STS IT Systems to provide the functionality for submitting reports on reportable accounts for the CRS.

Besides the adoption of the legislative framework and deployment of IT solutions for the exchange, to ensure that the CRS is implemented, the STS needs to design new business processes (for the collection, processing, transmission and receipt of the data and application of the obtained information for the tax control purposes). In addition, it is crucial to determine the STS departments responsible for the following functions:

1) conducting audits of financial institutions in regard to their compliance with the requirements of the due diligence procedures and the submission of the CRS reporting, analysis and monitoring of compliance by financial institutions with the CRS regulations;
2) communication with financial institutions on the CRS application, including seminars, meetings, trainings and publications of the communication materials;
3) support of preparation and submission of the reporting on the reportable accounts by the financial institutions;
4) carrying out a desk audit of reporting accounts for compliance with the requirements of the CRS identifying violations when preparing reports, communication with financial agents regarding identified violations;
5) institutions of the financial institutions that have not submitted the reports on reportable accounts, ensuring the preparation of reports by all financial institutions to which the CRS requirements apply;
6) monitoring of financial institutions, identification and assessment of the CRS risks;
7) sending reports to the CRS partner jurisdictions, receiving data packages from CRS partner jurisdictions;
8) identification of data received from the CRS partner jurisdictions (identification taxpayers' data);

9) information support for the exchange of information with the CRS partner jurisdictions (communication with the competent authorities of other CRS partner jurisdictions, analysis of errors in obtained data and reports on reportable g accounts submitted the financial institutions);
10) IT support of the process of receiving reporting accounts from financial agents, sending them to jurisdictions-partners for automatic information exchange and receiving data within the framework of the AEOI procedure according to the CRS;
11) administration of the databases, software, servers and processes of the application of the Common Transmission System (ensuring data protection and confidentiality);
12) usage of CRS data for the effective tax control measures, their integration into the comprehensive tax risk management system;
13) audit inspections of financial institutions.

Therefore, despite the war challenges, the Ukrainian government is actively working on the CRS introduction. The Standard implementation is carried out according to the approved Plan.

CRS Exchange Procedure

In accordance with the Standard, financial institutions annually report to their tax authorities in regard to financial accounts held by foreign tax residents or in some cases legal entities controlled by foreign tax residents.

The tax administration receives the data from the financial institutions, carries out their preliminary verification, systematizes, prepares separate reporting files for each of the countries participating in the exchange and sends them to the relevant jurisdictions.

The tax authority receives similar reporting documents about the balances on the financial accounts of domestic tax residents from the foreign countries. The process of automatic exchange of information about financial accounts according the CRS is shown in Figure 6.

According to the provisions of the CRS, tax authorities receive information from the financial institutions annually by 1 July. They exchange this information with the tax authorities of each CRS jurisdiction in which the account holder is a resident by the end of September of a calendar year. In addition to the initial exchange, jurisdictions may exchange corrective statements when financial institutions report corrected information in the form of correction statements.

Such reports are sent when inaccuracies are identified by the financial institutions agents or when requested by a foreign jurisdiction that received the information and identified the inaccuracies. It should be noted that the process of providing feedback on the data quality and integrity received by the partner jurisdiction, addressing the need for corrections and further assessment of the completeness of their implementation at the international level is not regulated and is carried out by the tax authorities of various countries in any form.

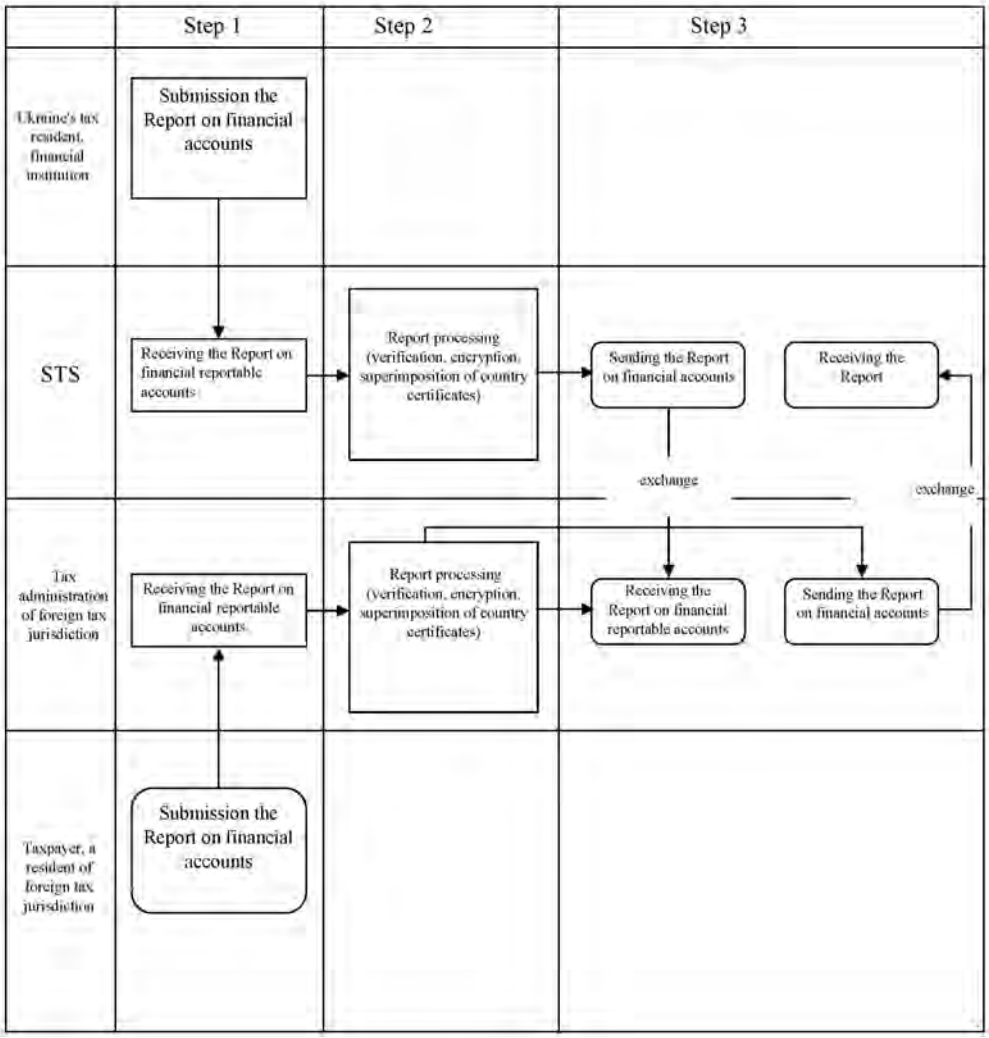

Figure 6. The process of automatic exchange of tax information according to the CRS
Source: developed by the authors.

Tax authorities of the jurisdictions participating in the exchange must collect information from relevant financial institutions on all specified types of financial accounts of residents of other jurisdictions participating in the CRS exchange. There are only certain financial institutions and accounts that pose a low risk for tax evasion (government agencies, public pension funds, inactive accounts, etc.).

Therefore, the rules for financial institutions are applied to a specially defined market segment, the CRS financial institutions. Table 6 shows types of financial institutions according to the CRS.

Table 6. Types of financial institutions according to the CRS

Type of financial institution	Category
Depository Institution	• any entity that accepts deposits in the ordinary course of a banking or similar business; • commercial banks, credit unions, building partnerships, loan associations, etc.
Custodial Institution	• financial institutions that obtained the license to carry on deposit-taking; • an entity holds financial assets for the account of others as a substantial portion of its business if the entity's gross income attributable to the holding of financial assets and related financial services equals or exceeds 20% of the entity's gross income; • custodian banks, nominal owners, trust companies, certain brokers, central securities depositories.
Investment Entity	• Type A: An entity that conducts certain activities for or on behalf of clients (trading in financial instruments; individual and collective portfolio management; or otherwise investing, administering or managing funds or money on behalf of others), e.g., brokers, investment managers/consultants, etc.; • Type B: An entity that receives gross income from investing or trading financial assets and is managed by a financial institution (invests for its own account, as a CIV on behalf of members or as a trust on behalf of beneficiaries): listed/unlisted investment funds, private equity funds, funds of venture capital, professionally managed trusts, joint investment institutions.

Type of financial institution	Category
Specified Insurance Company	• an entity that is an insurance company or the holding company of an insurance company that issues or is obligated to make payments with respect to, a cash value insurance contract or an annuity contract (i.e., an insurance contract with an investment component); • generally, does not include insurance companies that provide only general or term life insurance or reinsurance companies that provide only contracts.

Source: (OECD, 2014).

According to the CRS, there are two categories of financial institutions:

1) Reporting Financial Institutions (institutions that do not meet the criteria of a reporting financial institution);
2) Non-Reporting Financial Institutions to which CRS rules do not apply. The criteria for such institutions are described in Section VIII of the CRS. The Ministry of Finance of Ukraine will approve the list of non-reporting financial institutions by special Order.

A financial institution should follow the CRS provisions to determine whether it meets the requirements of a reporting financial institution. When a financial institution is defined as a "reporting financial institution" for the purposes of the CRS Multilateral Agreement, it must be registered with the STS. According to the Draft Law on the CRS implementation, financial institutions that meet the criteria of a reporting financial institution will have to submit an application for registration to the tax authority during 2023 (the first year of the CRS implementation in Ukraine), and in subsequent years within 60 calendar days after obtaining such a status. If a financial institution loses its reporting status, it must deregister. The procedure for registration and deregistration will be determined by a separate bylaw of the Ministry of Finance.

The Law will require to register reporting financial institutions with the Ukraine's tax authority, in order to establish proper tax control and determine a complete list of reporting financial institutions. There are different approaches of the tax administrations in international practice, as in some countries requirements for separate registration of financial institutions are not applied. At the same time, all tax authorities are developing methodical approaches for formation a domestic list of reporting financial institutions and identification of organizations that avoid CRS

compliance. To form a list of reporting financial institutions, tax authorities can use different sources of information:

(i) their own sources—registers, databases, submitted tax reporting;
(ii) registers of the National Bank, the National Securities Market Commission, authorities that regulate insurance and pension funds, capital markets, financial services and markets; authorities of financial supervision and supervision of credit unions;
(iii) non-regulatory lists (representative associations)—representative authorities of associations of funds; insurance associations; associations of banks; asset management associations;
(iv) entities that are required to provide FATCA reporting—FATCA FFI list (legal entities registered with the IRS to obtain a GIIN); annual FATCA reporting.

Reporting financial institutions must annually report financial accounts to the tax authority and carry out due diligence procedures in accordance with the CRS requirements. If the Reporting financial institution doesn't maintain the accounts that must be included in the reporting, it is obliged to prepare blank reporting in accordance with the Standard requirements. For example, when a bank does not have any reportable accounts under the CRS, the bank must file a report that does not contain account information. The classification of financial institutions according to the CRS is shown in Figure 7.

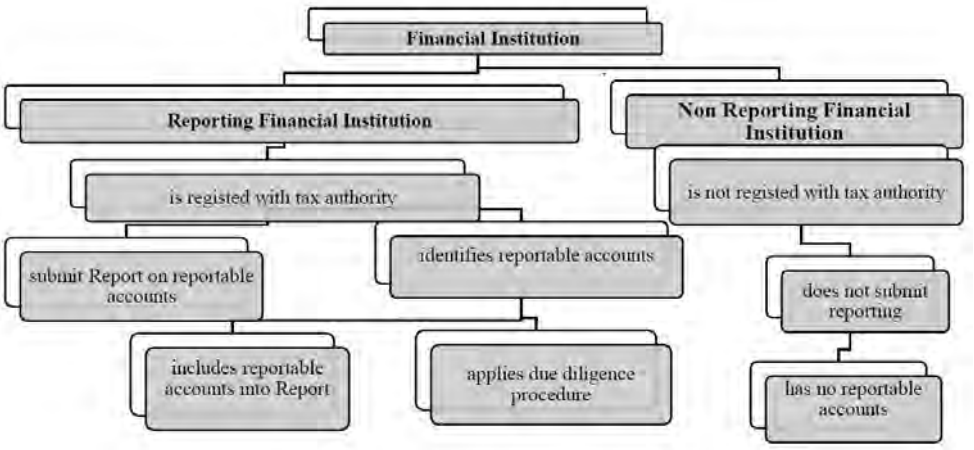

Figure 7. Classification of financial institutions according to CRS
Source: developed by the authors.

Reporting financial institution must assess the financial accounts, identify the reportable accounts, apply a comprehensive review procedure, and submit annual reports.

The list of non-reporting financial institutions will be approved by the Ministry of Finance of Ukraine in accordance with the CRS requirements. Accordingly, non-reporting financial institutions are financial institutions that are included in the list. A non-reporting financial institution should not be registered with the STS, it is not obliged to carry out due diligence procedure and prepare reports.

The information that financial institutions should report to the tax authority must contain the identification data of the account holder (including the taxpayer identifying number in a jurisdiction of tax residence), the account balance at the end of the calendar year, and—for certain types of accounts—payments received during the calendar year from account's holder (dividends or similar income payments) and other reportable information under the CRS. Table 7 shows the information to be exchanged according to the CRS Standard.

Table 7. Information to be exchanged according to the CRS

Type of Data	Details
Non-resident	1. account holder's name; 2. address; 3. tax residency; 4. tax number; 5. date and place of birth.
Financial institution	The name and the identifying number of financial institution
Account	1. Account balance at the end of the reporting period; 2. Account balance on the account closing date; 3. For deposit accounts: interest paid; 4. For custodial accounts: interest, dividends, other income and gross income paid; 5. For other accounts: gross amounts paid; 6. Controlling persons—their share of income and value of assets/balance sheet; 7. Income and turnover per account (depends on the type).

Source: (OECD, 2014).

Based on the analysis in Table 7, it should be noted that the tax number of the account holder, a non-resident in the jurisdiction of his or her tax residence, plays an important role in collecting information for the purposes of reporting under the CRS. This information will ensure the identification of the owner of the financial account at all stages of the exchange according to the CRS. Financial institutions will send information to the tax administration annually as the reporting, the form of report and procedure of its preparation will be approved by the MoF.

The term "Account Holder" means a person identified as the holder of a financial account by a financial institution that maintains the account. A person that is not a financial institution and holds a financial account in the interest or benefit of another person as an agent, custodian, trustee, signatory, investment adviser or intermediary, is not considered as a person that holds such an account for purposes of the CRS, and the other person is considered the owner of the account (OECD, 2014). According to the CRS, financial accounts (opened in financial institutions by tax residents of other jurisdictions) are divided into the following types:

– reportable financial accounts (they must be reported to the tax authority);
– excluded accounts (the list will be approved by the MoF).

A reporting financial institution must perform due diligence procedures of financial accounts to identify whether any of them are reportable accounts. Knobel A. and Mainzer M. argue that there are many loopholes and exceptions in the procedure of the special inspection, thereby unscrupulous financial institutions and holders of reporting financial accounts may take advantage of these gaps. These procedures should be revised and eliminated (Knobel, Meinzer, 2014).

To determine the type of financial account of the reporting financial institution, the account holder must provide the following documents:

1) CRS self-certification;
2) other information or necessary documents for the review of financial accounts.

In order to carry out due diligence procedures, a reporting financial institution may use information provided by account holders under the law on prevention and countermeasures against money laundering.

The reporting financial institution must obtain a self-certification of the tax residency status of the account holder or its controlling persons when it opens new financial accounts. The aim of this document is to determine the tax residency (country or territory) of the account holder or its controlling persons (herein "self-certification"). The account holder fills out this document upon opening the account. The account holder is responsible for the information provided in self--certification. The CRS Implementation Draft Law provides for transitional provisions of self-certification by financial account holders for the accounts opened on the CRS implementation date. Account holders are obliged to inform the financial institution of any changes in tax residency status or any changes in the status of their controlling persons within ten working days.

When the reporting financial institution identifies that the self-certification is incorrect or unreliable, it must obtain a valid self-certification. The reporting financial institution cannot use the self-certification or other information provided by the account holder if there are doubts about the authenticity of the data provided.

The reporting financial institution must not open a financial account or provide financial services if the account holder:

a) has not provided information for due diligence procedures;
b) has not provided a response to a financial institution's request;
c) has provided incorrect information.

The main advantage of the exchange procedure is a reliable due diligence system, because a coordinated verification of the tax resident status of financial investors for the purposes of international reporting is carried out for the first time.

During due diligence, a reporting financial institution should identify reporting financial accounts according to the following algorithm (Figure 8).

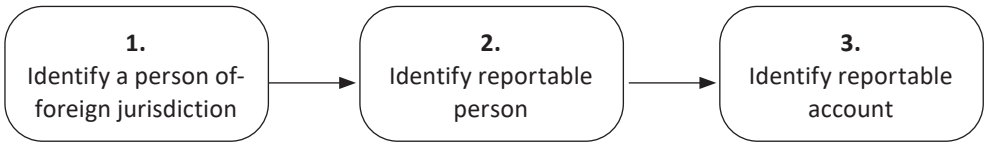

Figure 8. Algorithm for determining a reporting financial account
Source: developed by the authors.

According to the algorithm provided in Figure 8, at the first stage of the analysis of the financial account, the reporting financial institution must determine the person of the foreign jurisdiction, the reporting person and the reporting account. The analysis of these concepts is shown in Table 8.

Table 8. Basic Definitions

Definition	Meaning of the definition
Entity	A legal person or a legal arrangement such as a corporation, partnership, trust or foundation.
Reportable Jurisdiction Person	The term "Person of Reportable Jurisdiction" means an individual or Entity that is resident in a Reportable Jurisdiction under the tax laws of such jurisdiction, or an estate of a decedent that was a resident of a Reportable Jurisdiction.
Reportable Person	The term "Reportable Person" means a Reportable Jurisdiction Person other than: (i) a corporation whose stock is regularly traded on one or more established securities markets; (ii) any corporation that is a Related Entity of a corporation described in clause (i); (iii) a Governmental Entity; (iv) an International Organization; (v) a Central Bank; or (vi) a Financial Institution.

Definition	Meaning of the definition
Reportable Account	The term "Reportable Account" means an account held by one or more Reportable Persons or by a Passive NFE with one or more Controlling Persons that are Reportable Persons.
Controlling Persons	Means natural persons who exercise control over the Entity. In the case of a trust, the term "Controlling Persons" means the settlor(s), the trustee(s), the protector(s) (if any), the beneficiary(ies) or class(es) of beneficiaries, and any other natural person(s) exercising ultimate effective control over the trust.

Source: (OECD, 2014).

Ukraine implements the Standard by applying a "broader approach," which means that reporting financial institutions are obliged to submit data on all reporting accounts held by tax residents of other jurisdictions, regardless of whether the jurisdiction is an exchange partner or not. This approach is simpler for financial institutions and requires less administrative and financial resources to support it. Therefore, the STS will receive data on all accountable accounts of tax non-residents, but send information only to jurisdictions that will be the exchange partners, i.e., which are defined in the published list.

Controlling persons of a passive non-financial Entity may be owners of a reportable account (Table 8). To define a Passive Non-Financial Entity (herein the "NFE"), the CRS provides the following rules:

1) the term "Non-Financial Entities" means any organization that is not a financial institution;
2) NFEs are divided into active and passive;
3) NFE is passive if it does not meet the characteristics of an active NFE;
4) if the NFE is "passive," it is necessary to determine the tax status of its Controlling Person (CP) (Figure 9).

The CRS standard defines the following characteristics of an active Non-Financial Entity:

– passive incomes make up less than 50% of gross income and assets that generate passive incomes are less than 50% of all assets of the NFE for the previous calendar year;
– public companies;
– non-profit, governmental and international organizations;
– newly created NFEs (within 24 months after registration) that do not plan to provide financial services;
– NFEs that were not Financial Entities during the last five years and are in the process of reorganization (liquidation) (OECD, 2014).

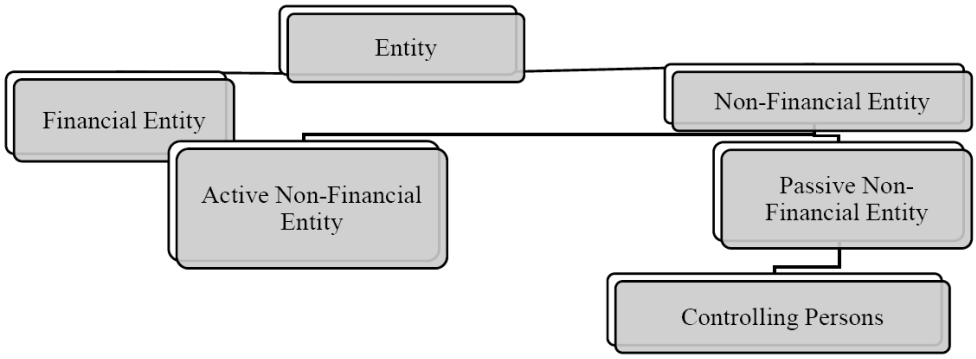

Figure 9. Identification of Passive Non-Financial Entity according to the CRS
Source: (OECD, 2014).

Passive financial entities are often used to avoid taxes. The CRS defines the following characteristics of passive financial institutions:

a) economic entities with ≥50% of their assets generate passive income (dividends, interest, rent, etc.);
b) type B investment entities located in non-participating jurisdictions;
c) public organizations (and related organizations), state institutions, etc. (OECD, 2014).

Investment organizations of type B include organizations whose gross income relates to investment, reinvestment or trading of Financial Assets, and which are under the management of another Organization (Depository Institution, Custodial Institution, Designated Insurance Company or Investment Company).

The CRS define the following holders of reportable accounts (as shown in Figure 10).

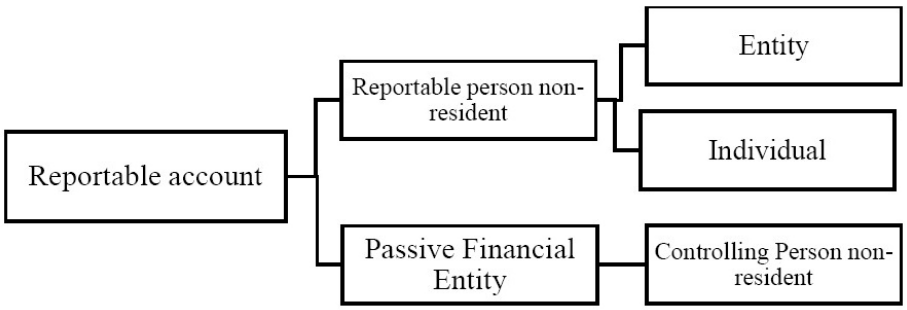

Figure 10. Holders of Reportable Accounts
Source: (OECD, 2014).

Financial institutions must define two basic categories of reportable accounts in the first year of CRS implementation:

– existing accounts (opened in financial institutions on the effective date of CRS legislation);
– new accounts (opened in financial institutions after the date of implementation of automatic exchange of tax information on financial accounts).

Participating jurisdiction that starts in CRS should also implement a one-time mechanism for obtaining and sharing information about pre-existing financial accounts, i.e., develop rules for financial institutions to conduct due diligence procedure and on including the reportable accounts into the reporting.

The CRS identifies three types of financial accounts. The Draft Law on the Implementation of the CRS establishes the step-by-step application of verification procedures and inclusion in the Report on Reportable Financial Accounts such accounts as:

i. High value accounts (the balance or value of the accounts exceeds USD 1,000,000);
ii. Low value accounts (the balance or value of the accounts is less than USD 1,000,000);
iii. Entity accounts (the balance or value of the accounts exceeds USD 250,000).

Figure 11 shows the classification of the financial accounts that is based on the analysis of the CRS and the Draft Law of Ukraine on the Implementation of the CRS.

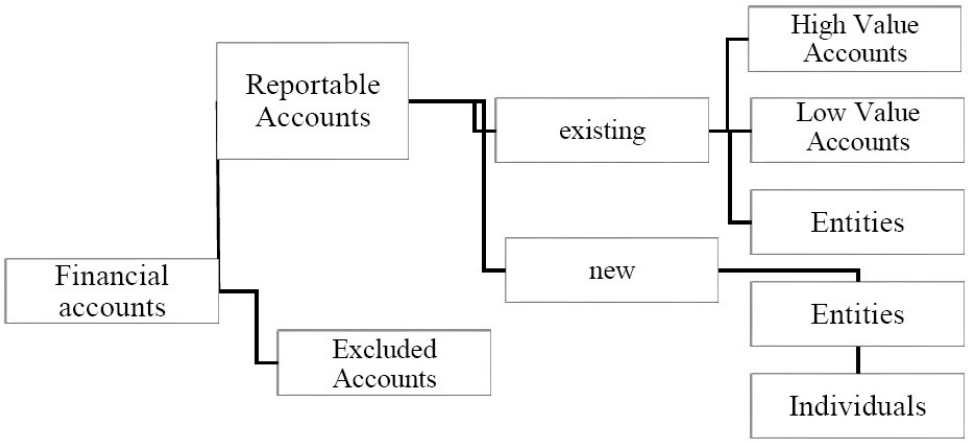

Figure 11. The classification of the non-residents' financial accounts according to the CRS
Source: (OECD, 2014).

Table 9 shows the aspects of the application of the CRS rules in regard to reportable accounts, and the verification deadlines and reporting.

Table 9. Types of reportable financial accounts and the aspects of the application of CRS rules

Accounts			Intended Dates			
			Deadline for due diligence	Reporting Period	Deadline for reporting	Deadline for Information Exchange
Existing Accounts opened as of 31 December 2022	Individual High Value Accounts	the balance or value of the accounts exceeds USD 1,000,000	31 December 2023	2023	1 July 2024	30 September 2024
	Individual Low Value Accounts	the balance or value of the accounts is less USD 1,000,000	31 December 2024	2024	1 July 2025	30 September 2025
	Entity Accounts	the balance or value of the Entity accounts exceeds USD 250,000	31 December 2024	2024	1 July 2025	30 September 2025
New Accounts (opened since 01 January 2023)			1 December 2023	2023	1 July 2024	30 September 2024

Source: summarized and adapted by the authors based on Draft Law of Ukraine № 8131, 2022.

Based on the analysis of the information provided in Table 9, it should be emphasized that the CRS rules will be applied for the Entity accounts of institutions when their value exceeds USD 250,000.

At the same time, a number of methodological issues may arise during the implementation of the planned stages. It is important to clarify the issue how Investment Funds will conduct due diligence on existing accounts, as fund managers are not required to collect any data on account holders in accordance with the current legislation. The register of investors will be the only available information for them on December 31, 2022. The register of investors (or the "register of holders of securities") is prepared at the request of the central depository on a certain date and contains information of each investor, the number of securities he owns and the

custodian's name (RFI in accordance with the CRS). Information about the owners will not be available to the fund manager. It is advisable to oblige custodians to provide the necessary information to fund managers.

Investment Entities do not have direct contact with investors and they do not see the overall ownership's structure. And now the open question is whether Investment Entities may carry out due diligence procedures for new accounts (opened on or after 1 January 2023).

To ensure compliance with the requirements of tax legislation in accordance with the CRS, financial institutions must complete the following steps of preparation (Table 10).

Table 10. The steps to be taken by financial institutions to implement the CRS

Date	Measures
By 30 June 2023	• It is necessary to define whether the institution meets the criteria of the reportable Financial Institution.
From 1 July 2023	• Apply due diligence rules when opening New Accounts; • Require self-assessment CRS (self-certification) documents from clients; • Integrate the collection of new documents into AML procedures; • Refuse to open accounts or conclude contracts with clients who do not provide CRS self-assessment documents.
during the first year of application of the CRS rules	• Register as a Reportable Financial Institution with the STS, fill a special form and send it automatically to the tax authority; • Develop an internal document (policy) on CRS compliance issues; • Describe the system of internal control over employees' fulfillment of CRS requirements; • Determine the duties of compliance managers; • Determine the approach to the due diligence rule; • Develop a procedure for using information when implementing the rule of due comprehensive verification; • Modernize IT systems to ensure compliance with CRS requirements (reception, storage of self-assessment documents, accounting of accountable accounts and reporting).
By 1 July 2024	• Submit Report on Reportable Accounts to tax administration for 2023.

Source: developed by the authors based on Draft Law of Ukraine № 8131, 2022.

For the due diligence procedures when opening New Accounts, the authors suggest to apply an algorithm provided in Annex 2.

It is important to note that financial institutions should ensure the storage of self-certification and other documents related to reportable financial accounts for five years from the day following the deadline for reporting on reportable accounts (1,825 days). For example, the documents relating to all accounts included in the preparation of statements for 2024 will need to be kept for five years after 1 July 2025 (e.g., 1 July 2030).

Tax Control

The CRS requires effective tax control over compliance by financial institutions and account holders with CRS rules and implements a fair system of penalties in case of violations (Figure 12).

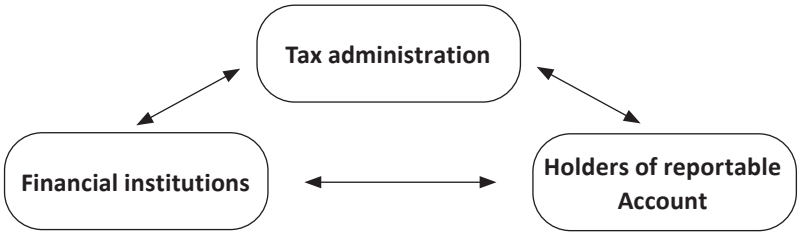

Figure 12. CRS Tax control
Source: developed by the authors.

The draft Law on the Implementation of the CRS provides for the following forms of tax control of financial institutions concerning their CRS compliance:

– desk audit of the reporting;
– monitoring and survey of financial institutions;
– unscheduled tax audit concerning the CRS issues;
– including the issue of compliance with the CRS in a scheduled tax audit of institutions that are or may be potential financial institution (Draft Law of Ukraine № 8131, 2022) (Figure 13).

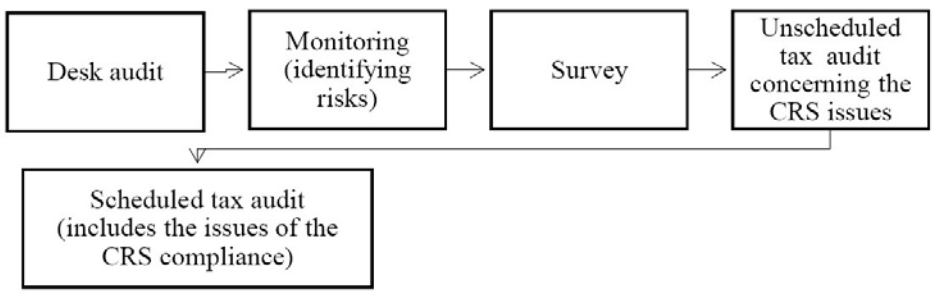

Figure 13. Forms of tax control of CRS compliance in financial institutions
Source: (Draft Law of Ukraine № 8131, 2022).

According to the Draft Law on the CRS implementation, the STS will conduct desk audit of the Report on the reportable accounts within 30 calendar days. Such verification will be carried out automatically, using specially developed standardized algorithms. The taxpayer will receive a receipt for the detected errors and a requirement to send a corrected report during ten calendar days. The tax authority will not apply penalties if such report is submitted on time.

During a desk audit, the tax authority may detect such errors as incorrect date of birth and tax number of the account owner or its controlling person; incomplete data on the date of birth, tax number, address and country of the account holder or its controlling person; the account number that does not correspond to the IBAN or ISIN structure; the negative value of the account balance.

Monitoring of financial institutions will be carried out by the STS in order to identify institutions that evade reporting of financial accounts or violate CRS requirements.

For the sake of monitoring, the tax authority will use information from its databases, the National Bank of Ukraine, the National Commission for Securities and the Stock Market, and data provided by tax authorities of other countries. Information from open sources, such as social networks, professional publications, and advertisements is also used in international practice.

A risk-oriented approach is used to identify specific risks for the sector of the economy or the type of activity of financial institutions during monitoring. When the risks are identified in certain financial institutions, the tax authority will perform a survey, and based on its results, a decision can be made to appoint a CRS audit. In such a case, the object of audit will be compliance with the CRS, and not the risks identified during monitoring.

Risk management plays an important role in ensuring the effectiveness of tax control with the CRS, the identification and risk assessment of violation of the CRS rules.

The main objectives of the CRS risk assessment are:
– improvement of voluntary compliance by financial institutions;
– improvement of data quality.

In practice, risk assessment must be carried out twice a year. July and August are important for identifying risks for the tax authority, as they follow the CRS reporting deadline. The tax administration should take all appropriate measures to identify the CRS risks during this time.

During risk identification, the tax authority must identify and evaluate such groups of the CRS risks as:
– non-reporting of the CRS;
– non-inclusion of the reportable financial accounts into reporting;
– incorrect information in the reporting about the jurisdiction of the account holder or controlling person;
– incorrect data;
– lack of a proper due diligence procedures.

Based on the results of identified risks, the tax administration takes measures to reduce risks in the following periods (e.g., the disclosure of information about the identified risks and ways of their mitigating to target groups of financial institutions and business associations). It is advisable to provide information on identified risks to financial institutions, so that financial institutions can improve their CRS compliance.

There is a practice to remind early about the reports preparation and sending them to the following groups of financial institutions:
(i) a new financial institution (at the time of its registration/qualification as a financial institution in the Central Bank);
(ii) institutions with low compliance with reporting deadlines;
(iii) financial institutions with previously identified risks;
(iv) institutions within the same business group.

The STS is obliged to inform the National Bank of Ukraine (herein the "NBU") and the National Commission for Securities and the Stock Market about the detected violations committed by financial institutions if there is a risk that these violations relate to the requirements of legislation in the area of prevention and countermeasures against the legalization of proceeds of crime, the financing of terrorism, and the proliferation of weapons of mass destruction (*Zakon Ukrainy № 361-IX*, 2019).

Account holders' violations may be detected by the tax authority during the audit of financial institutions or by obtaining information from the tax administration of another country. In such cases the draft Law on the Implementation of the CRS considers two options of tax control:

a) an unscheduled audit is carried out if the account holder is registered with the tax authority;
b) if the account holder is a non-resident and is not registered with the tax authorities, the tax administration fines the account holder for violating the rules of the CRS and sends a corresponding tax notice.

According to the Draft Law on the Implementation of the CRS, the application of fines for violation of the CRS requirements is foreseen, but its introduction is planned according to the schedule shown in Table 11.

Table 11. Stages of introducing penalties for violation of the CRS rules

Time period of violation	Approach to the application of penalties
2023	Penalties are not applied (reporting is not sent during this period and there are no deadlines for the due diligence procedure)
2024	Penalties are not applied (the period of the first reporting and deadline for carrying out due diligence procedures and registration with the tax authorities as a financial agent)
2025	A factor of 0.5 will be used to calculate penalties
2026	Penalties will be applied in full

Source: developed by the authors based on Draft Law of Ukraine № 8131, 2022.

The biggest penalties will be imposed on a financial institution in the case of systematic violations, more than twice within two calendar years. Table 12 presents the classification of violations of the CRS requirements for which the tax authority will apply administrative penalties. The following table is a summary of the penalties for violating the CRS rules:

Table 12. Classification of violations of the CRS requirements

Violator	Violation category	Violation type
Financial institutions' violations	Registration violation	• untimely registration of the reportable institution; • lack of registration of the reportable institution;
	Reporting violation	• failure to submit reports; • untimely submission of reports; • untimely submission of a corrected report; • submission of a report with incomplete data; • submitting a report with inaccurate information; • submitting a report with errors; • deliberate failure to include a reportable financial account in reporting.
	Violation for cooperation with clients	• refusal to establish business relations; • provision of financial services in case of detection of violations by the account holder; • non-termination of business relations in case of detection of violations by the account holder.
	Violation of due diligence requirements	• failure to conduct a proper inspection; • improper conducting of a comprehensive inspection; • violation of the rules for conducting a proper audit; • lack of documents confirming the implementation of a proper inspection; • lack of self-assessment documents.
	Violation of document storage	• violation of the requirements regarding the terms of storage of documents and information; • storage is not complete; • loss or destruction of documents.
Account holder's violation	Violations regarding the provision of self-certification documents	Deliberate submission of CRS self-certification documents on the tax status of the account holder and/or its controlling persons with incorrect data.

Source: developed by the authors based on Draft Law of Ukraine № 8131, 2022.

The analysis of the violations of the CRS requirements in Table 12 shows that the developed system of penalties corresponds to the international practice and it is used in the United Kingdom of Great Britain and Northern Ireland (Legislation, 2017),

Australia (Australian Government, 2023), the Cayman Islands (Cayman Island. Tax Information Authority, 2022), and Indonesia (Darmanti, Mangkan, 2020).

At the same time, penalties will be applied in the case of fault or intention of the financial institution (when the financial institution violates the CRS rules intentionally and does not take appropriate measures to prevent it). Therefore, the tax administration will not impose penalties to financial institution if:

– there is no fault of a financial institution concerning the errors in the Report on reportable accounts;
– an account holder provides incorrect information and the financial institution carries out due diligence procedure on the data of the reportable accounts and checks the tax residency status of the holder under the CRS rules;
– the financial institution immediately informs the tax authority about false information;
– errors in the Report do not affect the identification of the reportable account, the account holder and his jurisdiction;
– the institution corrects errors in the report independently or according to the notification of the STS within the limits set by the TCU.

In our opinion, the planned system of administrative penalties for the CRS violations needs a broader rethinking, taking into account the reasons for the Standard implementation. It is also important to introduce penalties against Ukraine's tax residents who violate the CRS requirements or abuse cooperation with jurisdictions that are not participants in the automatic exchange of tax information on financial accounts, in order to hide information about their profits and avoid taxation. There is a penalty of 300 percent of the tax for moving assets to try to avoid the CRS in the United Kingdom of Great Britain and Northern Ireland, and criminal prosecution is a risk for those who deliberately fail to pay tax on offshore income (Walker, 2018).

Experts believe that any country that introduces the exchange under the CRS should abandon the further implementation of voluntary declaration programs or tax amnesties, because they will neutralize the effect of the automatic exchange of tax information on financial accounts and stimulate tax evasion (Langenmayr, 2017).

Therefore, Ukraine should introduce a tax control system for obtaining timely and high-quality information for exchange with other jurisdictions and develop a system of control measures to prevent violations of the CRS reporting requirements by Ukraine's tax residents. The information about domestic tax residents is important for the country's budget and the fair taxation of all taxpayers.

Meanwhile, the Global Forum calls on tax administrations to implement measures aimed at strengthening voluntary compliance by financial agents. Such measures may include:

a) training courses;
b) communication materials;
c) a special section about the CRS on official portals of the tax administrations;
d) reminder deadlines for submitting reports, including personal messages to the e-mail of a financial institution;
e) notice of inaccurate information in reporting;
f) recommendations for reducing technical errors when filing out the xml scheme;
g) improvement of domestic legislation.

At the stage of the CRS implementation it is important to carry out a well-planned communication campaign in order to clarify the requirements of the Standard for financial institutions in Ukraine. Tax administrations may involve other institutions and associations, which will inform the potential financial institutions about the CRS rules. Banking committees of the European Business Association (EBA) and the American Chamber of Commerce in Ukraine (ACC), banking and insurance associations may fulfill such functions in Ukraine. These organizations should help to the introduce the CRS, pass domestic laws, carry out trainings, and materials.

Use of CRS Information

The issue of the effective use of data received as part of the exchange procedure is important as is the approval of the legal framework that regulates the application of the CRS, the design of effective processes and the development of necessary procedures to ensure the collection of information and the exchange of financial accounts. The use of information is the main purpose of the functioning of the exchange procedure according to the CRS.

The Global Forum also evaluates the effective use of information by the jurisdiction during the peer review. An assessment of the use of data is systematic and includes all tax risk management and tax audit processes.

Application of new methods and technologies will allow tax authorities to effectively use the CRS data to:
– detect mismatch of income from foreign sources;
– develop improved profiles of taxpayers and databases for more effective use of tax control resources;
– assess risks and use of analytical tools and methods.

The CRS data is informative, accurate, relevant, timely and ensures high performance.

The tax authority should ensure the integration of the CRS data into the general IT system of tax risk management, carry out analysis in the risk management

process in order to use effectively data received under the procedure of the exchange of information on financial accounts.

The tax administration should introduce the following procedures for the effective management of the CRS information:

– determination of the structural unit responsible for general supervision of the use of the CRS in the STS;
– definition of business procedures that will be involved in the mandatory use of the CRS data;
– development of changes draft to internal documents regulating business procedures under the use of the CRS data;
– testing of updated tax control business procedures as soon as the CRS data is available;
– prepare technical specifications for the modernization of IT systems of taxpayer reporting, risk management, audit and tax accounting for the purpose of integrating the CRS data and its further analysis;
– carry out modernization of internal IT systems.

We propose to divide the methods of using the CRS data according to their origin:

1) data received from domestic financial institutions;
2) data received as part of the exchange from foreign jurisdictions.

It is advisable to use the information that will be received as part of the exchange from the competent authorities of other countries for these purposes:

– data comparison with the income tax declaration (assets of individuals);
– investigation of bank accounts of local individuals with large incomes (e.g., accounts in offshore tax zones);
– data comparison with passive income of legal entities;
– identification of foreign trust companies, holding companies related to local individuals and legal entities;
– use for the BEPS measure: structuring of companies, verification of transfer pricing obligations in reporting on income tax;
– research of the sources of passive income of legal entities;
– request statements for accounts in foreign banks/operations of foreign companies/individuals.

We suggest to use the information in the reports of domestic financial institutions for:

– detection of undisclosed (undeclared) bank accounts of financial institutions;
– using tax liabilities, declared in tax returns and payments, for cross-checking (in relation to Ukrainians who are beneficial owners of foreign companies);
– using local tax registration, tax reporting for cross-checking (in relation to foreign companies, permanent representations);

– identification of foreign trust companies, holding companies related to local individuals and legal entities;
– use for BEPS purposes, identification of groups of companies, review of transfer pricing reporting;
– accessing statements of local bank accounts/operations of foreign companies/individuals that are beneficial owners for BEPS purposes.

Therefore, the information received under the automatic exchange of information according to the CRS may be used for the following measures:
– improvement/expansion of the taxpayers register (unregistered individuals, permanent representations, beneficial owners, bank accounts);
– pre-filing of annual income tax declaration and property declaration;
– disclosure (provision) of the CRS information in the taxpayer's account (profile);
– simplified access to statements of local bank accounts/operations of foreign companies/individuals;
– tax audits, multilateral tax audits;
– international assistance in debt collection, assets seized;
– criminal investigation.

The tax administration should demonstrate how it uses the CRS to identify unscrupulous taxpayers and that it does not waste public resources by initiating additional investigations for the compliant taxpayers. Trust in the tax authority and public support for this tool may decrease if the CRS information is frequently used to survey or audit those who meet the criteria of bona fide taxpayers.

The peculiarity of the use of information obtained under the CRS exchange is that the Standard limits its use in criminal or corruption investigations. At the same time, the tax authority, having received the information and identified certain risks based on the results of its analysis, may ask the country's competent authority within the framework of procedures for exchange of tax information upon request (herein "EOIR"). At the same time, it should be noted that this information may be used for criminal investigations related to corruption offenses. The tax authority of Ukraine may send received data according to the EOIR standard to the relevant investigative bodies (NABU and SBI).

Although democratic countries allocate funds to support Ukraine during the war and contribute into the reconstruction of Ukraine, the issue of controlling the intended use of funds and preventing their embezzlement requires special attention.

We believe that the implementation of the CRS will be one of the important safeguards against ineffective use of the funds provided to Ukraine during the war and the funds for recovery, namely the use of these resources in corruption schemes. And this is due to the fact that information about any financial resources on foreign accounts will be available to the Ukrainian tax authority, and the opportunities to hide illegally obtained funds in foreign bank accounts will be reduced.

Exchange According to the CbC Standard/ DAC 4
Objectives and International Practice of Implementing the CbC Standard

Many experts believe that the biggest problem that arises in the international tax system is the taxation of transfer prices between related groups of corporations (Raghu, 2015).

According to the latest OECD data, there were 82,000 non-financial corporations in the world as of 2008, and 230,000 of their foreign branches as of 2014 [Figure 14]. These data are incomplete, because not all countries are included in the statistics. Therefore, international corporations play a key role in the global economy.

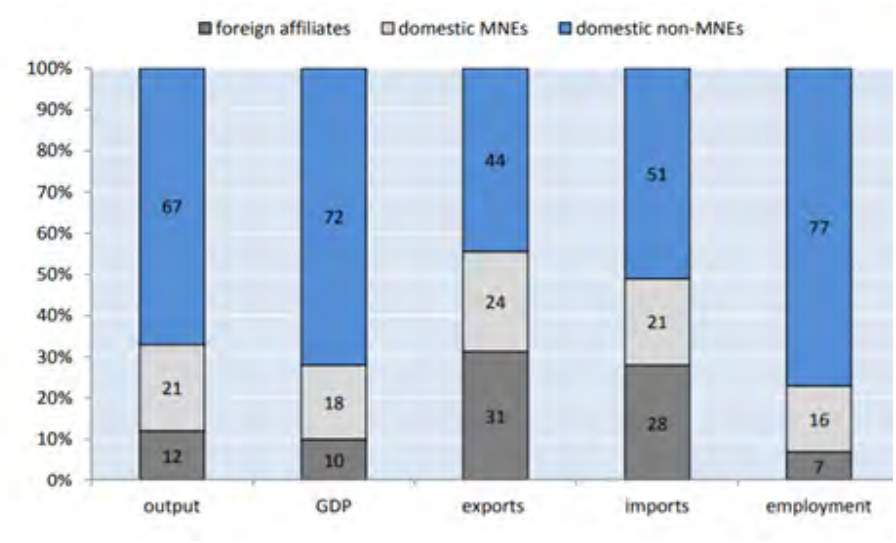

Figure 14. Impact of multinationals on the world economy, 2014
Source: (OECD, 2018a).

Multinational Enterprise Enterprise (herein the "MNE") Groups make their profits globally, but countries tax them locally, using the technique of geographic distribution or allocation (Raghu, 2015). International Groups of Companies built their group structures with the aim of efficient use of their resources, expansion and maximization of profits by registering companies in low-tax jurisdictions, which allowed to shift profits and reinvest them in the future without restrictions (Barlow, Wender, 1955). That is why national governments began implementing TP regulations at the state level more than a century ago, and developed and coordinated these rules at the international level for greater efficiency. Today, the OECD is the main international body that develops and improves TP rules.

The practice of abusing the rules of transfer pricing is the most serious risk for reducing revenues to the budgets of developed countries of the world. According to estimates, more than 40% of MNE Group's profits were transferred to low-tax jurisdictions as of 2015 (Tørsløv, Wier, Zucman, 2022).

Foreign scholars Becker J., Fuest C. (Becker, Fuest, 2012), Raimondos-Moler P. (Raimondos-Moler, Scharf, 2002), Udompol S. and Myles G. D. (Udompol, Myles, 2019) made a significant contribution to the study of the impact of transfer pricing rules on the reducing of the profits shifting to low-profit jurisdictions, and the strengthening of competition in terms of tax rates between countries. Rogers H. and Oats L. (Rogers, Oats, 2021) proposed that the current rules of transfer pricing were imperfect and suggested to review them.

The tax authorities of different countries had different data on the activities of a MNE Group as most countries applied different approaches to the disclosure of information submitted by the MNE Group in the TP reports. In addition, they did not have the opportunity to carry out a high-level analysis of the cross-border activities of the MNE Group, application of tax strategies and planning aimed at artificially reducing tax liabilities. Thus, there was a need to introduce unified requirements for reporting from TP, and tax administrations carried out effective tax control from TP.

In order to create opportunities for tax administrations to assess high transfer pricing risks, the OECD developed Step 13 of the BEPS Plan, which provides for the introduction of a standardized three-step approach to TP documentation in 2015 (OECD, 2015c).

Table 13 shows the analysis of the three-level reporting. Step 13 of the BEPS Plan provides for the submission of the "Country-by-Country Reporting" (herein the "CbCR") of the MNE Group and the exchange of such reports between tax jurisdictions.

The issue of three-level TP reporting has been studied by foreign and Ukrainian researchers. Murphy R. was the first scholar who introduced the idea of such reporting; he considered it as a source of information about the income earned by multinationals in different jurisdictions and about intragroup transactions, which were necessary for investors, stakeholders and tax administrators (Murphy, 2009).

Table 13. Analysis of the three-level structure of transfer pricing reporting

Requirements	TP reporting		
	(Country-by-Country Report)	Global TP documentation (master file)	TP documentation (local file)
conditions of submission	• Submitted by multinationals with a combined turnover of EUR 750 million or more; • Filed only in the jurisdiction of the parent company; • Submitted annually.	• Submitted upon the request of the tax authority	• Submitted upon the request of the tax authority
purpose of reporting. Звітності	• General information about the Multinational Enterprise Group of companies and all its companies	• A general overview of the economic, legal, financial and tax aspects of the MNE's activities for tax authorities and an explanation of what mechanisms the MNE uses in the TP	• Information on the controlled operations of an individual member of the International Group that is a resident of the relevant local jurisdiction
reporting data	• Aggregate information on revenue (including, separately indicating revenue from operations with members of this international group); • Amount of profit (loss) before taxation; • Amount of calculated tax; • Amount of tax paid; • The amount of capital as of the end of the reporting period; • The amount of accumulated profit as of the end of the reporting period; • Number of employees for the reporting period;	• The structure of capital participation and control of an international group of companies; • Markets of goods (works, services) on which members of an international group of companies carry out their main activities (in the form of schemes); • Activities of an international group of companies (factors affecting the financial result, a brief description of significant transactions, a brief functional analysis, information on restructuring);	• Information about the local member of the Group; • (management system, detailed description of business activity and strategy, carried out restructuring, main competitors); • Detailed information on controlled operations; • Financial information.

Requirements	TP reporting		
	(Country-by-Country Report)	Global TP documentation (master file)	TP documentation (local file)
reporting data	• The amount of tangible assets as of the end of the reporting period; • Identification information about each member of the international group, including the state (territory), the state (territory) of tax residency and the main types of activity of each member of the international group of companies	• Intangible assets; • Financial performance of the group.	

Source: developed by the authors based on Transfer Pricing Documentation and Country-by-Country Reporting (OECD, 2015a).

Hanlon M. studied Country-by-Country Reporting Requirements and application issues, limitations or a possible misinterpretation of its data (Hanlon, 2018); he emphasized the need to analyze changes to IAS/IFRS accounting standards when analyzing CbC reports. Professor Spengel C. investigated the public release of Country Report data as an effective anti-evasion measure (Spengel, 2021). Longhorn M. Rahim M. and Sadiq K. concluded that the Country Report is an important tool for providing useful information for geographic decision-making (Longhorn, Rahim, Sadiq, 2016). According to the results of the research, Joshi P. P. concluded that the introduction of the Country-by-Country Reporting contributed to the growth of effective tax rates on income tax by 2-4 percent (Joshi et al., 2020).

Foley S. and Martin M. R. investigated the possible use of CbC reporting data for the planning of MEG activities at the strategic and operational levels (Foley et al., 2020). Professor Clausing K. A. analyzed the published data of CbC reporting and emphasized the significant impact of the shifting of MNE Group profits to low-tax jurisdictions on the amount of US tax revenues and the need to introduce a mandatory minimum tax liability for MNE Group (Clausing, 2020), later it became the basis for the implementation of the initiative Tax Rule Pillar 1 of the Extended Cooperation Program on Countering BEPS of the OECD/G20 (OECD, 2021).

The scholars also say that the disclosure of information by the taxpayer to the tax authorities increases the risk of detection of a violation of tax legislation, therefore

it requires the taxpayer to increase the costs of developing strategies for aggressive tax planning, which may lead to a decrease in the level of tax evasion (Joshi et al., 2020). Therefore, the introduction of CbC reporting may be a preventive measure to increase tax compliance.

The basis for a jurisdiction to join the exchange according to the CbC Standard is the signing of the Multilateral Competent Authority Agreement (herein "MCAA CbC"). The agreement establishes obligations for the participating countries to automatically exchange CbC Reports submitted by the MNE Group on an annual basis to the tax authorities of the jurisdiction of the tax residence of the parent company of the MNE Group, with the tax authorities of all jurisdictions where the MNE operates.

Exchange of CbC reports is carried out annually, it is made automatically through the use of the CTS, the OECD special platform for the exchange. The first exchange of information was in June 2018 and as of 22 November 2022, 93 countries signed the MCAA CbC and 100 countries implemented legislative rules for submitting CbC at the national level (OECD, 2022e).

The OECD has developed and approved a number of legal documents that regulate the procedure for preparing the CbC Report, the specifics of the CbC Standard implementation, the exchange procedure and the specifics of the use of CbC Report data (Table 14).

Table 14. International legal acts regulating the exchange according to the CbC Standard

International legal act	The content of the document
Multilateral Competent Authority Agreement (MCAA CbC)	• Provides an international legal framework for the automatic exchange of information according to the standard; • It is the legal basis for the introduction of CbC at the national level.
Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—2015 Final Report	• An approach to the preparation of three-level documentation from TP; • A form of *Country-by-Country Reporting*; • Rules for the introduction of three-level documentation with TP jurisdictions.
Guidelines for proper use of CbC information	• Purposes for which CbC information may be used; • Recommendations on the development of internal procedures of the tax administration for the proper use of CbC information; • Responsibility for improper use of CbC information; • Limited access to CbC information.

International legal act	The content of the document
Country-by-Country Reporting Status Message XML Schema: User Guide for Tax Administration	• Structure of CbC XML message schema; • Practical recommendations for using the XML schema.
Guidelines for effective risk assessment	• Risk assessment methodology and identification of risk identifiers in CbC data by tax authorities and taxpayers.
Country-by-Country Reporting (CbCR) Risk Assessment Tool	

Source: (OECD, 2015c, 2017a, 2017b, 2019b).

The OECD developed and approved the CbC Implementation Guide, which is a practical guide to CbC implementation for tax administrations and MNE Group (OECD, 2019d).

Global Forum annually assesses the implementation status of the automatic exchange of tax information according to the CbC Standard and its effectiveness, and publishes a report based on the results of the assessment (Figure 15). According to the latest assessment, some countries have delayed the implementation of the CbC Standard due to the COVID-19 epidemic, but in general countries carry out their obligations.

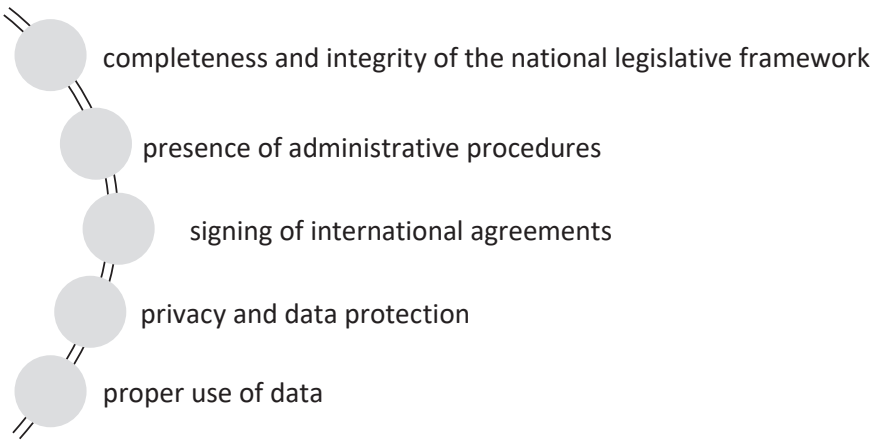

Figure 15. Aspects of the Global Forum's expert assessment of the implementation status of the CbC Standard by jurisdictions
Source: (OECD, 2021d).

The USA Tax Administration and the OECD periodically publish aggregated CbC data, which are used for high-level analysis of the role of low-tax jurisdictions, trends in international tax planning, effective income tax rates, and conducting scientific research on TP (IRS; OECD, 2017c).

Proper use of CbC report data according to the OECD Guidelines is a prerequisite for obtaining and using data within the framework of the CbC Standard exchange. In addition, the exchange participating jurisdiction's obligation to use CbC information appropriately should be included in the CbC MCAA. The OECD guidelines on the proper use of CbC information contain restrictions on the use of information from CbC reports for the purpose of high-level risk assessment of MNE Group and determination of potential risks of the tax base erosion and profit shifting and may not be considered as evidence of aggressive tax planning (OECD, 2017b).

The participating country's tax authority must develop and approve written policies on the use of CbC report data to ensure the proper use of CbC information. This policy should also determine the rules and procedure for access by tax administration's officials to the CbC data.

It is important to emphasize that a jurisdiction may not require local CbC reporting unless it meets confidentiality, consistency and proper use requirements.

Research by Muzychuk M., Fomina O. postulates using the information obtained according to the CbCR standard for the following tax control measures: data comparison with the income report of local legal entities; identification of foreign trust companies, holding companies related to local legal entities; usage for BEPS purposes; verification of transfer pricing obligations in reporting; determination (detection) of undisclosed associated foreign companies; use to expand the network of a group of companies; detection and investigation of transactions (invoices) among the MNE Group in real time regime (Muzychuk, Fomina, 2021).

In 2016, requirements envisaged by Action 13 of the BEPS Plan on submission and exchange of CbC reporting were introduced for EU member states by adopting amendments to Directive 2011/16/ which provided for the introduction of mandatory automatic exchange of information in the area of Country-by-Country Reporting. EU Directive 2016/881 of 25 May 2016 on the automatic exchange of CbC reports (herein "DAC 4") (Council Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2016) was the legal act that introduced these changes.

The DAC 4 sets out requirements for MNE Group (that are located or operate in the EU and their total annual consolidated revenue is equal to or more than EUR 750 million) to submit CbC reports to the tax authorities annually from 2017.

The reasons for implementing the procedure for exchanging CbC reports between tax authorities of EU countries are:

– leakage of information on the application of tax avoidance schemes, known as the LuxLeaks international tax scandal (Brunsden, 2017);
– ineffective spontaneous exchange of information upon request;
– cross-border tax evasion, aggressive tax planning and unfair tax competition are major concerns in the EU and at the global level;
– issuance of preliminary tax approvals (decisions) and conclusion of advance pricing agreements (Advance Pricing Agreement—APA), which contribute to the consistent and transparent application of legislation, is a common practice in many EU member states;
– increasing transparency and taking preventive measures.

EU countries exchange CbC Reports data through the Common Communication Network (CCN) of the European Commission.

In addition, there has been a heated debate about the need for publication of CbC report data for the general public to ensure high tax transparency in the EU countries since the introduction of CbC reporting. However, scientists have different opinions on the positive effect of such publication.

In particular, Murphy R. proposed the idea of publishing such data (Murphy, 2003). German scholars Schreiber U. and Voget J. concluded that the CbCR publication gave society the opportunity to assess whether the MNE Group followed the principles of social responsibility (Schreiber, Voget, 2017). Groterr S. suggested that the reputational risks, associated with the publication of CbCR reporting data, encouraged MNE to reduce the use of aggressive tax planning and to adhere TP (Grotherr, 2016). Research by Professor Spengel C. and Dutt V. showed that the costs of companies for public reporting may exceed the overall positive benefits of such publication (Ed. Stiftung Familienunternehmen, 2020).

In November 2021, the EU Parliament adopted the Public Country-by-Country Reporting (CBCR) Directive, which introduced the disclosure of information on the income tax paid by certain enterprises and branches (herein "the CbC Public Reporting Directive") (Schranz, Yakimova, 2021). The provisions of the Directive contain requirements for MNE Group with an annual income of more than EUR 750 million to publicly disclose in a special report the amount of income tax paid by them in:

– every country member of the EU;
– each third country listed in Annex I of the Council on the EU (the list of non-cooperative jurisdictions for tax purposes (the so-called "black list") (EU list of non-cooperative jurisdictions for tax purposes, 2022);
– each country listed for two consecutive years in Annex II of these Council conclusions (the so-called "grey list") (EU list of non-cooperative jurisdictions for tax purposes, 2022).

It is important to prepare this report according to the approved form in a machine-readable format and publish it on the official website of the MNE Group parent company.

Implementation of CbCR in Ukraine

Muzychuk M., Fomina O. (Muzychuk, Fomina, 2021), Lovinska L. G. (Lovinska, Oliinyk, Kucheriava, 2020) and Lehenchuk S. F. (Lehenchuk, Zhyhlei, 2022) studied implementation of the automatic exchange of tax information according to the CbCR Standard in Ukraine.

In Ukraine, the rules of TP were introduced on 1 September 2013, and the Law of Ukraine "On Amendments to the Tax Code of Ukraine on Transfer Pricing" came into force (Law of Ukraine № 408-VII, 2013). Then, over several years, the domestic rules of TP were constantly revised and improved, implementing the best international practices of the OECD.

The introduction of three-level reporting from TP in Ukraine and the automatic exchange of tax information by Ukraine according to the CbC Standard was implemented through the adoption of the Law of Ukraine dated 16 January 2020, No. 466-IX "On Amendments to the Tax Code of Ukraine regarding the improvement of tax administration, elimination of technical and logical inconsistencies in tax legislation" (The Law of Ukraine No. 466-IX) (Law of Ukraine № 466-IX, 2020), which made appropriate changes to the TCU.

The Law of Ukraine No. 466-IX has introduced three-level reporting from TP and it requires the following information:

i. a report on controlled operations (local file) (it must be sent by taxpayers who carried out tax audits in the reporting year);
ii. notification on of MNE Group participation (they must be sent by taxpayers who carry out the controlled transactions in the reporting year);
iii. Country-by-Country Reporting provides a set of rules for determining the necessity of the requirement to submit a CbC Report;
iv. global documentation from the TP (master file) (it is sent by taxpayers at the request of the STS) (Law of Ukraine № 466-IX, 2020).

The Country-by-Country Report is a subject of the automatic exchange of tax information according to the CbC Standard. Therefore, Ukraine will send the Country-by-Country Reports prepared by Ukrainian companies and receive reports from other jurisdictions where MNE operates. In November 2022, Ukraine signed the MCAA CbC to join the CbC Standard exchange procedure (*Ukraine has joined the*

Multilateral Agreement of Competent Authorities on the Automatic Exchange of Reports by Country). In addition, the STS is currently developing the IT subsystem "Automatic exchange of tax information CbC/CRS," through which the STS will exchange Country-by-Country Reporting with other jurisdictions (*Priamuiemo Razom*, EU4PFM).

CbC Reporting

The analysis of the terms of the reporting periods and deadlines, the dates of the first submission of the notifications on participation in the MNE Group and the CbC Report is shown in Table 15.

Table 15. Analysis of the reporting requirements of the Notices of participation in the MNE Group and the CbC Report

Report	Deadline for submission	Reporting period	Date of the first sending
Notifications on participation in an MNE Group	• Until 1 October of the year following the reporting year	Calendar year	• In 2021 for 2020
(Country-by-Country Report)	• Within twelve months after the end of the financial year established by the parent company of an MNE Group; • In the absence of information about the financial year established by the parent company of MNE Group—within twelve months after the end of the calendar year.	Financial year	• Applied for the first time in relation to the financial year in 2021; • But not earlier than in the year in which the competent authorities concluded the MCAA CbC; • No earlier than 31 December 2022.

Source: (Law of Ukraine № 466-IX, 2020)

According to the provisions of the domestic tax legislation. The taxpayers (the MNE Group members) have to send the Country-by-Country Report in the case they meet the following criteria:

1) the criterion of the level of income: a consolidated revenue of the MNE of at least for the financial year, preceding the reporting year, and exceeds the equivalent of EUR 750 million;
2) circumstances criterion

2.1. the taxpayer is the MNE Group parent company;

2.2. the MNE Group parent company authorizes a taxpayer, a resident of Ukraine, to send a Country-by-Country Report to the tax administration;

2.3. in accordance with the legislation of the country where the parent company of the MNE Group is located, the parent company of this group does not authorize another member of the international group to send a report in another foreign jurisdiction where its reporting is provided;

2.4. an international agreement has been signed between Ukraine and the relevant foreign jurisdiction (the parent company of MNE Group or another member of this group, authorized by the parent company of such group) to send a Country-by-Country Report that may provide for the possibility of exchanging tax information, but:

a) the procedure for exchanging reports across countries has not come into force;
b) there are facts of systematic failure to comply with this order (Law of Ukraine № 466-IX, 2020).

The STS must publish a list of such foreign jurisdictions on its official web portal no later than 60 calendar days before the deadline for submission of the CO report on controlled transactions.

Experts emphasize that it is quite difficult to prepare Country-by-Country Report. Thus, Brennan B. argues that the preparation of a Country-by-Country Report has a potential impact on the global tax profile of a multinational, and it is a matter of strategic risk management of an MNE Group (Brennan, 2015).

The researchers consider that the tasks of the Country-by-Country Report determine:

– the countries in which an MNE Group operates;
– a list of all members of the MNE Group with their organizational and legal forms;
– jurisdictions where members of the MNE Group are tax residents;
– the scope of the MNE Group activity in each country;
– the amount of investments of the MNE Group in each country;
– tax jurisdictions in which the MNE Group generates profits and in what amounts;
– tax jurisdiction in which the MNE Group pays taxes and in what amounts;
– the volume of intragroup transactions in the MNE Group;
– whether the level of activity and the size of profits differ greatly within the MNE Group;
– how widely the MNE Group applies low-tax jurisdictions;

– how the use of low-tax jurisdictions in the business model of the MNE Group affects the reduction of the overall tax rate of the MNE Group;
– whether the MNE Group activity is stable (Murphy, 2009).

The Ministry of Finance of Ukraine approved the form of the Country-by-Country Report by Order No. 764 dated 14 December 2020 (On the approval of the form and the Procedure for filling out the Report by country of the international group of companies, № 764, 2020), which corresponds to the OECD XML schema and is modeled after the template in Appendix III of the Final Report BEPS Action 13 Final Report, which contains a diagram of the Report structure, instructions and definitions of terms (OECD, 2015c).

The report is a collection of separate reports for each country (or territory that has tax autonomy) where MNE Group has operated during the reporting year. Therefore, the total number of reports in the Country-by-Country Report should correspond to the number of jurisdictions where the MNE Group operates. When compiling reports, it is important to follow the consistency principle—the same data sources should be used consistently from year to year. Changes and their consequences should be noted when circumstances require a change in the data source. The analysis of the structure of the report is shown in Table 16.

Table 16. The analysis of the Country-by-Country Report structure

Information type	Report indicators
General information about the MNE Group	• The name of the MNE Group; • The status of the taxpayer in submitting the Report; • The reporting period (financial year).
General information about Country-by-Country Report (for each country)	The name of the country where the MNE Group operates
	Chapter I • The currency of the parent company; • The main indicators of the MNE Group activity in the country (analysis in Annex 3).
	Chapter II. The list of all members of the MNE Group who are the country's tax residents: • Name; • Business structure; • Adress; • Tax identification number; • Other registration number; • Type of economic activity.
	Other Relevant Information

Source: (OECD, 2015c; On the approval of the form and the Procedure for filling out the Report by country of the international group of companies № 764, 2020).

The taxpayer should send the following information in the Chapter "Other Relevant Information" of the Country-by-Country Report:

- a brief explanation of which data sources were used in the preparation (consolidated financial statements of MNE Group, annual reports of MNE Group participants, internal reporting for management purposes, financial reporting for regulatory purposes);
- a change of the data source, reasons and consequences of the change;
- a currency exchange rate that is used to calculate the reporting of the MNE Group participants, which is different from the reporting currency of the MNE Group parent company;
- the method of determining data on the MNE Group participants (on the last date of the financial year or the reporting period);
- identification of the MNE Group members who joined or left the MNE Group during the reporting period;
- a change in the method of determining data on the MNE Group participants and the reason for the change;
- a change of tax jurisdiction during the reporting period;
- an application of a different reporting period (in the case when the financial reporting period is different than 12 months);
- an explanation of negative amounts and ambiguity of their interpretation in the Report;
- an explanation whether the accumulated profit includes negative value and the identification of the tax jurisdiction where it was generated;
- dividends paid to other MNE Group members (if they are included in the calculation of profit before taxation in Chapter 1);
- accrued tax on dividends paid to other members of the MNE Group (if they are included);
- a description of the nature of the economic activity, if in Chapter 2 the main economic activity of the MNE Group participant is identified as "other";
- other information about assessment of the TP risks and risks associated with tax base erosion and profit shifting.

The taxpayer should collect, analyze and summarize information about all MNE Group participants and the countries where they carry out their activities to prepare Country-by-Country Report. It is advisable to systematize such information in the Report about the MNE Group activities for the financial year for the purposes of TP (its form is proposed in Annex 4). We recommend an enterprise to use this proposed form to prepare information for filing the CbC report.

In order to prepare Country-by-Country Report, the MNE Group must establish a standardized and reliable process for collecting tax data all over the world. It is

necessary to collect and systematize data from various sources, structure the flows of economic transactions in order to highlight supply chains and transactions between the MNE Group participants and ensure the data in all reporting documents of the three-level reporting with the TP (Figure 16).

The amount of revenue of the MNE Group in the Notification on participation in the MNE Group = The amount of revenue in the CbC Report = Amount of revenue (Global documentation)
Revenue from the transactions with related persons in the Country-by-Country Report = the amount of payments to related persons in local files (Report on Controlled Transaction in Ukraine)
The amount of income received from related persons in the local file of the income recipient = the amount of payments to related person in the local files of related persons, parties of the controlled transaction

Figure 16. Compliance of indicators of three-level TP reporting
Source: developed by the authors.

At the global level, there is a need for an MNE Group to follow the Rules for the implementation of the three-level reporting model from TP of all jurisdictions where the MNE Group operates, including the date of the first submission of the Country-by-Country Report in these jurisdictions, threshold values for the submission of the TP reporting, deviations from the OECD guidelines. Under certain conditions, an MNE Group may be required to send a Country-by-Country Report in several jurisdictions. In order to ensure compliance with the rules for submitting the Country-by-Country Report in accordance with the countries' legislation where the MNE Group operates, the MNE Group should monitor all Bilateral and Multilateral Conventions on the Avoidance of Double Taxation Relations, including agreements on the tax information exchange, mutual assistance conventions, EU directives and agreements of competent authorities. It is necessary to analyze tax jurisdictions that will receive the Country-by-Country Report according to the tax information exchange procedure and in what jurisdictions the authorized participants have the right to send Country-by-Country Report.

At the same time, careful analysis of information during the preparation of the CbC report helps to eliminate discrepancies in advance, anticipate requests from tax authorities, and identify the real tax rate in each jurisdiction.

The company's preparation of a Notification on participation in the MNE Group needs special attention. According to Article 2 of the Model Convention on Coun-

try-by-Country Reporting, the tax administration is informed by enterprises (the MNE Group members) about the submission of CbC Report and who should send it (the parent company or an authorized MNE Group member) (OECD, 2015b). Countries that have joined the BEPS Action Plan 13 may independently decide on the implementation of a Notification. Mostly all countries have introduced the requirement to send such information (OECD, 2021e).

Since 2021, taxpayers (which carried out controlled operations in the reporting year) are required to submit a Notification on participation in an MNE Group by October 1 of the year following the reporting year (Tax code of Ukraine № 2755 VI, 2010). The procedure and form of a Notification on participation in the MNE Group member are approved by the Order of the Ministry of Finance of Ukraine dated 31 December 2020 No. 839 (On the approval of the form and procedure for drawing up the Notice of participation in an international group of companies№ 839, 2020).

Table 17. Algorithm of filing a Notification on participation in an MNE Group

Paragraph of the report	Required information
The status of a member of an MNE Group	• Is the enterprise a member of the MNE? • An explanation of the non-extension of the definition of an 'MNE Group participant" on the member.
Aggregate consolidated revenue of an MNE Group for the financial year preceding the reporting one	The code of the revenue amount interval according to the three-level model is indicated: • less than EUR 50 million; • from EUR 50 to EUR 750 million; • exceeds EUR 750 million. Currency: • in EUR; • currency in the reporting of the MNE is indicated for reference. Currency conversion: • at the average exchange rate for the reporting year. Calculation: • is made according to the accounting standards applied by the parent company of the MNE Group; • in the absence of the information—in accordance with international accounting standards.

Paragraph of the report	Required information
The date of the end of the financial year	a) The last day of the financial year for which the consolidated financial statements of the MNE Group are prepared; b) The date of the end of the financial year in accordance with the internal regulations of the parent company of a MNE Group, if consolidated financial statements of the MNE Group are not prepared. 1) Whether the financial period used by the MNE Group coincides with the calendar year (the reporting period for the purposes of the TP); 2) To count the deadline for submitting the CbC Reporting, if the MNE Group meets the requirements for its submission for the relevant financial year in the relevant jurisdiction.
Data of the MNE Group	• Name of the MNE Group; • If it does not have a specific name, enter the name of the main parent enterprise of this group.
Status of submission of the Country-by-Country Report	a) The report is submitted by the ultimate parent company; b) The report is submitted by an authorized member of the MNE Group; c) In accordance with the requirements of the legislation of the location of the parent company of the MNE Group, such an MNE Group is not required to submit a report, and at the same time, the parent company of such a group does not authorize another member of the MNE Group to submit a report in another foreign jurisdiction where its submission is provided.
Data on the parent company an MNE Group	• The full legal name of the parent company of the MNE Group, including the internal designation of the legal form; • The country where the parent company is established or registered (if it is different from the country of tax residency); • Tax registration number; • Other identification numbers (company registration number, or global legal entity identification code).

Paragraph of the report	Required information
Data on the member of the MNE Group authorized by the ultimate parent entity to submit a report by country	• The name and code of the relevant country (territory) of tax residency; • Full legal name including the internal designation of the legal form; • The country where the participant is established or registered (if it is different from the country of tax residency); • Tax registration number; • Other identification numbers (company registration number, or global legal entity identification code).
Countries, according to the legislation of which an MNE Group does not submit a Country-by-Country Report	• Is filled in if the MNE Group is not required to submit a report due to the lack of requirements, or under the condition of exemption from such submission in accordance with the legislation of other countries; • All countries (territories) in which the MNE Group carries out its activities where the MNE Group is not required to submit the report.

Source: (On the approval of the form and procedure for drawing up the Notice of participation in an international group of companies № 839, 2020).

It is necessary to choose correctly the financial year for which the calculation of the company's consolidated revenue is carried out (if an enterprise is required to file a Country-by-Country Report and the master file in accordance with the requirements of domestic tax legislation). The date of the end of the financial year of an MNE Group is important for calculating the time periods in which the controlling authorities may send a request for the submission of global documentation (Master file). This is the example of determining of the total consolidated revenue of an MNE Group for the financial year preceding the reporting year (if the financial and reporting periods do not coincide) and a preparation of a Notification for 2021:

– the financial year defined by the an MNE Group parent company runs from 1 October to 30 September;
– for calculation purposes, it is necessary to take into account data for the financial year that ended on 30 September 2020;
– data for the financial year from 1 October 2020 to 30 September 2021 will be taken into account when making a Notification for the reporting year 2022.

It is very important to determine if a taxpayer is an MNE Group member, and the amount of the total consolidated revenue of the MNE Group for the financial year preceding the reporting year (this information is necessary for filing a Notification

on participation in the MNE Group). So, this criterion defines if an MNE Group or a taxpayer is required to submit TP Documentation and a CbC Report. The OECD guidelines for the implementation of CbC reporting under BEPS 13 (herein: the Guidelines for CbC reporting) recommend applying IFRS or other internationally recognized financial reporting standards to solve the following issues:

– including the results of the activities of entities without the status of a legal entity in consolidated financial statements;
– minority stakes in consolidated reporting for the purposes of determining threshold criteria;
– determination of affiliation to the MNE Group and consolidated revenue if the taxpayer owns and/or controls of more than one unrelated to the MNE Group;
– application of consolidation methods;
– identification of membership in the MNE Group and consolidated income in case of changes in ownership due to mergers, acquisitions or divisions, etc., in a particular year.

According to IFRS 10 "Consolidated Financial Statements," the main condition for consolidation is the control. IFRS 10 defines the rules for determining the presence of investor control over the investment object and the need for consolidation of this object and requirements for the preparation of consolidated financial statements (IFRS, 2022).

It is necessary to clearly identify the parent company to ensure the correct filling of the Notification on participation in the MNE Group. Multi-level structures of the MNE Group have models in which the following business structuring are used: companies combine into subholdings according to a certain principle, subholdings are combined into a holding. In this case, the parent company of the MNE Group is the parent company of the holding.

In this paragraph, we will consider the application of the combined financial statement. A beneficial owner of several holdings prepares combined financial statements. IFRS 10 does not outline the requirements for the preparation of combined financial statements. If the shares of one of the companies of the holding are quoted on the stock exchange, the holding will be required to prepare the consolidated financial statements. Thus, the parent company of the holding is the parent company in this case. Therefore, the information in the combined financial statements, as a set of financial statements of a group of enterprises controlled by one investor, is not used to fill the Notification on the participation in an MNE Group.

We propose to apply the following approaches to determine the revenue of the MNE Group for the Notification on participation in the MNE Group (Table 18 and Table 19).

It is necessary to determine all participants during the preparation of the Notification on a participation in the MNE Group. BEPS Action 13 Final Report identifies the following participants of the MNE Group (for the purposes of preparation of three-level reporting on TPc):

1) any separate subdivision of the MNE Group, which is included in the consolidated financial statements of an MNE Group for the purposes of financial reporting or will be included if the shares of corporate rights of the subdivision of the MNE Group are quoted on the stock exchange;
2) any entity that is excluded from the consolidated financial statements of the MNE Group on the basis of size or materiality;
3) any permanent establishment of separate subdivision of the MNE Group included in (1) or (2) above, provided that the subdivision prepares separate financial statements for such establishment for the purposes of financial reporting, regulatory, tax reporting or internal control (OECD, 2015c).

The authors believe that for the preparation of the Notification to determine the amount of revenue it is necessary to follow the same approach as in the case of filing of Country-by-Country Report. The OECD Final Report provides that revenues should include revenues from the sale of stocks and property, services, royalties, interest, premiums and any other sums (OECD, 2015c).

According to OECD Guidance on the Implementation of Country-by-Country Reporting, "In determining whether the total consolidated group revenue of an MNE Group is less than EUR 750 million (or near equivalent amount in local currency as of January 2015), all of the revenue that is (or would be) reflected in the consolidated financial statements should be used.

Table 18. Algorithm of calculation of the consolidated data of an MNE Group

Information on	Scenario 1	Scenario 2	Scenario 3
Status of preparation of consolidated reporting by the Parent Company of the MNE Group	Shares of the parent company of the MNE Group are listed on stock exchange.	• Shares of the parent company of the MNE Group are not listed on stock exchange; • The parent company of the MNE Group, in accordance with the legislation of the jurisdiction in which it is registered, is not obliged to prepare Consolidated Financial Statements; • The parent company prepares the Consolidated Financial Statements in accordance with the policy of the MNE Group.	• Shares of the parent company of the MNE Group are not listed on stock exchange; • The parent company of the MNE Group, in accordance with the legislation of the jurisdiction in which it is registered, is not obliged to prepare Consolidated Financial Statements; • The parent company of the MNE Group does not prepare such reporting in accordance with the policy of the MNE Group.
Information about the revenue of the MNE Group	The revenue is indicated in the published Consolidated Financial Statements of the parent company of the MNE Group, including the auditor's report.	The revenue is indicated in the Consolidated Financial Statements of the parent company of the MNE Group.	The taxpayer performs the analysis according to the algorithm given in Table 19.

Source: developed by the authors.

Table 19. Analysis algorithm in the case when the parent company does not prepare consolidated financial statements

Stages	Actions of the taxpayer	
Step 1	Definition of the organizational structure of the MNE Group: • all participants; • organizational and legal forms; • ownership structure (indicating shares of ownership); • countries and territories where the participants carry out their activities.	
Step 2	Identification of the parent company of the MNE Group.	
Step 3	Assessment whether it would be mandatory to prepare consolidated financial statements of the MNE Group if the shares (corporate rights) of the parent company were listed on stock exchange.	
	Scenario A The parent company of the MNE Group is not required to prepare consolidated financial statements of the MNE Group.	Scenario B The parent company of the MNE Group is required to prepare consolidated financial statements of the MNE Group.
	The taxpayer, for the purposes of filing the Notification, concludes that it is not part of the MNE Group.	The total consolidated revenue of the MNE Group for the financial year preceding the reporting year is calculated by the taxpayer independently according to the IFRS.

Source: developed by the authors.

A jurisdiction where the Ultimate Parent Entity resides is allowed to require inclusion of extraordinary income and gains from investment activities in total consolidated group revenue if those items are presented in the consolidated financial statements under applicable accounting rules (OECD, 2019d).

Chapter III of the Notification is filed if an MNE Group is not required to submit a Report in accordance with the legislation of other jurisdictions (On the approval of the form and procedure for drawing up the Notice of participation in an international group of companies № 839, 2020).

DAC 3 Tax Ruling Exchange

Step 5 of the BEPS Plan establishes rules for implementing a transparency framework, which provides for the exchange between countries that have joined BEPS Action 5 on information on tax rulings that relate to favorable tax conditions:

– agreements relating to preferential regimes;
– unilateral ARA or other cross-border unilateral resolutions in the field of TP;
– cross-border agreements involving a downward adjustment of taxable income;
– agreement on issues of permanent representation (PE);
– coordination for conduit structures of related entities;
– any arrangement identified by the Forum on Harmful Tax Practices (FHTP) which creates BEPS.

The information on tax rulings is exchanged in accordance with the following:

1) information gathering process;
2) information exchange process;
3) ensuring the confidentiality of the received information;
4) keeping statistics (OECD, 2015a).

According to the general rules, the information is exchanged between:

a) the tax jurisdiction countries of all related entities with which the taxpayer carries out a transaction in respect of which a tax ruling has been made or the country where the profit received by related parties benefiting from preferential treatment arises (this rule is also applied in the context of TP);
b) tax jurisdictions of the Ultimate Parent Entity and the parent company.

Annex C to Step 5 of the BEPS Plan sets out the form of the document to be used for the exchange of information (OECD, 2015). The information on tax rulings is exchanged through the OECD platform CTS—Common Transmission System (*Priamuiemo Razom*, EU4PFM), and the OECD has issued Instructions for filling in and XML-schema used in the exchange (OECD, 2019c).

The OECD annually carries out an expert assessment of the implementation of the exchange of information on tax rulings according to the established methodology (OECD, 2021c), and publishes reports based on the results of these reviews (OECD, 2020c). According to the results of the 2019 report, 124 tax jurisdictions adopted 20,000 tax decisions (rulings), which are the objects of the process of information exchange and 36,000 relevant exchanges between jurisdictions were made (OECD, 2020c).

Ukraine has joined Step 5 of the BEPS Plan, so it is also included in the annual review. However, the domestic tax legislation provides only one type of tax decisions to be exchanged—advance pricing agreement (APA), and the other agreements have not been concluded yet, so the country's data are not being provided.

EU countries have introduced a procedure for exchanging information on tax rulings that relate to favorable tax conditions. The procedure is established in accordance with EU Directive 2015/2376 of 8 December 2015 (herein "DAC 3") (Council Directive (EU) 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation amending Directive 2011/16/EU on the mandatory automatic exchange of information in the field of taxation, 2015)).

The object of the automatic exchange of information is any agreement, communication, other instrument or action (signed, changed or extended in the context of a tax audit) that have similar effects and meet the following conditions:

– have been issued, amended or renewed by or on behalf of a government or tax authority of an EU Member State or by territorial or administrative divisions of an EU Member State, including local authorities, regardless of whether it is applied in practice;
– have been issued, changed or extended to a specific person or group of persons and on which that person or group of persons has the right to rely;
– relate to the interpretation or application of a legal or administrative provision relating to the administration or enforcement of domestic taxation laws of a Member State or territorial or administrative subdivisions of a Member State, including local authorities;
– relates to a cross-border transaction or to the question of whether or not activities carried on by a person in another jurisdiction create a permanent establishment.

The term advance pricing agreement (APA) according to the DAC 3 means any agreement, communication or any other instrument or action *between a taxpayer and tax authority determining the transfer pricing methodology for pricing the taxpayer's international transactions*, which meets the following conditions:

– has been issued, modified or extended to a specific person or a group of persons and on which that person or group of persons has the right to rely;
– determines, prior to cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment (Directive 2011/16/EU on the mandatory automatic exchange of information in the field of taxation, 2011; Council Directive (EU) 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2015, 2014).

The competent authority of the EU member country which issued, amended or renewed the previous international agreement (ruling) or APA after 31 December 2016, informs the competent authorities of all other member countries about it

through automatic exchange of information, as well as the European Commission (part of the information).

The information is exchanged within three months after the end of six months of the calendar year during which previous international agreements (rulings) or advance pricing agreements are issued, changed or renewed.

Information required to be exchanged:

a) identification of a person who is not a natural person and, in appropriate cases, does not belong to the group of persons;
b) summary of the content of the previous cross-border agreements or APA, including a description of the relevant commercial activity or an operation or a series of operations, presented in abstract terms, which do not lead to the disclosure of a commercial, industrial or professional secret or commercial process, or information, the disclosure of which could harm public order;
c) the dates of issuance, amendment or renewal of the advance cross-border ruling or advance pricing arrangement;
d) the starting date of the advance cross-border ruling or advance pricing arrangement, if it is indicated;
e) the end date of the period of validity of the advance cross-border ruling or advance pricing arrangement, if it is indicated;
f) type of preliminary cross-border agreements or APA;
g) the amount of a transaction or a series of transactions provided for by a previous cross-border agreement or an advance pricing agreement, if such an amount is mentioned in these documents;
h) a description of the set of criteria used to determine transfer pricing, or the transfer price itself in the case of an advance pricing agreement;
i) identification of the method used to identify the transfer pricing in the case of an advance pricing agreement;
j) identification of other EU member countries that may be concerned by the advance cross-border agreement or advance pricing agreement;
k) identification of any person, except a natural person, EU member countries that may be affected by the previous international agreement or advance pricing agreement (indicating with which EU member states the relevant persons are connected);
l) an indication of the information to be transferred is based on a previous cross-border agreement or an advance pricing agreement (Council Directive 2011/16/EU on the mandatory automatic exchange of information in the field of taxation, 2011; Council Directive (EU) 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2015, 2014).

Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy/DAC7

An Implementation Objective

Digitalization has undergone rapid development over the last two decades. Digital technologies have spread rapidly; the launching of the online markets is a distinctive feature of the XXI century. More and more companies are providing their services or selling own products over the Internet and use all advantages of online trading. Online platforms greatly facilitate various transactions between users (within different countries and continents), simplify purchase and sale procedures, tracking and calculation of transactions or financial results. Such platforms have a significant impact on business profitability, facilitate marketing campaigns, and bring buyers and sellers closer together. The implementation of online platforms has become more relevant than ever during the COVID-19 pandemic. Global isolation has forced most small and medium-sized businesses to introduce virtual trading and protect themselves from bankruptcy. In the era of digitalization, it is difficult to find a company that does not take advantage of the Internet environment.

Thus, online trading has become an integral part of individual economies, opened up new prospects for business development, and at the same time revealed many controversial issues related to accounting and taxation. Tax authorities face the problem of inconsistency of existing tax strategies with modern realities, and therefore there is a need to increase the number of taxpayers receiving taxable income through digital platforms. On the other hand, the increase in the number of sharing platforms opens up other opportunities for tax administrations and facilitates the control of tax payments. Businesses that previously worked in the "shadow" must register their transactions in electronic form in the online environment. The same relates to customer payments for services or goods. Thus, it is very important to develop the right strategy, regulatory and technical support because tax authorities can use such information to verify the activities of digital platform operators. The possible advantages include increased transparency and minimization of the burden of compliance for administrations and taxpayers.

However, due to the expansion of digital business and the popularity of the principles of the sharing economy, it has been recognized that income generated by entrepreneurs selling goods or services through online digital platforms can also evade taxation due to difficulties for local tax authorities in assessment of the relevant taxpayers. At the same time, tax administrations or taxpayers may not always have access to these platforms. This is due to the fact that the development

of socio-economic processes leads to a transition from traditional labor relations under employment contracts to the provision of services by individuals on an independent basis (the so-called "freelancing"). These changes cause risks of distorting competition with traditional enterprises and reducing declared taxable income. For these reasons, local tax authorities in some European countries have already tried to shift the burden of reporting taxpayer information to the competent tax authorities, e.g., the short-term rental legislation that has been approved in several countries (Italy and Belgium). Tax authorities can exchange the received information and use it as a data source for possible further audit activities. However, it should be noted that the transfer of such information is a burden for the digital platform operators, increasing the administrative burden on enterprises, which is not part of their main business activities.

Businesses on the online platforms are mainly focused on developing technologies to facilitate digital commerce, providing a trading platform for efficient access to (cross-border) markets and communication between suppliers of goods and services and users, etc.

Every country develops and implements its own tax policy, takes into account the change in the economic environment. However, the EU legal framework has been developed adhering to common rules and regulations. The exchange of tax information is an important aspect of cooperation, the implementation of tax policy by various countries of the world, including the EU.

Tax authorities have various methods of collecting and exchanging information. The DAC7 is one of such mechanisms that ensures compliance with tax rules and tax legislation (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021). In fact, the DAC7 aims to provide equal conditions of taxation between those who offer their goods or services through a digital platform and those who work offline. The EU has fought against tax evasion, for fair taxation, control over the payment of taxes by all entities without exception for a long time, so it became the prerequisites for the introducing of DAC7. Thus, the DAC7 combines the need to achieve transparency and exchange of information for the purposes of taxation of digital platform operators that may collect information in the context of their business activities. Digital platform operators are required to support tax authorities in fighting against tax evasion and promoting honest business practices.

It should be emphasized that the DAC7 is not the first attempt to establish the exchange of tax information within the EU and other countries. DAC7 for the sixth time makes changes to Council Directive 2011/16 15, which was introduced to improve the efficiency of the exchange of information for tax purposes between member states for the purpose of assessment of tax violations. Council Directive 2011/16

has been changed over the years considering the evolution of business models, transferring to the EU level the concepts developed by the OECD as part of the BEPS project: Step 12 from 2015 recommends the countries to adopt the International Standard for Mandatory Data Submission, the so-called Mandatory Disclosure Rules, in order to increase tax transparency and counter abusive international practices (OECD, 2021g). The Electronic Commerce Directive 2000/31/EC of 8 June 2000 (Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000) prohibits member states to require disclosure of information by operators of digital platforms, except in very specific circumstances. Thus, it is clear that DAC7 goes beyond the framework for the modernization of the existing information exchange rules, so it significantly affects all interested parties of the digital business industry, such as sellers or digital companies operating platforms. The latest amendments concern the digital economy and must be implemented by member states by the end of 2022.

Thus, DAC7 has a double purpose: on the one hand, to satisfy the need of tax authorities to transfer the disclosure of information to the parties involved in a certain transaction, and on the other hand, to exchange relevant information between competent tax authorities. This aspect is still subject to analysis and practical testing due to the recent implementation of DAC6, which introduced a similar disclosure of information for intermediaries (such as consultants, lawyers, financial institutions) who advise or implement an agreement that may be potentially harmful to taxation).

The OECD also published a report on 3 July 2020, Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (herein: the "Model Rules") and considered these issues (OECD, 2020d). The standard rules are to:

– ensure that taxpayers and tax administrations receive timely access to high-quality and up-to-date information about the remuneration received by platform sellers in order to increase compliance and minimize the compliance burden for tax administrations and taxpayers;
– promote the standardization of reporting rules between jurisdictions to help platforms meet their reporting obligations in different jurisdictions by allowing them to follow broadly similar processes for collecting and reporting information about the transactions and identities of platform sellers;
– ensure the reliability of information that is collected, transmitted and exchanged. Information should be relevant and high-quality to tax administrations: the due diligence and reporting requirements of the Model Rules were designed to collect and submit only high quality and relevant information and relate the to the work of tax administrations;

– promote international cooperation between tax administrations to ensure access of tax administrations to information about income received by sellers of resident platforms, including platforms located in other jurisdictions;
– provide a reporting regime that can also be used for other purposes related to taxation;
– contribute to the development of new technical solutions to support the conduct of due diligence: the Standard Rules provide for the possibility of confirming the identity and tax residency of the seller through the so-called state verification service;
– ensure effective and targeted area: the Model Rules include the rental of real estate and personal services, including the provision of transport and delivery services.

According to the OECD, on 9 November 2022, 22 jurisdictions signed the Multilateral Competent Authority Agreement for the automatic exchange of information under the OECD Model Rules for Reporting by Digital Platforms (also known as the DPI MCAA) (OECD, 2022e).

Therefore, the prerequisites for the establishment and implementation of the DAC7 directive were: rapid digitalization of economies; growth of the market of digital operators; the importance of increasing the level of transparency and relevance of countries' tax policies; deepening the fight against unscrupulous taxpayers, residents and non-residents of the EU; deepening the cooperation of the countries' tax authorities in the exchange of tax information, and in issues concerning inadequacy and unreasonableness of the existing rules, norms, and principles; constant change in the business environment. First of all, the DAC7 directive extends tax transparency rules to digital platforms by requiring: (i) operators of reporting platforms to collect and report proposed information on accountable sellers who use their platforms for certain commercial activities, and (ii) EU member states to automatically share this information. DAC7 broadly follows the OECD model rules for platform operators' reporting on sellers in the sharing economy, although the area of reporting activities under DAC7 covers a wider range of issues.

Legal Framework and Exchange Rules

On 22 March 2021, the Council of the European Union adopted Directive 2021/514 amending Council Directive 2011/16/EU on administrative cooperation in the field of taxation known as DAC7 (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021). The DAC7 introduces a new reporting obligation for digital platform operators that do business in the EU. In addition, opportunities for information exchange between EU member

states are expanding. DAC7 came into force on 1 January 2023, therefore digital platform operators should inform about sales of certain types of goods and services on their platform.

The main objective of DAC7 is to support tax transparency and prevent tax evasion in business activities carried out using digital platforms. It should be emphasized that DAC7 measures are aimed at the fair taxation of the incomes of persons working through online platforms (the so-called sellers) and not at the profits of the platform operators.

Standardization of reporting requirements for Platform Operators at union level should avoid excessive administrative burden due to individual tax administration requirements and unilateral reporting obligations introduced by some country members. The exchange of information between tax authorities will allow platform operators to comply with reporting obligations on income received by sellers using a digital platform in the same member country.

In European countries, different institutions are responsible for the implementation of DAC7:

1. In the Czech Republic, the Ministry of Finance is responsible for the implementation of DAC7. The Ministry prepared Act No. 164/2013 "About International Cooperation in Tax Administration". Under the proposed law, the new rules will come into force on 1 January 2023 (VATupdate, 2022).
2. In order to implement DAC7 into national law, the Hungarian Parliament adopted an amendment to Act No. 37 of 2013 "On the Rules of International Administrative Cooperation on Taxes and Other Duties", which will come into force on 1 January 2023 (Asquith, 2021).
3. The Romanian Ministry of Public Finance has transferred the requirements stipulated by DAC7 to the Romanian Tax Code (e.g., platform operators will be required to report transactions made by sellers). However, the procedure for submitting such reporting should be regulated. As a rule, these new requirements will be applied on 1 January 2023 (Asquith, 2023).
4. In order to introduce DAC7 into national legislation, the Ministry of Finance of the Slovak Republic adopted amendments to Law No. 442/2012 On International Assistance and Cooperation in Tax Administration. It will come into force on 1 January 2023 (KPMG, 2022).

Platform operator is an organization that provides a platform to sellers on the basis of a concluded contract. However, the form of the contract is not specifically negotiated, it can be in any form (not only in writing). Natural persons are excluded from DAC7 platform operators (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

According to DAC7, the term "platform" means any software, including a website or its part, as well as an application, including mobile application, that is accessible

to users and allows sellers to connect with other users for the purpose of performing relevant activities directly or indirectly for such users. It also includes any arrangements for the collection and payment of fees of the relevant activity (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

The operators of the platform carry out the relevant activity; a relevant activity is defined as carrying out the following activities:

– rental of real estate, including residential and commercial property, as well as any other immovable property and parking space;
– personal service;
– sale of goods;
– rental of any mode of transport.

The seller acts as an employee of the Platform Operator or a related person of the Platform Operator (it is not classified as "relevant activities").

There are different types of platforms:

– platforms for providing personal services—delivery, repair, cleaning, professional services (TaskRabbit, Handy, etc.);
– platforms for the sale of various products and goods (Amazon, eBay, AliExpress, etc.);
– platforms for providing transport services (Uber, Bolt, Lyft, etc.).

A wide range of digital platform operators should fulfill the DAC7 obligations:

– digital platforms available to users and sellers for the sale of goods and certain types of services (the definition of platform covers both websites and mobile phone applications);
– platforms that have legal or commercial presence in the EU;
– platforms that are used by sellers to carry out relevant activities.

Figure 17 shows the functioning of DAC7 in the EU.

The DAC7 reporting obligations are applied only to (i) platform operators that are tax resident or established in the EU (through registration or a permanent establishment) and (ii) foreign platform operators that carry out commercial activities in the EU but have no legal or tax presence in the EU (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

Qualified non-Union platform operators do not send reporting as they comply with the reporting obligation in a qualified non-EU member country that cooperates with EU countries and applies automatic exchange of equivalent information. If an operator that would have to report information (in advance and on annual basis) to the competent authority of the member country that the platform business model has no reportable sellers, it will be excluded from the reporting obligation.

The competent authorities are Specialized Tax Inspection (the Czech Republic), National Tax and Customs Administration (Hungary), National Agency of Public Finance (Romania), Financial Directorate (Slovakia).

Reported information must be submitted to the tax authority no later than 31 January of the year following the calendar year in which the reportable seller is identified. The deadline for the first reporting by platform operators is 31 January 2024. Sellers who have carried out less than 30 relevant activities on the digital platform for the sale of goods and for which the remuneration received does not exceed EUR 2,000 (USD 2,400) during the reporting period will also be exempted from reporting as registered organizations, public authorities and sellers in the rental property sector, if their limits are not exceeded (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

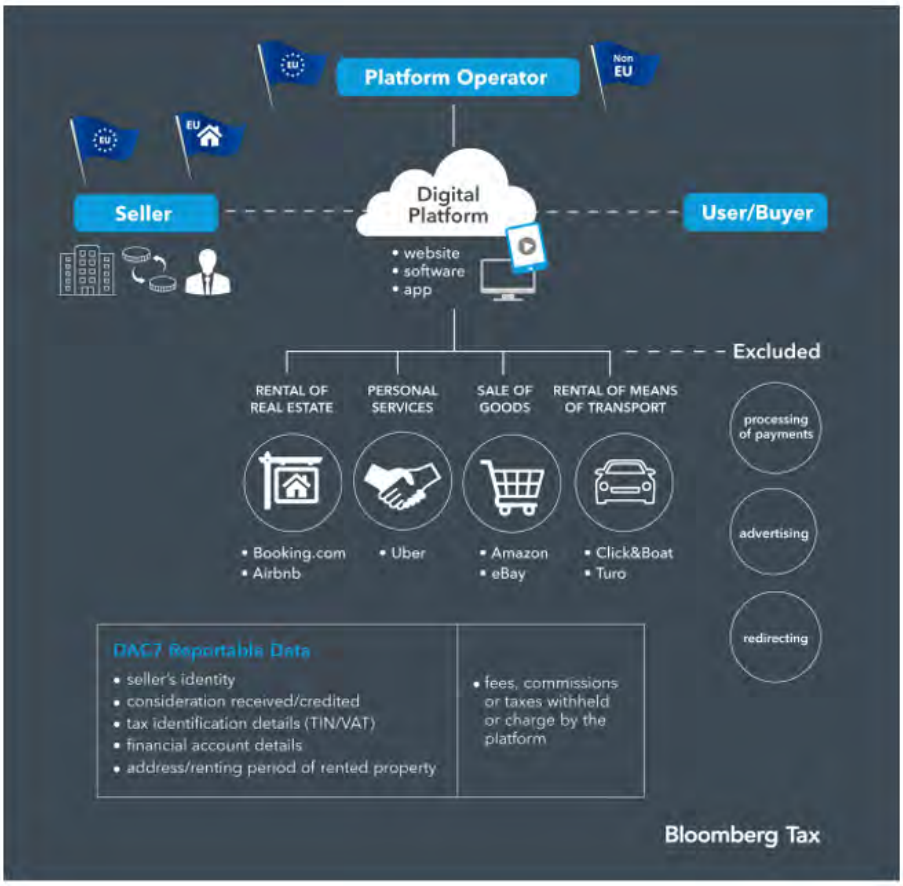

Figure 17. Exchange under the DAC7
Source: (Bloomberg Tax, 2021).

The platform operator must submit a report to the competent tax authority of the EU country. This is determined by the DAC7 and will generally apply where the operator is a tax resident. If the platform operator carries out its activities in more than one EU country, the operator must choose the tax authority of the country it will report to. Non-EU platform operators are generally required to register in and report to a selected EU country. However, they may be exempted from reporting to the EU if equivalent information is exchanged under an agreement between the country in which the operator is located and the Member State where the operator carries out its activities.

The adopted DAC7 covers broad reporting by platform operators. It includes not only digital platforms that facilitate transactions between their customers and small/medium enterprises (SMEs) offering services, but also e-commerce platforms and social media platforms, networking sites and streaming platforms. Taking into account the broad coverage of the proposal and its possible impact on information society services, influencers, content creators and the way SMEs conduct their business, analysts believe that these provisions should be discussed with SMEs, European platforms and European digital economy experts, so that they do not jeopardize the European digital transformation. The consultation would ensure coherence of European law on digital platforms, which is of great importance in light of the future regulation of the Digital Single Market (by the Digital Services Act).

In order to ensure that information about a reportable seller is effectively exchanged with the jurisdiction (in which the reportable seller is resident or has provided relevant real estate services), the reportable seller must also have such status in the jurisdiction in which the operator platform provides reporting. It can be the usual jurisdiction or a partner jurisdiction that has similar rules.

Figure 18 shows that Platform Z is operated by two Platform Operators: Platform Operator 1 (resident of Jurisdiction 1) and Platform Operator 2 (resident of Jurisdiction 2), with Jurisdiction 2 being a partner jurisdiction of Jurisdiction 1. Platform Z is used by three categories of sellers: Seller A (resident of Jurisdiction 1), Seller B (resident of Jurisdiction 3) and Seller C (resident of Jurisdiction 4). Jurisdiction 4 is a reporting jurisdiction in both Jurisdictions 1 and 2, Jurisdiction 3 is a reporting jurisdiction only in Jurisdiction 1 and not in Jurisdiction 2. Platform Operator 2 provides most of the seller-related functions and Platform Operator 1 relies on Platform Operator 2 to complete due diligence procedures; Platform Operator 2 will complete due diligence procedures for Platform Operator 1 in accordance with the regulations in Jurisdiction 2.

Platform Operator 1 complies the reporting requirements, Platform Operator 2 assures that it fulfills its reporting obligations for Seller C, therefore Platform Operator 1 does not report information about Seller C to the tax administration of

Jurisdiction 1. Platform Operator 1 must report information about Seller A to its (domestic) tax administration. Platform Operator 1 must also report information about Seller B, as Seller B is not an reportable seller to Platform Operator 2 due to the absence of an exchange agreement between Jurisdictions 2 (jurisdiction of residence of Platform Operator 2) and 3 (jurisdiction of residence of Seller B).

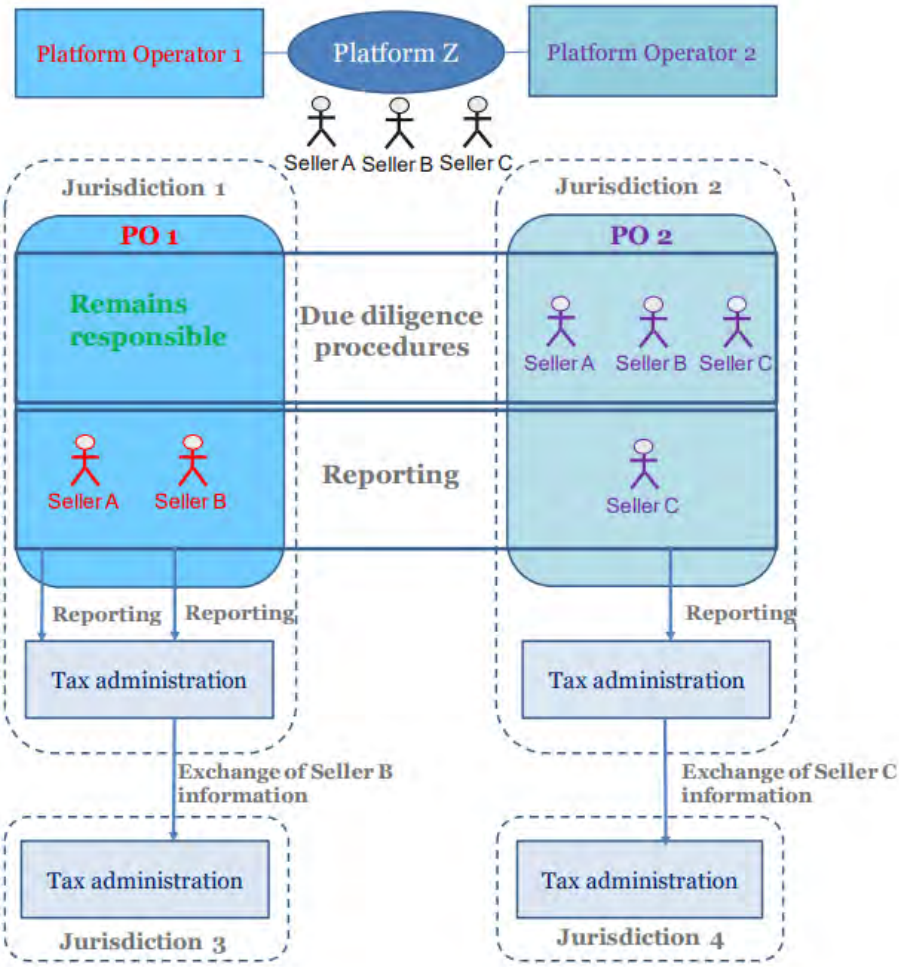

Figure 18. Exchange of tax information of digital platforms according to the OECD rules
Source: (OECD, 2020d).

DAC7 also amends existing provisions on exchange of information and administrative cooperation.

1. Exchange of information upon request: conditions for the request:

– Foreseeable relevance and exhaustiveness. The foreseeable relevance of the information requested by one-member country from another determines whether or not the requested member country shall be required to comply with the request for information, and thus constitutes one of the legal bases of the information order addressed by that member state to a relevant person and of the penalty imposed on that person for failure to comply with the information order. The aim of DAC7 is to clearly define the standard of foreseeable relevance, to ensure effectiveness of the exchanges of information and prevent unjustified refusals of requests, as well as to provide legal clarity and certainty to both tax administrations and taxpayers.

For these purposes, DAC7 provides for a definition of the standard of foreseeable relevance under which "the requested information is foreseeably relevant where, at the time the request is made, the requesting authority considers that, in accordance with its national law, there is a reasonable possibility that the requested information will be relevant to the tax affairs of one or several taxpayers, whether identified by name or otherwise, and be justified for the purposes of the investigation." A request for information may refer to one or more taxpayers if they are individually identified. In this context, DAC7 clarifies that the foreseeable relevance standard should not be applied to requests for additional information after an exchange of information relating to a prior pricing arrangement.

The DAC7 also lays down procedural requirements which the requesting authority must observe. Thus, "with the aim to demonstrate the foreseeable relevance of the requested information, the requesting competent authority shall provide the information to the requested authority about the tax purpose for which the information is sought, and a specification of the information required for the administration or enforcement of its national law."

The DAC7 also clarifies that before requesting information, the requesting authority must use all sources of information and all available means. However, if the requesting authority faces difficulties and risks, the obligation is not applied. The requesting authority may refuse to provide information.

Group requests. Considering there is sometimes a need for issuing requests for information that concern groups of taxpayers which cannot be identified individually but are instead described by a common set of characteristics, DAC7 addresses the issue of group requests in the context of a request for information. In that respect, DAC7 provides for the possibility for tax administrations to make group requests for information. In such a case, the requesting authority has to provide the requested authority with a set of information including a comprehensive description of the characteristics of the group and an explanation of the applicable law and of the facts and circumstances which led to the request.

– Standard form. According to DAC7, the standard information request form must include at the following information, which is provided by the requesting tax authority: the identity of the requested or investigated person, a detailed description of the general characteristics of the group (for the group requests), the tax purpose for the requested information.

Review of the legal framework for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy is provided in the Table 20.

Table 20. Legal framework for reporting by Platform Operators

EU framework	OECD framework
• Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC7); • Model domestic rules; • EU exchange framework; • Rules for non-EU Platform Operators; • Implementing Regulation; • XML User Guide.	• Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy; • Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods; • Model Rules for Reporting by Digital Platform Operators XML Schema and User Guide for Tax Administrations; • Multilateral Competent Authority Agreement on Automatic Exchange of Information on Income Derived through Digital Platforms (DPI MCAA)—signed by 23 jurisdictions (as of 9 November 2022); • Code of Conduct.

Source: (Directive 2011/16/EU on the mandatory automatic exchange of information in the field of taxation, 2011; Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021; OECD, 2020a;2020d, 2021g, 2022d; 28 Jurisdictions Sign International Tax Agreements to Exchange Information with Respect to Income Earned on Digital Platforms and Offshore Financial Assets, OECD).

Although the Directive and the OECD Model Rules are directly aimed at the creation of an international exchange framework, they could also be used in domestic context (e.g., a Ukrainian platform operator reports on Ukrainian sellers).

The intention of the Code of Conduct is to facilitate a possible standard approach to co-operation between administrations and platforms on providing information and support to platform sellers on their tax obligations while minimizing compliance burdens (OECD, 2020a).

According to DAC7, from 1 January 2023, reporting platform operators must identify reportable sellers and collect information on all non-excluded sellers which carry out relevant activities. The platform operators are also required to carry out due diligence and reporting obligations of the collected information (Bloomberg Tax, 2021).

The main aspects of due diligence and reporting obligations by platform operators are presented in Figure 19.

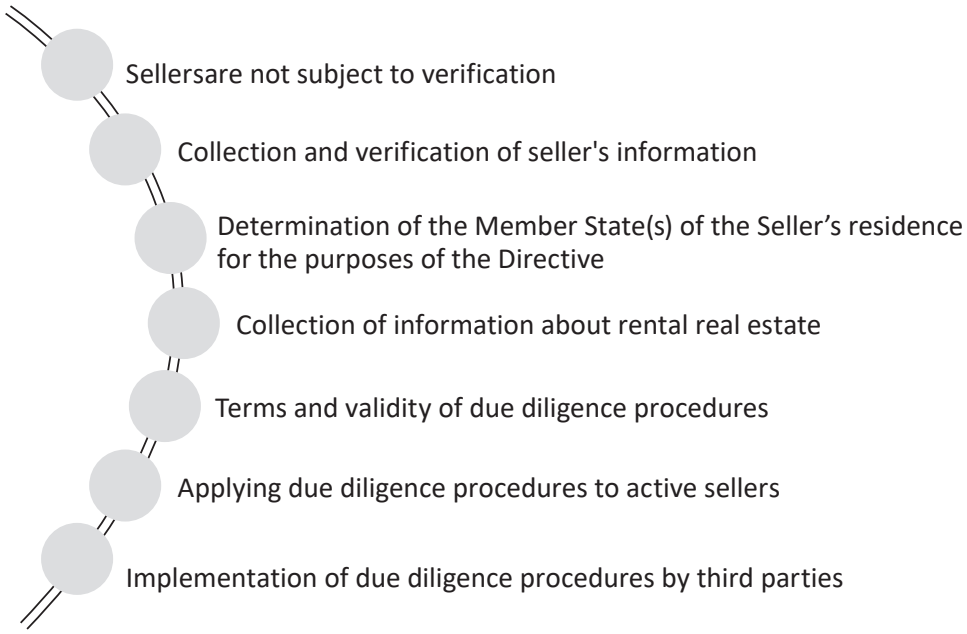

Figure 19. Basic aspects of performing due diligence procedures according to DAC-7
Source: developed by the authors based on *Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation* (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021).

The first step of the due diligence procedures is to identify the Excluded Sellers. The DAC7 defines the Excluded Seller as any seller:

– that is a Governmental Entity;
– that is an Entity the stock of which is regularly traded on an established securities market or a Related Entity of an Entity the stock of which is regularly traded on an established securities market;

– that is an Entity for which the Platform Operator facilitated more than 2,000 Relevant Activities by means of the rental of immovable property in respect of a Property Listing during the Reporting Period; or
– for which the Platform Operator facilitated less than 30 Relevant Activities by means of the sale of Goods and for which the total amount of Consideration paid or credited did not exceed EUR 2,000 during the Reporting Period (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative co-operation in the field of taxation, 2021).

The following sellers could be defines as Excluded:

– Governmental Entities;
– Publicly traded Entities and their Related Entities;
– Entities with more than 2,000 rentals of immovable property;
– Sellers with less than 30 sales of goods for less than EUR 2,000.

In order to determine the excluded status, the Reporting Platform Operator may rely on: publicly available information, confirmation from the Seller or its available records (depending on the exception). The option to rely on a government-offered verification service (for example, through an API solution integrated in the Platform) aims to accommodate the use of new technology solutions that are already in place in some jurisdictions for purposes of identifying and reporting Sellers.

The Reporting Platform Operator collects information about each seller who is an individual or a legal entity and is not an Excluded Seller. The information relates to clearly specified Seller credentials and is collected in its entirety. The Reporting Platform Operator has the option of using an identification service provided by a member country or the EU to verify the Seller's identity and residence for tax purposes. The Reporting Platform Operator has the right not to require the identification number of the taxpayer, if the country, where the Seller is a tax resident, does not issue and require the collection of the identification number of the taxpayer.

The tax authority requires information about the Seller (full name and address), country of residence in the EU, financial account details, taxpayer identification number, VAT/business registration numbers, remuneration that is paid or credited per quarter, any fees, commissions or taxes are kept by the Reporting Platform Operator.

If the Seller's activities are related to the rental of real estate, the Platform Operator collects each address from Property List and the corresponding land registration number, if any. If the Reporting Platform Operator has facilitated more than 2,000 leases of the same Seller, it will collect supporting documents, data or information that the property from this Listing is held by the same owner.

The Reporting Platform Operator determines the EU member country of which the Seller is a tax resident for the purposes of DAC7 according to the following rules:

1) the Reporting Platform Operator must consider the Seller a resident in the jurisdiction of the Seller's primary address;
2) the country that issued the taxpayer identification number, if it differs from the country of the Seller's primary address;
3) the country where the Seller has a permanent representative office;
4) any other country confirmed by means of electronic identification.

The Reporting Platform Operator determines whether the information collected is reliable using:

– all records available to the reporting platform operator;
– access to databases provided by the member country or the EU for free use to check the validity of the taxpayer identification number.

If the Seller provides inaccurate information, the Reporting Platform Operator requires to correct it, as well as to provide reliable supporting documents, data or information from an independent and reliable source.

The Reporting Platform Operator must carry out due diligence procedures by 31 December of each reporting period. Existing Sellers registered on 1 January 2023 have a two-year deadline to complete due diligence. The Reporting Platform Operator must update the due diligence data every 36 months.

Reporting Platform Operators may choose to apply due diligence procedures only to active sellers. They also may use a third-party service provider to perform due diligence procedures. However, the operator of the platform is still responsible for following the rules of the due diligence procedure and providing reliable information.

In order to comply with the General Data Protection Regulation, the Reporting Platform Operator must also inform individual Sellers that their information is collected and shared in accordance with DAC7.

Any processing of personal data carried out within the framework of Directive 2011/16/EU should continue to comply with Regulation (EU) 2016/679 of the European Parliament and of the Council (Regulation (EU) 2016/679 of the European Parliament and of the Council 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, 2016) and Regulation (EU) 2018/1725 Regulation (EU) 2018/1725 of the European Parliament and of the 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, 2018). Data processing is set out in Directive 2011/16/EU solely with the objective of serving the general public interest, namely the matters of taxation and the purposes of combating tax fraud, tax evasion and tax avoidance, safeguarding tax revenues and promoting fair taxation, which strengthen opportunities for social, political and economic integration

of the Member States. Therefore, in Directive 2011/16/EU, the references to the relevant Union law on data protection should be updated and extended to the rules introduced by this Directive. This is of particular importance for the purpose of ensuring legal certainty for data controllers and data processors within the meaning of Regulations (EU) 2016/679 and (EU) 2018/1725 while ensuring the protection of the rights of data subjects.

EU member states are obliged to exchange the submitted information within two months after the end of the reporting period. Digital platform operators established in a non-EU jurisdiction that has reporting obligations equivalent to the DAC7 rules are exempt from reporting under DAC7. The European Commission is developing a list of jurisdictions that it considers having equivalent reporting obligations (Arends, Peeters, Kolkman, 2022).

In the cases of non-compliance with DAC7, reporting platform operators will be subject to sanctions that are similar to the sanctions imposed for violations of DAC6. Although every EU member state is required to impose effective and deterrent sanctions, and there is no uniform set of sanctions across the EU.

The reporting platform operators will be forced to close the user's account of any Reportable Sellers who have been reminded twice to provide the relevant information and failed to do so. Such closure shall occur if 60 days have passed since the last reminder without a response from the Seller, and re-registration shall be blocked until the Seller has disclosed the requested information.

This means that sanctions may vary between EU member states, but the penalties must be deterrent and effective in each EU member state. In the Netherlands, an administrative penalty up to a maximum of EUR 900,000 may be imposed on the Platform Operator, as well as prosecution (Arends, Peeters, Kolkman, 2022). In the Czech Republic, it is possible to impose a fine of up to CZK 1.5 million (about EUR 60,000) for failure to comply with obligations to provide information. The amount of the penalty for failure to comply with obligations to provide information to the National Tax and Customs Administration of Hungary and due diligence procedures is not more than HUF 5 million. According to the Tax Procedure Code of Romania, failure to comply with the reporting obligation may result in a penalty from ROL 2,000 to 14,000, depending on the type of organization operating the platform. However, it may be amended as the implementation of DAC7 in national legislation is still ongoing. The Ministry of Finance of the Slovak Republic proposes a penalty of EUR 10,000 for non-compliance with obligations to provide information to the competent authority of the Slovak Republic and due diligence procedures, which may be imposed repeatedly (Accace, 2022).

Review of the Literature

The field of taxation has been studied by domestic and foreign scholars. Modern scientific research is focused on the problems of the shadow economy, overcoming the problem of tax evasion, double taxation, as well as taxation of online business. Many studies have explored the relevance and necessity of research in the field of taxation due to the variability of the economic environment, the emergence and rapid development of new industries, as well as new methods of tax evasion. Brodzka A. has emphasized that "a number of initiatives at the national and international levels show that the changes in financial transparency and information exchange is a constant trend. Measures taken by countries and international organizations allow the automatic exchange of information to become a standard not only in EU member states and in relations between the EU and the USA, but, in the near future, in the global business environment" (Brodzka, 2015).

The development of the market of digital platforms stands out as a separate area of the research. Adamski D. has studied the analysis of the application of the regulatory approach in the activities of digital platforms in the domestic market. The author emphasizes that the regulatory approach to technology companies in the domestic market is in the process of reorientation from maximizing economic benefits to minimizing social and political costs. He systematized the basic economic and political benefits, as well as the costs of creating a European market for online activities, and the results of positive integration in this area before and after the implementation of the single digital market strategy in 2015. One valuable practical aspect is the clarification of the European Court's position on Uber, as well as highlighting unsubstantiated legal decisions and legal conflicts. The scholar has suggested that the creation of a single digital market in the EU has negative impact on the member states; he has also explained this impact through the prism of the level of economic development of each of the participating countries. Thus, the author also thinks that the highly developed countries will benefit from the digital market, while the developing countries will significantly leg behind (Adamski, 2018). We agree with the author's opinion about the negative consequences of the creation of a single digital market, however, stressing that there are many advantages for all Member States and candidate countries.

Strauss H., Schutte D. and Fawcett T. have expressed an interesting opinion about the ongoing debate at the global level regarding tax administration and reform within the framework of the digital economy. Their study summarizes, analyzes and evaluates the global tax response to various elements that have emerged with the development of digital economies.

In the researchers' study, a global and holistic overview of the current tax reform for all major types of taxes is affected by the digitalization of the economy. The scientists conducted research based on actual data collected for 120 countries of the world. They have concluded that "while the digital economy is seen as limitless and efficient, current international responses are still influenced by country borders and traditional tax principles, which have led to a global tax reform that is complex, expensive and difficult for highly multinational companies to comply with digitization." The researchers consider that the international tax response to the digitization of the economy does not take into account and recognize the hybrid nature and digital environment of business models related to the digital economy (Strauss, Schutte, Fawcett, 2021).

The impact of the development of digital platforms on the economy has been studied by such scholars as Di Porto F., Zuppetta M. and Notes A. F. They emphasize that "with digital platforms gaining dominant intermediating role and exerting regulatory functions vis-à-vis small and medium-sized enterprises (SMEs) through algorithms, EU institutions have started considering to rely on their analytical capacity to regulate the myriads of market transactions occurring within and through them". Most of the time, the EU suggests recurring to light-tough disclosure duties. Hence, the European model falls short in rebalancing information asymmetry and unequal bargaining power plaguing the SMEs. In practice, the EU model consists either in pure delegation of self-regulatory powers (codes of conduct) or non-enforceable co-regulatory schemes (with technical standards established by the platforms themselves). Other models have been suggested that rely on the regulator's access to the platform's data. In particular, to tackle the multifaceted risks associated with algorithmic decisions by digital platforms, while at the same time avoiding suppressing innovation, they make three suggestions: (1) information disclosures should also be done by an algorithm (2) that is pre-tested in a co-regulatory process, that involves the regulator and stakeholders and (3) enforced through legal and other empowerment tools, rather than solely through fines (Di Porto, Zuppetta, Notes, 2021).

Lane M. has presented different direction of the research. Although sharing opinion on the effectiveness of digital platforms, as well as the importance of their development, she singles out the problem of compliance with rules, norms and standards for employees. The scholar focused on such issues as working conditions on digital platforms, in particular, how to ensure guaranteed work and income, access to social protection, general career growth and collective bargaining rights, fair collection of taxes and legal employment (Lane, 2020).

Many studies are based on the experience of specific countries. Fanea-Ivanocci M., Musetescu R., Pana M. and Voicu C. have concluded that "the fight against corruption and increasing tax compliance with the help of digital public services are

key factors for increasing sustainable development in Romania." Tax regulation can affect the level of tax compliance due to the additional costs it generates. The use of digital public services reduces costs for entrepreneurs and increases their trust in public institutions due to a higher level of transparency (Fanea-Ivanocci et al., 2019). The scholars put forward several hypotheses to explain the cause-and-effect relationships between digital platforms and tax policy (Figure 3):

– Hypothesis 1 (H1): Business taxation increases entrepreneurs' costs of tax compliance with Romanian tax regulations;
– Hypothesis 2 (H2): The growing costs of tax compliance can be correlated with corruption occurrence or spread in Romania;
– Hypothesis 3 (H3): The spread of corruption endangers the process of sustainable development in Romania;
– Hypothesis 4 (H4): Digitization improves tax compliance and reduces corruption, both of which lead to increased sustainable development in Romania.

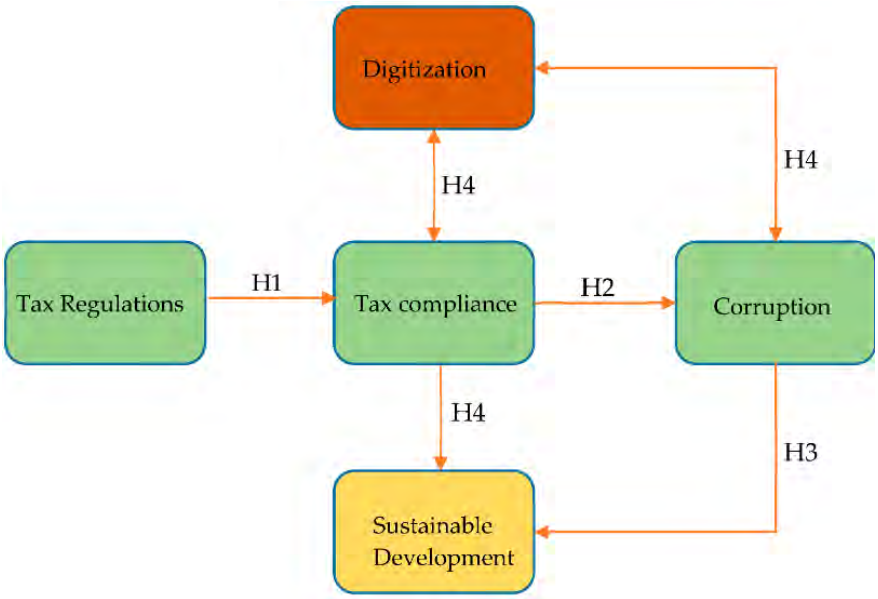

Figure 20. Map of arguments
Source: (Fanea-Ivanocci et al., 2019).

The global pandemic and its impact on socio-economic processes in the global environment have been studied by different scientists. Bilotta N. N. has emphasizes that the COVID-19 pandemic has shown how important digital platforms are for the functioning of the world economy (Bilotta, 2020). Big Tech companies are likely going to emerge stronger from the COVID-19 pandemic due to the massive surge in

demand for public, retail and corporate digital services. This megatrend has consolidated the dominant market position of digital multinationals—almost all of them from the US—in the EU markets, raising critical questions ranging from the EU's ambition for technological sovereignty to the much more urgent issue of how Big Tech's profits should be taxed. The "digital tax" issue—already the source of a heated international debate before COVID-19—has gained in prominence as it would be an important instrument for governments in dire need of raising money to finance the post-pandemic economic recovery (Bilotta, 2020).

Digitalization has done more to shape the 21st century than virtually any other phenomenon. However, international tax law has seemingly failed to keep pace with rapid technological developments, which has likely led to inequalities between the tax burden of traditional and digital business models. Thus far, there has been no consensus regarding the issue of fair taxation of the digital economy at the international and EU level. As European policymakers have begun to experience noticeable amounts of pressure to act, several EU countries have pushed forward and introduced unilateral measures to ensure they receive a fair share of the tax revenues pie. Geringer S. considers that "it is unclear whether national digital taxes can overcome the tax challenges stemming from the increasing digitalization of the economy. Thus, newly proposed and implemented national digital taxes in Europe are thoroughly elaborated in the context of their relationship with double tax treaty law, the perils of double/multiple taxation, their coherence with European law, their global and regional impact on competition and competitiveness, their contribution to tax revenues and the establishment of fair taxation conditions" (Geringer, 2021). The member states are introducing unilateral measures to solve the taxation problems of companies in the digital economy. The EU's actions are necessary to mitigate the fragmentation of the single market and the creation of distortions of competition within the EU through the adoption of such unilateral actions at the national level (Hak, Devcic, Budic, 2021).

Finck M. examines digital data-driven platforms and their impact on contemporary regulatory paradigms. Lawmakers around the globe including the European Commission are currently trying to make sense of these evolutions and determine how to regulate digital platforms. In its 2016 Communication on Online Platforms, the European Commission proposed various options for regulating the platform economy, including self-regulatory and co-regulatory models. The Commission's assumption that self-regulation or co-regulation can replace top-down legislative intervention in the platform economy forms the background of this paper, which examines these three options to determine their respective suitability. Finck has concluded that as command-and-control regulation as well as self-regulation raise significant problems in their application to the platform economy, co-regulation emerges as the most adequate option if certain conditions are complied with (Finck,

2017). Therefore, numerous researches in the field of development of digital platforms and the problems of regulation of their activities, in particular, tax issues, are quite popular among foreign scholars. As for Ukraine, this topic became popular only a few years ago, when digital platforms began to operate. However, it is important to review the works of domestic scientists in order to understand how Ukraine is ready for its integration into the EU.

Many works of the domestic experts have been devoted to the problems of effective integration and harmonization of regulatory and legal support, transformation of institutions and preparation of business entities for possible future changes. Pakhnenko O. and Semenoh A. have studied the basic principles of the EU tax policy and concluded that "the tax system in the EU countries has the relative autonomy of national governments regarding the formation of their own tax policy, under the condition of compliance with the established requirements in the tax field, designed to ensure effective functioning of the pan-European market and the free movement of goods and services, capital, labor and technologies. The main tasks of the tax policy of the EU countries, which are solved at the pan-European level, include the fight against tax evasion, tax fraud, avoidance of double taxation of incomes of individuals and legal entities earned on the territory of different EU countries" (Pakhnenko, Semenoh, 2016). Rainova L. has investigated the experience of approximation of Poland's tax legislation to EU directives. Poland is Ukraine's closest partner and the member of the EU since 2004, so studying its experience is extremely important for building an effective tax system in Ukraine. The researcher has underlined that "Poland was one of the ten countries of the fifth wave of EU expansion of 2004 that managed to negotiate the largest list of special provisions (positions) in order to ensure gradual changes in tax legislation and, thus, limit their negative economic and social consequences" (Rainova, 2017).

It should be noted that the topic of tax policy is quite popular among researchers. They pay more and more attention to the problems of tax evasion, double taxation, tax fraud, facilitating the formation and submission of tax reports, and automatic exchange of tax information. The analysis of scientific research made it possible to single out certain common features. In particular, there is a similar approach to explaining and justifying the place of digital platforms in the digital economy and the importance of implementing an effective tax policy in relation to the activities of the platforms. There is also a common conclusion regarding the advantages of introducing automatic exchange of tax information and deepening administrative cooperation within different countries of the world. In addition, experts are focusing on the digitalization of the economy, and at the same time, they are increasingly exploring new innovative solutions to overcome the problems of taxation and tax compliance of digital platforms. It is clear that further research will be aimed at resolving the issues related to the adoption of DAC7.

Implementation in Ukraine

For the aligning Ukrainian tax legal and administrative framework with EU requirements it is recommended to start actives on drafting legislation on administrative cooperation in direct taxation in 2023, in particular on e-Platforms for selling goods and services. The provision of DAC7 say that "non-EU platform operators must also comply with DAC7 if they facilitate relevant activities of sellers who are residents in the EU or they rent out immoveable property located in the EU" (Council Directive (EU) 2021/514 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, 2021). Thus, DAC7 affects not only EU member states, but also companies around the world, including Ukrainian ones.

The EU Directive on reporting obligations for digital platform operators known as DAC7 builds on the OECD rules. As the OECD Model Rules for Reporting by Digital Platforms corresponds with the EU initiative DAC7, it is advisable to implement the OECD's model reporting rules for digital platforms in order to build the administrative capacity for the introduction of the information exchange under DAC7.

For completing Ukrainian commitments on implementation of the OECD standards and the EU acquis on taxation in the mentioned fields, Ukraine should:

- develop and adopt tax framework to enforce the collection and verification requirements laid down in Section II of the Model Rules;
- develop and adopt amendments to tax legislation on requirements for Reporting Platform Operators to keep records of the steps undertaken and any information relied upon for the performance of the due diligence procedures and reporting requirements and adequate measures to obtain those records;
- design and introduce administrative procedures to verify compliance of Reporting Platform Operators with the due diligence procedures and reporting requirements;
- design and introduce administrative procedures to follow up with a Reporting Platform Operator where incomplete or inaccurate information is reported;
- develop and introduce effective enforcement provisions to address non-compliance (penalties);
- deploy the IT solution for obtaining the reports submitted by the Platform Operators and for carrying out exchange.

Besides the adoption of the legislative framework and deployment of IT solutions for the exchange, to ensure the implementation of Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy, the STS needs to design the new business processes (Table 21).

Table 21. Functions and processes to be established at the tax administration under the DAC7/DPI framework

Functions	Business processes
Receipt and validation of the data	• Recurrent action; • Automated processes should be established; • Usually involves the IT department and the Competent Authority.
Storage and Matching of the data	• Recurrent action; • Automated processes should be established; • Manual matching; • Usually involves the IT department and the Competent Authority.
Use of the data	• Recurrent action; • IT solutions should be established; • Usually involves various business functions of the tax administration.

Source: developed by the authors.

Use of information under DAC7

DAC7 came into force on 1 January 2023, and digital platform operators doing business in the EU should assess whether they fall under DAC7. If DAC7 reporting obligations are applied to a platform operator, it was important to set up a process to collect relevant information from reportable active sellers on the platform from 2022.

This process should include:

– assessment of the volume and quality of available current data (compared for registration, payment, VAT accounting and other purposes);
– studying the capabilities, systems and processes necessary for collection, verification, management, testing, transmission and possibly even analysis of data;
– studying the use of public interfaces for data verification and/or the possibility of outsourcing due diligence procedures;
– addressing a large number of sellers trading through the platform and possibly informing them of their tax obligations;
– review of contractual relations with sellers;
– assessment of any consequences for data protection;
– compliance with data storage rules;
– determining the place of registration for DAC7 purposes.

The reported information will be subject to automatic exchange of information between tax administrations. Failure to comply with these new reporting obligations will result in significant penalties.

The earliest reporting deadline for Platform Operators will be 31 January 2024 (for the calendar year 2023). Furthermore, platform operators should also determine whether changes to their IT systems and technologies are required to allow reporting under DAC7.

Platform operators should prepare to collect and manage a significant amount of data about businesses using their platforms, including confidential data such as: the bank account to which the payment was received and any additional information of a financial nature; the total amount of remuneration paid or credited during each quarter of the reporting period; any fees, commissions or taxes withheld or charged by the platform; in the case of rental immovable property, if any, cadastral data and the number of days during which each property was rented during the reporting period.

On the other hand, taxable entities that use platform operators to conduct their business activities should confirm that their information will be transferred to the tax authorities of all member states. Therefore, they should be very careful about their own compliance activities, as member states' tax authorities will send out questionnaires and cross-check to verify the correctness of the data and identify potential tax evasion.

It is necessary to consider General Data Protection Regulation (GDPR) issues in relation to the level of information requested. While DAC7 asks Member States to comply with the protection of collected data in accordance with relevant EU legislation, a thorough review of the implementing rules will be required.

Furthermore, businesses need to consider the impact of DAC7 on contractual relationships with sellers and prepare an action plan to address this issue in the future. An important aspect is to identify any implications for data protection. The new rules do not provide for non-compliance with domestic legislation, therefore businesses should monitor the implementation of domestic legislation with a view to expanding its scope and assess any necessary follow-up actions.

It is important for operators to remember that the information they provide should be used by tax authorities to calculate both income tax and value added tax (VAT).

Conclusions

The reason for the introduction of the automatic exchange of tax information was the need to have effective tools to combat tax evasion and profit shifting to low-tax jurisdictions. Implementation of automatic exchange of information is standardized and regulated at the international level in order to ensure its efficiency of administration. The automatic exchange of tax information is coordinated and regulated at the level of the OECD and the EU. The procedures for the automatic exchange of tax information in the EU countries correspond to the OECD initiatives, and therefore the implementation of the exchange according to the OECD Standards by the jurisdiction is an important preparation for the harmonization of legislation and procedures under the EU rules. The application of exchange procedures contributes to the growth of state budget revenues, ensures tax transparency and fairness, and also increases the effectiveness of tax control.

Since the first years of its independence, Ukraine has been on its path to the European integration. Despite the Russian military aggression, Ukraine continues to implement and popularize European standards in different fields. Significant results were achieved within a short time in the tax area, too. The active phase of the war accelerates the introduction of tax information exchange procedures in Ukraine; CRS is being introduced now. The implementation of this Standard, in addition to the development and adoption of the legal framework, requires the creation of necessary IT solutions, new business processes and procedures concerning the tax authority. It is also important to communicate with financial institutions and train them to use the CRS rules in practice. The implementation of CRS also requires the review of business processes and the introduction of additional procedures by financial institutions. Special attention is paid to the development and implementation of the methodology for using CRS data for the purposes of tax control, because their effective use will increase tax compliance, and will also be an effective tool for detecting tax evasion and protect the tax base. Implementation of the CRS is important for Ukraine as an EU candidate country in harmonizing of national legislation process to the EU acquis. The introduction of the CRS will significantly simplify the implementation of the DAC2 rules for public authorities and businesses, as the Directive generally provides for similar procedures.

In order to carry out the exchange according to the CbC Standard, Ukraine has already adopted the regulatory and legal documents and signed the CbC MCAA, and necessary software is being developed. It is important to take measures for the protection and proper use of data.

The functioning of the international exchange of tax information in the post-war period in Ukraine is important for ensuring revenues to the state budget, increas-

ing tax compliance, minimizing corruption risks, raising Ukraine's reputation as a transparent tax jurisdiction, as well as fulfilling European integration obligations.

The aim of Reporting by Platform Operators is the taxation of the incomes of persons operating through online platforms, the so-called sellers, rather than the taxation of the profits of the platform operators themselves. The initiative is focused on voluntary compliance, including through the active participation of the Platform Operators. It is expected that its implementation will improve the transparency and tax compliance of certain sectors of the economy and tourism, such as holiday apartments/properties rentals by non-residents. DAC7 is also aimed at improving voluntary compliance by providing data for pre-filling of annual tax returns of the Sellers. This will minimize the risk of tax evasion and the burden of carrying out control activities. Reporting by Platform Operators will allow customers to verify the identification and quality of Sellers as well.

In order to implement DAC7 and Model Rules for Reporting by Platform Operators, Ukraine needs to adapt the current domestic legislation to the requirements of DAC7 and Model Rules by amending the Tax Code of Ukraine, adopt the necessary by-laws that will regulate the exchange process, build administration processes in the tax authority, and create an IT system that will enable such exchange and processing of data.

We also think that the field of tax information exchange and compliance will be a topical issue in the coming years. We believe that further investigation could focus on evaluating the effectiveness of the use of data obtained as part of the exchange procedure, the quantitative and qualitative impact of the introduction of Exchange Standards on the receipts of state budgets, and the identification of schemes and mechanisms that are used to avoid the exchange.

Annex

Annex 1. Main EU legal acts in field of taxation to be transposed into Ukrainian tax legislation

Indirect taxation	Direct taxation	Administrative cooperation and mutual assistance
EU VAT Directive	Convention on the Elimination of Double Taxation and Code of Conduct	EU Council Regulation on Administrative Cooperation in Field of VAT
EU VAT Exemptions directives	EU Directive on Interests and Royalty Payments	EU Council Regulation on Administrative Cooperation in Field of Excise Duties
EU VAT Refund directives	EU Anti-Tax Avoidance Directive	EU Recovery Directive
EU Excise Directive (general arrangements)	EU Parent-Subsidiary Directive	EU Administrative Cooperation Directive
EU Directive on Fiscal Marking of Gas Oils and Kerosene	EU Directive on Tax Dispute Resolution Mechanisms	
EU directives on Taxation of Excise Goods	EU Directive on Hybrid Mismatches	
EU Directive on the Charging of Heavy Goods Vehicles		

Source: (*Priamuiemo Razom*, EU4PFM).

Annex 2. Algorithm of due diligence procedures for new accounts

Steps		Mechanism of implementation
Step 1	Self-certification documents must be obtained after opening the account to determine whether the account holder is a reportable person, unless it is established that the account holder is not a reportable person	• For example, according to available information or information held by the reporting financial institution, the account holder is a government agency. There is no need to request self-certification documents to determine whether an account holder is a reportable person; • The self-certification document must be signed/confirmed, dated and include the name of the account holder; residence address; tax jurisdiction(s); etc.; • It may contain additional information if the account holder is a passive non-financial entity (Step 3-4).
Step 2	Confirmation of self-certification	• The self-certification document must be compared with other available information about the account opening (e.g., documentation that is collected to meet the requirements of anti-money laundering legislation); • If the information turns out to be unfounded, a new self-certification document must be requested.
Step 3	Verification of Passive NFEs: this may be an account holder, despite the fact that the account holder is defined as a reportable person	• A self-certification document must be obtained to determine whether the account holder is a Passive NFE, unless it is based on information held by the Reporting Financial Institution (RFI) that the account holder is not a Passive NFE.
Step 4	Identification of the controlling persons of the Passive NFE	• A reportable financial institution may rely on AML/KYC information if it complies with the 2012 FATF Guidelines. If not, the self-certification document must be used. Trusts: it is necessary to have identification details of all relevant controlling persons (no 25 percent threshold for beneficiaries)—if not, self-certification document must be obtained.
Step 5	Identification of the controlling person's tax residency	It is necessary to obtain a self-certification document from the controlling person(s) or account holder of the organization.

Source: developed by the authors.

Annex 3. Algorithm for preparation of Chapter I of the Country-by-Country Report

	Indicator of activity of the MNE Group in the tax jurisdiction	Filing
1	Revenues from transactions with related parties	For the reporting period: • Includes revenues from the sale of goods and property, services, royalties, interest, bonuses and others; • It does not include payments received from other participants of the MNE Group, which are considered as dividends in the country of tax residence of the taxpayer.
2	Revenues from transactions with unrelated persons	
3	Revenues from transactions with unrelated persons	
4	Profit (loss) before taxation	For the reporting period: • Profit must include all extraordinary items of income and expenses; • Profit/loss may include dividends received from other business entities; • If dividends are included, this should be noted in Chapter 3 of the Report.
5	Corporate income tax	• CIT paid by members of the MNE Group who are tax residents in the relevant state for the reporting financial year; • Includes all extraordinary items of income and expenses; • Includes tax paid by the business entity to the tax residence jurisdiction and to other tax jurisdictions; • Includes withholding tax paid by other enterprises (related/unrelated) in respect of payments to the member of the MNE Group. e.g., the amount of repatriation withholding tax that is paid by a taxpayer in Ukraine when paying income to a tax resident in Germany is included in the amount of taxes paid to the MNE Group in Germany.

	Indicator of activity of the MNE Group in the tax jurisdiction	Filing
6	Accrued tax	For the reporting period: • Current tax expenses include only transactions in the reporting year; • It does not include deferred taxes or provisions for repayment of tax liabilities. Tax on dividends is included only on the condition that the corresponding dividends are included in the amount of the calculation of CIT before taxation and information about them is indicated in Table 3 of the report.
7	Shared capital	At the end of the reporting period: It includes all business entities for tax purposes in the tax jurisdiction. For permanent representative offices, information on the size of the authorized capital must be reported as part of the information on the participant of the MNE Group to which such permanent representative office belongs, with the exception that the permanent representative office has regulatory requirements in regard to the allocation of part of the authorized capital to such permanent representative office. Amounts of authorized capital for each participant must be the balance of equity after deducting amounts that are accumulated profit (or retained earnings). When determining these amounts, it is possible to follow the accounting standards of a member of the MNE Group.
8	Accumulated retained profit	At the end of the reporting period: • The total amount of undistributed profit of all members of the MNE Group who are tax residents of the relevant state as of the end of the reporting financial year; • For permanent establishments, the amount of undistributed profit is included in the data of the participant of the MNE Group to which such permanent establishments belongs; • The amount can have a negative value; • In the case of several companies in the same jurisdiction, negative amounts must be eliminated with positive ones (the net result is indicated).

	Indicator of activity of the MNE Group in the tax jurisdiction	Filing
9	The number of employees	At the end of the reporting period: • The total number of employees in the full-time equivalent of all members of the MNE Group who are residents of this state; • It is determined at the end of the year based on the average employment level for such year; • It is determined on any other basis that is applied from year to year when providing information for all countries; • Independent contractors, natural persons who perform work, provide services to the member of the MNE Group, may be included; • Rounding is possible on the condition that it does not lead to a distortion of the distribution of employees between different states; • For Ukraine's tax residents, it is defined as the average number of employees in accordance with the Instruction on statistics of the number of employees [130].
10	Balance value of assets	At the end of the reporting period: • The sum of the net value of tangible assets of all members of the MNE Group of the relevant state; • Information on the balance value of assets of permanent establishments is reported as part of information about the state where the representative office is located; • It does not include cash or cash equivalents, intangible assets, financial assets.

Source: developed by the authors on the base of Transfer Pricing Documentation and Country-by-Country Reporting (OCED, 2015c); (On the approval of the form and the Procedure for filling out the Report by country of the international group of companies № 764, 2020).

Annex 4. Report on the activities of the MNE Group for the financial year for the TP purposes

Data of the MNE Group member													
Country of tax jurisdiction	Name	Country A		Total Country A	Country B		Country B		All members of the MNE Group who do not have tax residency		Total of participants without tax residency	MNE Group	
		Company A1	Company A 2		Company B1	Company B2		Company X1	Company X2				
	Organizational and Legal Form			X			X					X	
	Taxpayer Identification Number			X			X					X	
	Other taxpayer number			X			X					X	
	Location			X			X					X	
Currency	The currency of the parent company												
	The MNE Group member currency												
	Everage rate of recalculation												
Profit from the transactions with related persons	The currency of the MNE Group's member												
	The reporting currency												

Data of the MNE Group member																					
Country of tax jurisdiction	Name		Country A		Total Country A	Country B		Country B		All members of the MNE Group who do not have tax residency		Total of participants without tax residency	MNE Group
			Company A1	Company A 2		Company B1	Company B2		Company X1	Company X2			
Profit from the transactions with unrelated persons	The currency of the MNE Group's member												
	The reporting currency												
Total profit	The currency of the MNE Group's member												
	The reporting currency												
Profit (loss) before taxation	The currency of the MNE Group's member												
	The reporting currency												
Dividents received from other MNE Group members	The currency of the MNE Group's member												
	The reporting currency												
Paid CIT	The currency of the MNE Group's member												
	The reporting currency												

Data of the MNE Group member											
Country of tax jurisdiction		Country A		Total Country A	Country B		Country B	All members of the MNE Group who do not have tax residency		Total of participants without tax residency	MNE Group
Name		Company A1	Company A 2		Company B1	Company B2		Company X1	Company X2		
Accrued CIT	The currency of the MNE Group's member										
	The reporting currency										
Including dividend tax	The currency of the MNE Group's member										
	The reporting currency										
Shared capital	The currency of the MNE Group's member										
	The reporting currency										
Accumulated retained profit	The currency of the MNE Group's member										
	The reporting currency										
The number of employees											

Data of the MNE Group member											
Country of tax jurisdiction		Country A		Total Country A	Country B		Country B	All members of the MNE Group who do not have tax residency		Total of participants without tax residency	MNE Group
Name		Company A1	Company A 2		Company B1	Company B2		Company X1	Company X2		
Balance value of assets	The currency of the MNE Group's member										
	The reporting currency										
Type of economic activity				X			X			X	X
Data sources											
Other											

Data specified in the Report

Primary data for calculation

Source: developed by the authors.

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Chapter 5

Corruption in Ukraine in view of the war

ABSTRACT

Ukraine has been facing corruption problems for many years. Their beginning is rooted in the collapse of the planned economy, which was obligatory in the former Soviet Union. During the process of transition from the centralized planned economy with large bureaucratic institutions for economic planning, management and control to the market economy, in which the market is the main mechanism for regulating economic relations, some former state-owned enterprises went bankrupt, and others were privatized. However, since the legal framework for privatization was imperfect, privatization was conducted in illegal or semi-legal forms; non-transparent privatization procedures led to corruption, allowing for privatization of state assets through the loopholes in laws. This created a favourable environment for the formation of an oligarchy, which gradually took control of the country's key economic growth factors, such as the production of various forms of energy and the exploitation of mineral resources.

The economic power of the oligarchs went hand in hand with their political power and influence over the media. In the 2000s, the Ukrainian oligarchs began to take over the existing, and create new, media sources to affect public opinion and form a loyal electorate. Owing to this open niche that could be exploited to affect voters, pro-oligarchic politicians were elected to the Ukrainian Parliament, which made oligarch-friendly legislation a common practice. The level of corruption in the country became extremely high.

Following the Kyiv uprising in 2014, Western countries called for a tangible progress in the fight against corruption, and Kyiv set up some anti-corruption bodies such as the National Agency for the Prevention of Corruption and a specialized court of law. The anti-corruption architecture in the country was shaped that involved western-minded government officials, foreign experts who provided the relevant consultations, and socially responsible citizen groups. The anti-corruption reforms in Ukraine were and continue to be based on two main pillars: on the one hand, public disclosure of the information on governance and expenditure, and on the other hand, establishment of the independent anti-corruption institutions as well as prosecution of corrupt state officials. When implementing the measures attributable to the first pole, the databases of state registers for real estate (land, buildings), business enterprises and vehicles were created, and the public procurement system became open and accessible online. In 2016, the annual declaration of income and property was introduced for public servants, who have been required to declare their own and their family members' income, real estate, other valuable property, business assets and other property interests. An electronic declaration system serves this purpose. If the data of the declaration are falsified and/or discrepancies between real and declared income, property or property interests are identified, administrative and criminal liability shall be imposed.

In the current situation of war, the country has seen a significant decline in its tax revenues, exports and other revenues; the situation is further exacerbated by misappropriation of property and export goods, including agricultural inventory and output; at the same time, the country's expenditure has significantly increased. Since the country's economy is declining, the likelihood of corruption is increasing. On the other hand, given the growing flow of foreign aid to promote Ukraine's economic, social and financial resilience in the face of the emergency, less restrictive accountability for the use of funds may pose a risk that a part of these funds can be laundered or misused. This section aims to uncover the corruption situation in Ukraine, with a special focus on the military situation the country has been undergoing since February 2022.

Keywords: corruption, Ukraine, military situation

Introduction

Ukraine has been facing corruption problems for many years. Their beginning is rooted in the collapse of the planned economy, which was obligatory in the former Soviet Union. During the process of transition from the centralized planned economy with large bureaucratic institutions for economic planning, management and control to the market economy, in which the market is the main mechanism for regulating economic relations, some former state-owned enterprises went bankrupt, and others were privatized. However, since the legal framework for privatization was imperfect, privatization was conducted in illegal or semi-legal forms; non-

transparent privatization procedures led to corruption, allowing for privatization of state assets through the loopholes in laws. This created a favourable environment for the formation of an oligarchy, which gradually took control of the country's key economic growth factors, such as the production of various forms of energy and the exploitation of mineral resources.

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be laundered or misused. This section aims to uncover the corruption situation in Ukraine, with a special focus on the military situation the country has been undergoing since February 2022.

1. The Concept of Corruption

The modern conditions of economic and social development alongside the technological advancement create favourable conditions for corruption by increasing conflicts of interest and diminishing the degree of personal responsibility. Although Brown and Cloke (2004) suggest that corruption is often perceived as an endogenous problem, inherent to less economically and politically developed societies (e.g., African states), the last few decades, shaken by the scandals of corruption even in developed democratic states (USA, France, Germany), show that nowadays corruption is considered to be a tool of domination both at the national and global level (Boucher et al., 2007).

Since corruption is a complex, multi-layered phenomenon that covers a number of economic, social, political and cultural aspects and is able to adjust to the changes in the environment (Varraich, 2014; Transparency International, 2018; Luna-Pla and Nicolas-Carloc, 2020; etc.), it is difficult to provide its universal definition. Literature suggests a number of definitions of corruption that different authors present depending on the context the phenomenon is analysed in. The literature analysis shows that previous theoretical, empirical and critical analysis studies usually interpret corruption as a breach of public interest, betrayal of public trust, a criminal offense, damage, and a manifestation of the low public morale (see Table 1).

Table 1. Interpretations of corruption as a social phenomenon

Context	Features	Literature
Corruption as a breach of public interest	Abuse of public office, abuse of entrusted power, defective governance structure	World Bank, 1997; Transparency International, 2018; Gillespie et al., 2020; Sofuoglu, 2021
Corruption as betrayal of public trust	Behaviour of public officials or servants that is not compatible with their public duties; pursuit of personal gain	Milovanovic, 2002; Mungiu-Pippidi, 2013; Lindberg and Orjuela, 2014

Context	Features	Literature
Corruption as a criminal offence	Violation of legal norms, established standards, the interests of other persons; the basis for applying punishments according to the law	Milovanovic, 2002; Ragauskas et al., 2014; Encyclopaedia Britannica, 2020
Corruption as damage	Material and non-material damage to the public good, lower quality of public services, lower public welfare and protection, damage to indivisible human rights	Boucher et al., 2007; United Nations Human Rights Office of the High Commissioner, 2013; Lindberg and Orjuela, 2014; UNCA Civil Society Coalition, 2015
Corruption as a manifestation of the low public morale	Deviation from the general norms of social behaviour – morality, ethics, civic virtues; pursuit of personal gain	Šatienė and Toleikienė, 2007; Szabo, 2014; Lawal, 2019

Source: compiled by the authors.

Corruption as *a breach of public interest* is, first of all, defined by the World Bank (1997), which suggests treating corruption as "the abuse of public office for private gain" (p. 8), and by Transparency International (2018), which defines corruption as "the abuse of entrusted power for private benefits or gains." Sofuoglu (2021) proposes that corruption is the misuse of public power for private or political gain. In this context, the main attention is drawn to the fact that corruption is related to deep problems in a country's governing structure, non-compliance with governing rules defined by law, improper distribution of organizational and administrative resources (Gillespie et al., 2020).

Corruption as *betrayal of public trust* means that due to illegal and immoral actions, public administration officials and servants representing the public sector betray the public trust granted to them and associated with the positions they hold. The principal-agent approach is dominant in theoretical studies of corruption. Based on this point of view, corruption is initiated by governors, so it can be restrained in the government layer, i.e., with governors taking on various roles of informing, monitoring and punishing the society (Lindberg and Orjuela, 2014). Nevertheless, as it was stated by Mungiu-Pippidi (2013), actors who also tend to treat themselves as governors (e.g., officials and servants in ministries, control agencies, anti-corruption institutions) often misuse the powers provided by their positions and either cover up corruption or become perpetrators of corruption. In the latter case, public trust

is lost even regardless of whether the corrupt behaviour was or was not a violation of the norms established by the law. In this context, corruption is defined as the behaviour (actions) of public officials or servants that is not compatible with their public duties, and thus violates the public trust related to the duties (Milovanovic, 2002).

Definitions of corruption as *a criminal offence* focus on violation of particular laws, regulations or standards established in a state. In this case, the main focus is on the actions that are legally forbidden. *Encyclopaedia Britannica* (2020) defines corruption as an "improper and unusually unlawful conducts intended to secure a benefit for oneself or another." Ragauskas et al. (2014) define corruption as any behaviour of any person employed in **civil service** (a state politician, judge, state official, civil servant or other equivalent person) or in **the private sector**, exceeding one's authority, behavioural standards established in legal acts or company's internal rules, in the pursuit of private or other persons' advantage thus causing harm to the interests of the State or individual natural or legal persons. It is the legal definitions of corruption that create the conditions for treating this phenomenon as legally prohibited, and create the prerequisites for applying the penalties provided for violating the law (Milovanovic, 2002).

In defining corruption as *damage*, the major focus is on the material and non-material damage that it causes to the public good (UNCA Civil Society Coalition, 2015). Due to corruption, funds intended for creating public goods are diverted from state budgets. This means that corruption reduces the quality of public services, as well as the degree of public welfare and protection. Due to corruption, the state becomes unable to ensure the proper functioning of such systems as the judiciary, law enforcement, health, education, and social services (United Nations Human Rights Office of the High Commissioner, 2013). Corruption leads to obscurity and ambiguity in the work of public institutions (Boucher et al., 2007; Lindberg and Orjuela, 2014). According to United Nations Human Rights Office of the High Commissioner (2013), damage is done to indivisible human rights: civil, political, economic, social and cultural, as well as to the right to development. Without ensuring the proper functioning of legal systems, corruption damages the legitimacy of regimes (United Nations Human Rights Office of the High Commissioner, 2013). It undermines the legitimacy of a state's governance and the activities of state institutions, increases inequality, creates mistrust between different social groups and makes the country's development less sustainable.

The definitions of corruption as a manifestation of *low public morale* focus on the incentives of corruption deeply rooted in society. Lawal (2019) refers to corruption as a break away or departure from morality, ethics, laws and civic virtues. According to Šatienė and Toleikienė (2007), corruption arises from the inappropriate application of society's moral standards or their absence. Szabo (2014) argues that this can be the

case when individuals in certain collective units start their own corruptive conduct to fit in with the habits of their fellows; when some type of loyalty (e.g., political, professional, personal, etc.) overrides one's moral attitudes; when corruptive behaviour becomes the expression of gratitude; and in many other cases. Nevertheless, as it was noted by Lindberg and Orjuela (2014), corruption must be treated not so much as a moral problem, but as a structural problem of collective behaviour; this will also help to avoid the patronising tone which is so often found in discussions about corruption.

Corruption, i.e., the abuse of entrusted power (public or private) for illicit private gain, is considered an obstacle not only to economic growth and development, but also to political stability, democracy and sustainable peace (Boucher et al., 2007). These effects of corruption are especially problematic in the states which are experiencing and/or have survived military conflicts and are trying to maintain the activities of public institutions or restore them, restore social trust, and help the economy to survive or recover. The effect of corruption in warring and war-surviving states is extremely detrimental. According to Lindberg and Orjuela (2014), a high level of corruption both among a country's political leaders and in the local administration can threaten the legitimacy of wartime and post-war governance, hinder reconstruction and fuel grievances. Therefore, the next section of this study discusses the environment for corruption in a time of war.

2. Environment for Corruption in Wartime

According to Kos (2022), one can hardly find conditions more favourable to corruption than a time of war. Chene (2012) suggests that countries emerging from conflict are often characterised by "state illegitimacy, low state capacity, weak rule of law, wavering levels of political will and high levels of insecurity" (p. 1). The combination of all these factors creates favourable conditions for corruption to flourish. Although the size and patterns of corruption can vary from country to country, the size of corruption in the countries that are experiencing or have experienced war tends to be higher than that in the countries with comparable standards of living and gross national income (O'Donnel, 2008).

Corruption may gain momentum in wartime for several reasons. The literature analysis allowed to identify why the misuse of public power for personal gain has the potential to increase during an armed conflict (see Table 2).

Table 2. Review of the major causes of corruption in wartime

Causes	Explanation	Literature
Weak institutions and government structures	Participation in war weakens both the capacity of a country's government to govern and the recognition of its right to govern; the structure of power, inimical to the rule of law, is created; short-term stability priorities can lead to the acceptance of the impunity and involvement of unscrupulous actors in power-sharing	Rothstein and Uslaner, 2005; Boucher et al., 2007; O'Donnel, 2008; Uslaner, 2008; OECD, 2009; Dix et al., 2012; Chene, 2012; Lindberg and Orjuela, 2014; Duvell and Lapshyna, 2015
Inability of the state's main social control systems to perform their functions	War destroys infrastructure of the state; the administrative power is decreasing; there is a lack of resources and professionals for performance of the direct functions; more attention is paid to solving the problems caused by the war than to the fight against corruption	Chene, 2012; Kos, 2022
Lack or absence of public accountability	Wartime is characterized by mimicry and coercive isomorphism, which creates favourable conditions for politicians to promote their private interests; a non-democratic form of power can manifest not only in the highest structures of state management, but also in the military-industrial complex due to the significantly increased resources allocated there	Andvig, 2007; Kim and Sharman, 2014; Sofuoglu, 2021
Disruption of the ordinary market transactions	During the war, the traditional channels of commercial exchange (supply of goods and services) are violated; the lack of resources tends to increase smuggling and cross-border trafficking	Boucher et al., 2007; UNDP, 2010; Chene, 2012; Lindberg and Orjuela, 2014; Sofuoglu, 2021

Causes	Explanation	Literature
Massive inflows of foreign aid	In wartime, there is an imbalance between rapid inflows of foreign aid and the capacities of public authorities to distribute this aid in response to the population's urgent and growing needs; the support that does not require accounting is a particularly attractive target for embezzlement and misappropriation	Boucher et al., 2007; Galtung and Tisne, 2008; USAID, 2009; OECD, 2009

Source: compiled by the authors.

Chene (2012) notes that participation in a military conflict makes the country vulnerable and fragile. The major characteristics of fragile states are a lack of government efficiency, as well as a lack of capacity and legitimacy. In other words, war weakens the capacity of a country's government to govern (OECD, 2009) and recognition of the right to govern (O'Donnel, 2008). Citizens have less confidence in the country's political system and public institutions, which further weakens the legitimacy of these institutions. Rothstein and Uslaner (2005) suggest that inequality, trust and corruption are closely interrelated since they reinforce each other. Corruption results in less trust and leads to greater inequality (Uslaner, 2008). Thus a vicious circle starts, and in some cases the state may even be at risk of becoming non-existent and unable to provide public services as a part of the social contract between it and society. The structure of power that is created in the country in wartime is inimical to the rule of law. The borders of a warring country are poorly guarded, which is favourable for cross-border trafficking, which feeds the structures of power, opens up more opportunities for the shadow economy, and reduces customs revenues, while at the same time the country's ability to pay civil servants and provide qualitative public services drops as well. Thus, the increasing level of corruption is enhanced by weak government structures and public institutions. Chene's (2012) study explains that a lack of political legitimacy and the social contract between the state and society, as well as a lack of stability can be extremely detrimental because public authorities and illegal actors can form and maintain a corruption network by physically eliminating opponents, which is easier to be arranged in wartime. When the proceeds of corruption are distributed within a small group of agents, the needs of population are definitely not met (Dix et al., 2012), and the distinction between the public and the private spheres blurs. Lindberg and Orjuela (2014) also note that short-term stability priorities can lead to the acceptance of the impunity and involvement of unscrupulous actors in power-sharing. In order to achieve peace agree-

ments and cessation of violence, it may be necessary to compromise on political opportunities or economic advantage.

The second reason is that the state's major social control systems—the judiciary and law enforcement—cannot perform their functions properly in wartime. During the war, the infrastructure of the state is destroyed, meaning not only destruction of the physical infrastructure, but also reduction of the administrative power and resources that could have been allocated for performance of the direct functions (Chene, 2012), and a lack of professionals (some of them join the armed forces, and the remaining personnel can no longer work as efficiently and quickly) (Kos, 2022). In addition, the fight against corruption in wartime is not a priority of the aforementioned institutions (Kos, 2022). Much more attention is paid to the collection and recording of evidence of war crimes, the fight against looting, marauding, assistance to citizens affected by the war, etc. This creates an atmosphere of impunity and may lead to disregard for legal norms and growing levels of predatory behaviour.

Third, as it was noted by Sofuoglu (2021), public accountability becomes difficult during wartime. There are cases when a higher or lower level of corruption among state leaders was already noticeable before war, which is associated with a lower level of transparency and accountability. Kim and Sharman (2014), who analysed the issues of accountability, corruption and human rights violations, argue that two parallel norms—mandate and international duty—shall hold state leaders accountable for corruption and human rights violations. The level of accountability, however, tends to decline dramatically after the outbreak of war. Wartime is are characterized by mimicry and coercive isomorphism (Kim and Sharman, 2014). This creates favourable conditions for politicians to promote their personal interests. A corrupt government may not even have public support or political legitimacy, but consolidate its power by using military forces, in some cases, invited from foreign countries (e.g., US military forces in Afghanistan, Russian and Iranian forces in Syria). Sofuoglu (2021) also points out cases when a non-democratic form of power can manifest not only in the highest structures of state management, but also in the military-industrial complex. This suggestion is supported by Andvig (2007). Military-industrial structures are relatively closed (for reasons of state security, preservation of military and industrial secrets), which is favourable for corruption formation within the structure. In addition, military expenses, which increase significantly in the event of war, 'feed' military-industrial structures, so military contractors tend to lobby politicians to promote military spendings. Sofuoglu (2021) suggests that precisely for this reason, it is likely that the US military will be constantly involved in armed conflicts around the world.

Another significant cause of corruption is that war disrupts the execution of ordinary market transactions, i.e., during war, traditional channels of commercial

exchange, supply of goods and services are disrupted (Sofuoglu, 2021). There are cases when both civil servants and economic agents operating in the private sector make fortunes in war economies due to the control of key supply chains. The war itself requires huge resources, so a warring country often lacks essential goods such as food, medicine, etc. The lack of the essential goods makes residents try to get them in any way possible, so bribing officials or local government representatives who distribute resources, taking goods through the 'back door', etc. become an acceptable practice. The lack of resources promotes smuggling and cross-border trafficking (UNDP, 2010; Chene, 2012). Boucher et al. (2007) notes that both during the war and in the post-war period, smuggling of high-value commodities (e.g., precious metals, timber, etc.) intensifies, which increases customs evasion, feeds the shadow economy, and reduces state budget revenues that could be earned by selling the above-mentioned commodities through legal channels. The existence of illegal channels may pose difficulties at the time of peace negotiations and building a free-market economy because due to the extensive network of illegal trade channels, the country may face the risk of relapsing into violence through disruptive privatization procedures and destructive electoral processes (Lindberg and Orjuela, 2014).

Furthermore, if the country receives charity consignments and foreign support that does not need to be accounted for, it can become a very attractive target for embezzlement and misappropriation. Every war causes chaos, which, in its turn, makes it easy to misappropriate particular resources and remain unnoticed. As stated by Galtung and Tisne (2008), there is an imbalance between rapid inflows of foreign aid and the capacities of public authorities to distribute this aid in response to the population's urgent and growing needs. The gap between the amounts of financial resources provided by foreign donors and the capacity of the state to effectively absorb these resources in a transparent manner was confirmed in the USAID's (2009) report. It is this gap that acts as the main stimulus for corruption. Another significant aspect of foreign aid is that, according to the OECD (2009), the state receiving foreign aid is accountable both to its citizens and international donors, though the expectations of citizens may not always coincide with the expectations of the donors, which are often influenced by geopolitical and political priorities. Therefore, the donors may decide to channel the support directly to non-governmental organizations (NGOs). However, Boucher et al. (2007) state that although this can improve access to the resources needed by the population in the short term, this effectiveness tends to decrease in the long term because on the one hand, limited accountability may raise corruption levels within the NGOs, and on the other hand, the circumvention of governmental structures leads to erosion of the stability of the state.

In summary, the potential for corruption in wartime tends to increase because of the combination of weak institutions and governance structures, inability of the

state's main social control systems (the judiciary and law enforcement) to perform properly their functions, a lack or absence of public accountability, disruption of ordinary market transactions, and massive inflows of foreign aid. Thus, corruption is promoted by structural opportunities, the weakness of a country's governance, the influence of military structures, and spoiler-specific factors (illicit profits). The results of previous studies show that the relationship between corruption and war is real. However, the direction of this connection has not been confirmed, i.e., it is not clear whether war promotes corruption due to the disruption of normal market activities and a lack of public accountability, or vice versa: corruption becomes one of the factors of the start of war because state leaders, managing the major resource supply chains, look for a justification for redirecting state resources at even greater levels. Although, as noted by Transparency International (2010), corruption in a time of war can be employed as a strategy for survival and overcoming bureaucratic barriers, it is also true that if a country functions properly, corruption should not go unnoticed and unpunished. Regrettably, governments of the countries in war can only expect marginal success in exercising their social control functions properly, as the major focus tends to be on military efforts.

3. The PEST analysis of Ukraine in the Context of Corruption in Wartime

Ukraine emerged as an independent republic following the collapse of the Soviet Union in 1991. The Declaration of the Sovereignty of Ukraine was adopted by the Parliament of the Ukrainian Socialist Republic on 16 July 1990 (Verkhovna Rada Ukrainy, 1990), but it still kept Ukrainian Soviet Republic within the Soviet Union. On 24 August 1991, the Ukrainian Parliament passed the Act of Declaration of the Independence of Ukraine as a response to the failed political coup attempt that had taken place in Moscow five days earlier. The Act of Declaration of the Independence made Ukraine a sovereign state and was an instrument to secure the state's border and citizens' rights (Thomson, 2019). The national referendum on the Act of Declaration of the Independence took place on 01 December 1991. 90.32 percent of the referendum participants (the total number of 28,804,000 people) supported the Act. The yellow and blue national flag was adopted as the official standard of Ukraine by the Parliament on 28 January 1992.

The Constitution of Ukraine was adopted in 1996, i.e., five years after the Declaration of Independence. The Constitution established an independent political system of government and defined it as a unitary republic (Chapter I, Article 2). The President of Ukraine, who was recognized as the Head of the State (Chapter V,

Article 102), was given the power of legislative initiative and the power to dismiss the Parliament. The Parliament was recognised as the main legislative institution of Ukraine (Chapter IV, Article 75). In short, the Constitution of Ukraine provides for a presidential-parliamentary system of the state's government.

Ukraine has a population of 39,701,739 people (as of 1 July 2022) (World Population Review, 2022); the capital and largest city is Kyiv; the main spoken languages are Ukrainian and Russian, which is widely spoken in the eastern and southern parts of the country.

Ukraine covers an area of 600,000 km² making it the second largest country in Europe after Russia. It has a coastline at the Black Sea and the Sea of Azov; it is bordered by Russia in northeast and east, Belarus in northwest, Poland and Slovakia in west, and Hungary, Romania and Moldova to southwest. The Crimean Autonomous Republic, encompassing the Crimean Peninsula, or Crimea, in the south is included in Ukrainian borders, but it is now under Russian occupation. In accordance with the Law of Ukraine "On the special order of local self-government in separate regions of Donetsk and Luhansk", a special order of local self-government is introduced in separate regions of Donetsk and Luhansk. On 17 March 2015, the Verkhovna Rada of Ukraine recognized the territory of certain areas in Donetsk and Luhansk regions (oblasts) as an occupied (by Russia) territory (the Law "On the recognition of certain districts, cities, towns, and villages of Donetsk and Luhansk regions as temporarily occupied territories").

Ukraine is not a member of the EU, but on 1 September 2017, the EU-Ukraine Association Agreement entered fully into force after a long period of ratification. On 28 February 2022 (shortly after the beginning of the full-scale Russian invasion), Ukraine applied for membership of the EU. On 17 June 2022, the European Commission recommended that the European Council grant Ukraine candidate status for accession to the EU. On 23 June 2022, the European Parliament adopted a resolution for the immediate granting of candidate status. On the same day, the European Council granted Ukraine the status of a candidate for accession to the EU.

Today Ukraine is in a deep political, economic and social crisis. In addition to the impact of the global economic crisis caused by the COVID-19 pandemic, the country is in war with Russia which has been ongoing since 24 February 2022. The major consequences of the war are a large-scale humanitarian crisis affecting millions of people and a severe economic shock (OECD, 2022). In the time of war, Ukraine has seen a significant decline in its tax revenues, exports and other revenues. The situation is further exacerbated by the misappropriation of property and export goods, including agricultural inventory and output, by Russia. At the same time, Ukraine's expenditure has significantly increased in response to the needs of the military forces defending the country. Since the country's economy is declining,

the likelihood of corruption is increasing. It is being further increased by the substantial inflows of foreign aid: less restrictive accountability for the use of donations may pose a risk that a part of these funds can be laundered or misused. A high level of corruption in every country negatively affects the adherence to the principle of the rule of law, the level of democracy and social justice; the effects of the deteriorating corruption can be detrimental to a warring country. This section of the study aims at providing the PEST (political, economic, social, and technological environment) analysis of Ukraine in the context of corruption in wartime.

3.1. Political Environment

Type of government. The Verkhovna Rada (Ukrainian parliament) adopted the Constitution of Ukraine in force on 28 June 1996. According to this Basic Law, Ukraine is a sovereign, independent, democratic, social and law-based state (Article 1). The sovereignty of Ukraine extends throughout its entire territory (Article 2). The human being, their life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value (Article 3). The principle of democracy is defined in Article 5, stipulating that "the people are the bearers of sovereignty and the only source of power in Ukraine." The power is exercised "directly and through bodies of state power and bodies of local self-government." The principle "social responsibility" of the State provides for social protection of the population, while the "rule of law" implies that legality is the general measure of freedom, equality and justice. State power in Ukraine is exercised on the principles of its division into legislative, executive, and judicial powers (Article 6).

By Article 75, the Constitution recognises the Verkhovna Rada of Ukraine as the sole organ of legislative power, with the highest executive body being the Cabinet of Ministers of Ukraine (Article 113). The Constitutional Court of Ukraine and courts of general jurisdiction exercise judicial proceedings (Articles 124 and 125). Article 102 defines the status of the President of Ukraine: "The President of Ukraine is the Head of State and acts in its name."

In Ukraine, the institute of presidency at the head of the state is a comparatively new phenomenon in the political life and state-building. Making the institution of presidency of Ukraine was the key element in the reformation of the state power connected with the proclamation of Ukrainian independence and change of its constitutional system. The Institute of Presidency in its present form did not form at once. At first, the President, in accord to his status and title, was the highest official in the country, becoming next the Head of State and Executive Power, to act as the Head of State at present in accord with the Constitution in force.

The government, the Cabinet of Ministers of Ukraine, which consists of the Prime Minister of Ukraine, First Vice Prime Minister, three Vice Prime Ministers and seventeen various departmental Ministers, exercises executive power in Ukraine. The Prime Minister heads the Cabinet and directs its work. The President appoints the Prime Minister under the consent of over half of the constitutional composition of the Verkhovna Rada. The President on the advice of the Prime Minister appoints personal composition of the Cabinet of Ministers. The Prime Minister is responsible to the President and accountable and acts under control of the Verkhovna Rada of Ukraine. Within its authority, the Government issues decrees and regulations mandatory for execution. The Prime Minister signs the deeds of the Cabinet of Ministers of Ukraine. In case of the Prime Minister's resignation or no confidence resolution adopted by the Verkhovna Rada, all the Government steps down from the office.

The Cabinet of Ministers provides for carrying out financial, price, investment and taxation policies, as well as actions in the areas of labour and employment, social protection, education, science and culture, environmental protection, ecological security, and nature management. The Cabinet of Ministers works out the draft of the Law on the State Budget of Ukraine for approval by the Verkhovna Rada and ensures its execution. In addition to the Cabinet of Ministers, the system of the national executive body covers the relevant ministries, state committees and special status central agencies of executive power.

Ministries, managed by Ministers, are the primary organs within the system of the national executive body to carry out government policies in the defined activity area. As a member of the Cabinet of Ministers of Ukraine, a Minister is responsible for developing and implementing the Program of the Cabinet on the relevant issues and executing the government policies within the defined area. A Minister exercises administration, directs and coordinates the activities of other organs of executive power related to the issues ascribed to their authority.

State Committees are organs of executive power and conduct the activities directed and coordinated by the Prime Minister of Ukraine, any of the Vice Prime Ministers or Ministers. They put forward propositions concerning the development of the government policies to the relevant members of the Cabinet of Ministers and ensure implementation of the government policies in particular area; they also exercise control and interdepartmental coordination and perform functional regulation on the issues delegated to their authority. A State Committee is headed by a chairperson.

The Special Status Central Organ of Executive Power has a special mission and authority defined by the Constitution and legislation of Ukraine with specific order of forming, shaking-up, removing, accounting and reporting, as well as appointing

and dismissing the management staff and settling other issues. Like state committees, it is also headed by a chairperson.

According to the Constitution, Justice in Ukraine is administered solely by courts. The delegation of court functions, as well as their usurpation by other bodies and officials is not allowed. Courts have jurisdiction over all legal relations which develop in the State. The Constitution of the country points out that the establishment of extraordinary and special courts is prohibited. The general structure of the judicial system is stipulated in Article 124 of the Constitution of Ukraine, according to which the justice is administered by the Constitutional Court of Ukraine and by courts of general jurisdiction. The courts of general jurisdiction administer justice in the form of civil, commercial, administrative, and criminal legislation. The Constitutional Court of Ukraine is a special judicial body of constitutional control. Justice is administered by professional judges and, in the cases overseen by the law, by people's assessors and juries. The independence of judges is guaranteed by their immunity and their election by the Verkhovna Rada permanently after their first appointment to the position of professional judge by the President of Ukraine for a five-year term.

The Constitution of Ukraine currently in force was assessed on the whole positively by the **European Commission for Democracy through Law,** also known as the Venice Commission, which is considered the most authoritative advisory body on constitutional matters.

The negative aspect, however, is that Ukrainian anti-corruption institutions—the National Anti-Corruption Bureau (NABU) and the Specialized Anti-Corruption Prosecutor's Office (SAPO), established after the victory of the Maidan Uprising—conflict with each other, which greatly diminishes their ability to fight corruption effectively. The NABU makes unofficial accusations against the SAPO and claims that the latter is involved in corruption and illegally dismisses criminal charges against certain officials. The SAPO, in its turn, accuses the detectives from the NABU of incompetence, especially with regard to preparing investigative materials. Although, in 2017, the institutions signed the memorandum on cooperation, the relationship has not been normalized (Ogarkova, 2017).

Privatization. As a result of its Soviet legacy, Ukraine inherited a highly centralised political system complete with powerful members of the Communist Party (the *nomenklatura*), who were closely interconnected and, with the beginning of the privatization processes, quickly appropriated the country's key industries (metals, chemicals, arms manufacturing) as well as financial institutions, which allowed them to build quasi monopolies (Pleines, 2016). According to Barrett (2018), nearly 85 percent of all the shares of former Soviet enterprises were acquired by managers

(the *nomenklatura*) and so-called "employee groups." This uneven distribution of resources during privatization set the stage for the formation of an oligarchy, especially considering that the country did not have a constitution from 1991 to 1996.

The process of privatization in Ukraine started slowly. The Act of the Concept on Destatization and Privatization of State Enterprises, Land, and Housing was approved in December 1991, and further on, three laws on privatization—the Law on Privatization of the Property of State Enterprises, the Law on Privatization of Small State Enterprises (Small Privatization Law), and the Law on Privatization Certificates—were issued in early 1992. Thus, by 1992, Ukraine had adopted the major privatization laws. They established the main permissible privatization methods: an auction, a tender, a non-commercial tender (in which bidders compete on the basis of promised investment or adherence to certain conditions, rather than on the basis of price), leasing with buyout, buyout, public offerings of shares on stock markets, foreign investment, etc. Most of these methods could be applied by using cash or privatization certificates. Privatization certificates were not issued in paper form, but were transferred to citizens' bank accounts (there was a fear of excessive issuance costs). The employees of the companies were given the preferential right to purchase shares in the enterprises they worked in (closed subscription). It was allowed to use personal funds for the purchase of shares. Employees were also allowed to lease their enterprises from the state (the law on leasing was issued in 1992). The major goal of privatization was to transfer the ownership to private hands. Only in 1993, the Parliament of the country adopted the Law on the Budget of Ukraine, according to which 50 percent of privatization proceeds were to be directed to the state's budget (Prokhorov and Yablonovskyy, 2020).

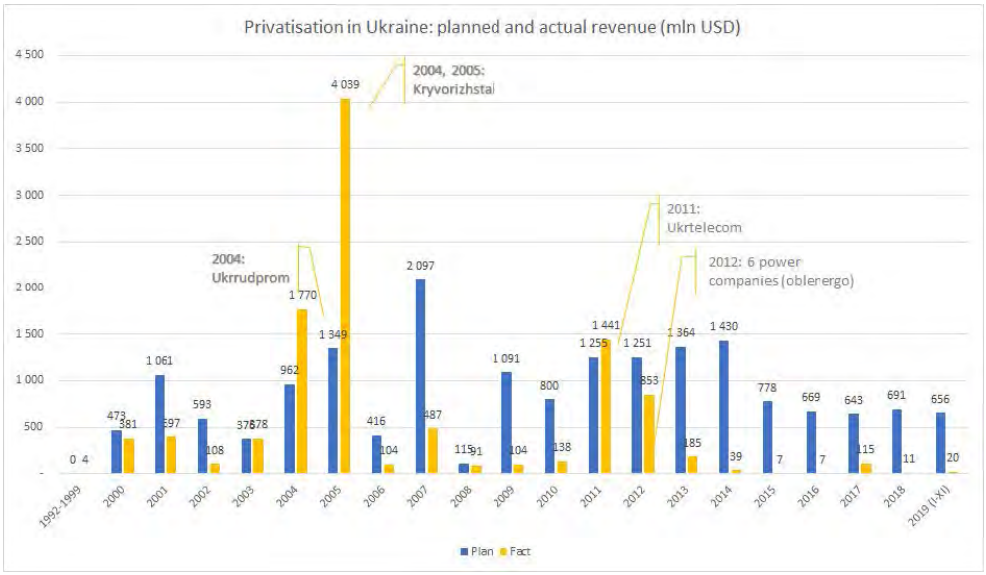
But despite the legal basis and methods prepared for privatization, relatively few companies had been privatized by December 1994 (Snelbecker, 1995). In July 1994, the newly elected Ukrainian Parliament passed the resolution "On Perfection of the Privatization Mechanism in Ukraine and Intensifying the Control of Its Conduct." A renewed privatization program was launched in 1994 that removed a significant number of previous obstacles, however, the privatization process did not proceed as expected. Out of 8,000 enterprises that were supposed to be the objects of privatization, less than 200 medium-size and large enterprises had participated in the mass privatization program by the end of June 1995. In early 1995, the Parliament approved the list of enterprises subject and not subject to privatization. The list of the former included 6,102 enterprises, many of which were attractive to investors (shipbuilding, maritime transport, oil refinery, fuel and energy enterprises, etc.). But many of them were subject to political interests (Prokhorov and Yablonovskyy, 2020). The approval of the list of companies to be privatized accelerated the privatization process, but in the 2000s the cumulative privatization receipts amounted to

only 3 percent of the country's GDP compared to an average of 9 percent in other transition economies.

In 1996, after the initiation of the Ukrainian financial system and the introduction of the national currency, selling blocks of shares for money became popular, which led to stock inflows into the stock market. Energy, mechanical engineering, metalworking, chemical, petrochemical and food enterprise stocks were the most in demand. However, the actual change of ownership (i.e., the transfer of more than 70 percent of ownership to private hands) occurred only in about a third of these enterprises, and the state remained the major owner, as before (Prokhorov and Yablonovskyy, 2020).

The State Property Fund, which was assigned direct responsibility for the implementation of the privatization policy, was relatively weak politically. The main decisions had to be made by the Cabinet of Ministers anyway, so the dispersion of decision-making greatly hurt the process (Snelbecker, 1995). Among other significant problems, it should be noted that local privatization funds were independent (had autonomy) from the central State Property Fund, so the latter could not properly supervise the course of the privatization process. The functions of the Fund were strengthened only in 2000-2002, after defining a clearer responsibility of this Fund.

Figure 1. Planned and actual revenue of the budget of State Property Fund of Ukraine, million USD, 1992-2019



Source: Prokhorov and Yablonovskyy, 2020.

Figure 1 indicates that the gap between the planned and actual revenues from privatization to the state budget is typical for practically the entire period under consideration. In 2004 and 2005, the growth of real income was determined by the privatization of large corporations Ukrrudprom and Kryvorizhstal. Ukrrudprom companies were privatized through oligarch-owned consortia under separate laws. The case of Kryvorizhstal is, however, mentioned as a positive example of privatization, as despite the original share package of this corporation being bought through consortia belonging to oligarchs, later, at the request of the President and the Prime Minister, the courts cancelled the results of the auction and the corporation was transparently re-privatized: 93.02 percent of its shares were purchased by Mittal Steel, one of the largest steel producers in the world. However, such examples were scarce. The privatization of the telecommunications company Ukrtelecom was subject to discriminatory conditions, requiring that objects of strategic importance be only sold to investors that already had a stake in a similar foreign or domestic market and were interested in expanding it; the participation of companies that had a share of any government or SOE exceeding 25 percent of capital was also limited. Thus, only one bid was received from the predetermined winner, and eventually the company fell into the hands of the oligarchs.

The sectors that were fully controlled by the state before privatization (i.e., chemicals, wood products, construction), became dominated by privately-controlled firms after privatization. The privatization of several large utility companies was interrupted by the seizure of physical assets by creditors. According to Elborgh-Woytek and Lewis (2002), the Ukrainian stock market was very thin, with enormous spreads and little transparency, allowing owners to expropriate minority shareholders. As a result, strategic investors rarely became owners of high-quality assets, while the shares acquired by citizens perished in trust funds, and politically connected individuals gained access to the state assets (Prokhorov and Yablonovskyy, 2020).

Elborgh-Woytek and Lewis (2002) suggest that privatization in Ukraine was uneven both in terms of the number of privatized companies and their restructuring. The private sector began to play a significant role in the economy only after the 2000s. However, Prokhorov and Yablonovskyy (2020) call this 'crony capitalism,' because the main fossils and energy enterprises were transferred to the hands of the chosen few, while local and foreign competitors faced the discriminatory conditions (e.g., JSC Ukrrudprom, and Ukrtelecom cases).

Government policy amendments were only made after the Maidan Uprising. In February 2016, the law on improving the privatization process and introducing privatization advisors was issued. In 2018, the law "On the Privatization of State and Municipal Property" was adopted. It was aimed at improving the process of large-scale privatization and ensuring greater transparency. The law significantly

limits participation of investors from Russia and the companies with 50 percent of shares owned by offshore companies. The law also effectively launched small-scale privatization auctions at the electronic platform Prozorro.Sale (by the end of 2019, 1.5 thousand objects had been successfully privatized through this platform) (Prokhorov and Yablonovskyy, 2020).

In summary, the primary conditions for corruption and formation of an oligarchy in Ukraine in the early period of privatization were the focus on the fiscal role of privatization rather than the goals, controversial and constantly changing privatization laws and programs, priorities for political rather than strategic investors' interests, discriminatory conditions, and thin and opaque stock market. After the Maidan Uprising, the privatization processes were improved by issuing new laws that helped to refine both large- and small-scale privatization and ensure greater transparency. The launch of the special electronic platform has proved effective for small-scale privatization auctions.

The Orange Revolution of 2004. Being a border country between democratic Europe and the corrupt authoritarian East, since 1991 Ukraine was facing the dilemma of which direction to follow (Sushko and Prystayko, 2006). At first glance it seemed that Ukraine would like to establish closer relations with European countries, however, it had been integrated into the Russian Empire and the Soviet Union for too long to be able to change its ways in a relatively short time and become an independent state. The shift turned out to be much more difficult than it had been hoped, and traditional ties with Russia dominated the structure of Ukraine's foreign economic relations (Atroshchenko, 2017). According to Motyl (1993), three key drivers of the transition from a Soviet country to an independent state are as follows: developing democratic policies, creating a strong civil society, and forming national identity. Prizel (1997) argues that democracy in post-Soviet regimes is characterised by a limited degree of independent judiciary, civil liberties, accountable public service, free press, and competitive elections. Underdeveloped civil society and national identification are indicated as weaknesses of Ukrainian democracy. Insufficient civil activism is associated with a lack of trust in political and social institutions (Emeran, 2017). The Ukrainian *oligarkhiia* is seen as the greatest obstacle to the country's democratic transition (Prizel, 1997; Kudelia, 2012). In this light, the Orange Revolution of 2004 is treated as an example of the positive correlation between increasing civil activism and democracy building (Kuzio, 2010).

The Orange Revolution was a series of protests and political events that took place in Ukraine from late November 2004 to January 2005. According to Dickinson (2020), it was the first revolution of people's power in Ukraine, and although it was not marked by a geopolitical drama of events, it marked the end of the early post-

Soviet era. The protests sparked after several local and foreign election observers submitted a report indicating that the results of the presidential election held on 21 November 2004 were rigged in favour of Viktor Yanukovych, who was running for the presidency against Viktor Yushchenko. The results of the election observers' report coincided with the widespread public perception that the election results were manipulated, and mass protests began in the country. The major achievements of the protests were the annulment of the election results and a revote that was ordered by Ukraine's Supreme Court for 26 December 2004. The final results showed a victory for Yushchenko, who received about 52 percent of the vote. The election was confirmed to have been free and fair, and after it, Ukraine was rated as "free" (previously it was rated as "partly free") by Freedom House (Pleines, 2016). President Yushchenko promised to strengthen democracy in the internal political structure of Ukraine, to ensure the rule of law and to strive for a decrease in the relations with Russia in favour for an increase in the relations with Western European countries in the structure of Ukraine's foreign economic relations (Atroshchenko, 2017).

President Yushchenko was substantially supported by the US government that renewed interest in Ukraine and enacted the Threshold Agreement (the agreement was signed in December 2006, and the program was concluded in December 2009), based on which $45 million were allocated to Ukraine to aid its anti-corruption effort. Ukrainian civil society groups were treated as the major vehicle for producing reforms (Barrett, 2018). The Threshold Program targeted the policy areas, measured by such indicators as Control of Corruption and Rule of Law. The program contained five projects with a multifaceted approach to reducing corruption in the public sector. The program was administered by the United States Agency for International Development (USAID) and involved more than 15 government entities, the Parliament and civil society organisations. According to the Millennium Challenge Corporation (2022), one of the main achievements of the program was that it significantly raised the quantity and quality of the information available to the public about corruption in Ukraine. In the scope of the judicial reform, the number of court decisions available in the Uniform Registry database increased by 486 percent. Seven Internal Investigative Units were formed within Ukrainian ministries and agencies to investigate fraud, abuse, wastage, and corruption cases.

Thus, the Orange Revolution laid important foundations for the fight against corruption in Ukraine, and this fight was quite generously funded by the United States. The post-Orange Revolution reforms, however, quickly got stuck because of the divisions among the leaders—President Yushchenko and Prime Minister Iulia Tymoshenko—especially concerning reforms in the energy sector. In 2005, President Yushchenko called for Iulia Tymoshenko stepping down. Having called for more resignations, President Yushchenko lost his popularity. At one point, he in-

stalled Viktor Yanukovych as prime minister, only to call for his resignation and reappoint Iulia Tymoshenko (Feifer, 2010). By 2010, public support for Yushchenko had deteriorated, and the 2010 election was won by Viktor Yanukovych, whom Russia saw as their pliable agent (Whitmore, 2014) and exploited the opportunity to assert its influence over Kyiv.

When analysing the effects of the Orange Revolution, Khodunov (2022) notes that the Orange Revolution took place at a time when Ukraine was experiencing extreme corruption, favouritism, nepotism, and the dominance of the oligarchs' political and economic power. All this led to a high level of inequality in society, dissatisfaction of the masses, regional and ethnic disagreements (confrontations). Thomson (2019) suggests that although the Orange Revolution does not fall within the definition of a classical social revolution, it initiated a process of transformation in the political culture and promoted public involvement in Ukraine. Another positive result of the Orange Revolution is that it prepared the ground for Ukraine's free media landscape, which freed itself from the smothering government censorship that had existed prior to 2004. Censorship gave way to free journalism, which, despite its imperfections, reflected the competing interests of various ruling clans (Dickinson, 2020). The presence of free media alongside the development of alternative social interaction forums (e.g., blogging, online discussion groups) created conditions for citizens to communicate freely, express their opinions (Thomson, 2019). This could serve as a basis for political socialization, the interaction between state leaders and the civil society, and future reforms. As noted by Dickinson (2020), the Orange Revolution can be treated as national awakening which established Ukrainian democratic values and helped the citizens to perceive their national identity. It also helped establish the principles of fair elections, contrary to the authoritarian regime characterized by political oppression and rampant vote-rigging. However, the reforms, especially in relation to the fight against corruption, were not implemented, because the essential aspects of the political culture in the country did not change: the effectiveness of politics remained low, which led to low public trust in political institutions and ruling officials, and discouraged the public from more active participation in political and non-political organizations.

The Maidan Uprising. Since the collapse of the Soviet Union in 1992, the Ukrainian political system has been characterized by poor government and systemic corruption, which led to deep social dissatisfaction and emigration. After the failure of the Orange Revolution in 2004, the subsequent coming to power of the Party of Regions and President Viktor Yanukovych gave rise to a new kleptocracy and a huge outbreak of corruption in all sectors, which severely undermined the rule of law and undermined public trust in the political elite and the efficiency of public

services. Duvell and Lapshina (2015), who conducted a survey of 2,000 Ukrainian respondents (aged 18-39) in the period 2010-2013, found that as many as 82 percent of them were dissatisfied with public policies addressing the issues of poverty, 76 percent were dissatisfied with the policies addressing employment opportunities, and 75 percent believed that politicians did not serve the population's best interests. 80 percent of the respondents indicated corruption as the major problem of the country. Corruption was characterized as a constantly increasing and widespread issue that affected negatively all areas of life. Hardly any citizens' legal rights were perceived as exercised without bribing state officials. Police officers were indicated as the officials constantly extorting bribes.

The lack of trust in the efficiency of the national political system alongside dissatisfaction with the quality of public services and the quality of life were the factors that shaped public mood on the eve of the Maidan Uprising (also known as Euromaidan). Although President Yanukovych, who had replaced his closest counterpart Yushchenko in the 2010 election, seemed to be trying to meet the requirements of the EU Association, at the same time he sought the economic integration of Ukraine into Russia's Eurasian Economic Union, one of the goals of which was to unify the former Soviet economic space (Atroshchenko, 2017). Meanwhile, Ukrainian society associated integration into the EU with the rule of law, functional public services, economic opportunities and stability (Duvell and Lapshina, 2015). Therefore, when after months of negotiations, on 21 November 2013 President Yanukovych decided not to sign the Association Agreement between the EU and Ukraine, a months-long mass protest rally began in the centre of Kyiv in response to the suspension of the preparations for signing the Association Agreement. Thousands of demonstrators (predominantly students) went out onto the streets. After Berkut, the Ukraine Special Force, had brutally beaten up the peaceful protesters on Maidan Nezalezhnosti ('Independence Square'), the student protest quickly evolved into a mass action of a national scope against the existing power. The rapid and dramatic expansion of the civil resistance was due to the extremely critical attitude of the people towards the policies that were being implemented by those in power, as well as the authoritarian use of power. Shevsky's (2022) study implies that the main factors of the Maidan Uprising were a deep regional linguistic, cultural and economic cleavage, ineffective management of the state's budget that led to the mass discontent, and the polarization of the political system. President Yanukovich's unexpectedly postponed signing of the Association Agreement served as a trigger for the rebellion, which was given the name "Euromaidan."

The name is a compound word, a combination of 'Euro' (from "European") and 'maidan' (which means in Ukrainian an open space in or near a town and at the same time is the name of the central square in Kyiv). This name reflects the

protesting public's support for the European integration of Ukraine and the pressure on President Yanukovich to fulfil the requirements of the Association Agreement so that the country was ready to apply for EU membership (Atroshchenko, 2017). The public expressed the desire for the European integration, spoke out against the regime of Viktor Yanukovych, demanded deeper democracy, justice concerning the perceived harmful actions of the government, and the dominance of the rule of law (Volovoj, 2015), and respect for human rights (Zelinska, 2017). This public attitude was supported by the protests in other regions of Ukraine. 106 people were killed in the protests in Kyiv and all over Ukraine. Since the summer of 2014, these events have been documented as the Revolution of Dignity.

Although President Yanukovych agreed to meet the demands of the public during the protests, he did not have much time to do so, because he was removed from power (Atroshchenko, 2017): in late January 2014, the Ukrainian government stepped down, ex-President Yanukovych fled to Russia and was replaced with an interim president until the next presidential election could take place. Following the election in May, Petro Poroshenko became President, presiding over a coalition of democratic and Ukrainian nationalist parties. Greater independence from Russia and the pro-European direction became the major goals of the new policy. Following the unprecedented use of violence, the Maidan Uprising resulted in the overthrow of the political regime. In June 2014, President Poroshenko signed the Association Agreement between Ukraine and the EU by which the EU agreed to provide Ukraine with political and financial support, access to research and knowledge, and preferential access to the EU markets.

The Maidan Uprising led to a return to pro-European foreign policies (Zelinska, 2017), and laid preconditions for creating a new civic identity (Zhuravlev, 2018). According to Shapovalova and Burlyuk (2018), Euromaidan started a new civic ethos of activism and prompted civic participation based on the values of civic responsibility, individual freedom, and dignity. Unlike the Orange Revolution of 2004, the Maidan Uprising promoted the civic activism that was more informal, more horizontal, more fluid and penetrated many more areas of public life and management (e.g., expertise, humanitarian aid, hard security provision, armed defence, etc.). Particular civil society groups offered their expertise to public authorities regarding the necessary reforms. Working closely with the country's government and parliament, the civic society promoted reforms in the area of public administration, was involved in drafting and advocating for legislative projects (organized advocacy coalitions to draft and lobby for legislation), participated in monitoring of how reforms were implemented. Public activists and volunteers united to address the military and humanitarian crisis caused by the armed conflict in the east of Ukraine, the Donbas region (Burlyuk et al., 2017).

President Poroshenko's government made progress in stabilizing the country's economic and financial situation, consolidated the banking sector, and initiated a more transparent system for public procurement (Pifer, 2020). However, in 2016, the reforms slowed down. The country failed to curb the oligarchic rule and prosecute those responsible for the 2014 shootings on the Maidan. Another reason for the failure was and is an ongoing conflict between the newly established anti-corruption agencies: the National Anti-Corruption Bureau (NABU), and the Specialized Anti-Corruption Prosecutor's Office (SAPO). NABU's unofficial claims against SAPO include the latter's illegal dismissal of criminal cases against certain officials, while SAPO is accusing NABU detectives of the lack of competence in preparing investigative materials (Ogarkova, 2018).

In summary, the advocacy and influence of the civic society on public policies stimulated by the Maidan Uprising are considered the major strength of Ukraine's civil society (USAID 2017; Democratic Initiatives Foundation 2018). Nevertheless, despite the clearly declared goal of the European integration, democratic elections, formation of the new government, and tackling the reform needs, the country failed to solve an old problem: the new Ukrainian government lacked a new political elite. The new President Petro Poroshenko was an oligarch, and Prime Minister of Ukraine Arsenii Yatseniuk was also a representative of the political past of Ukraine. According to Volovoj (2015), although the first post-Maidan presidential and parliamentary elections took place in specific conditions and can be excused for some shortcomings, the authorities failed to prove that the new system of governance was transparent and fair. The ongoing conflict between the newly established anti-corruption agencies—the National Anti-Corruption Bureau (NABU) and the Specialized Anti-Corruption Prosecutor's Office (SAPO)—makes the fight against corruption even more difficult. Thus, corruption continues to be the major concern of the state.

Annexation of the Autonomous Republic of Crimea and Sevastopol by Russia. Crimea was part of Russia since the 18th century; it was granted autonomy and was named the Crimean Autonomous Soviet Socialist Republic, existing under the umbrella of Russian Soviet Federative Republic. In 1954, Nikita Khrushchev transferred the Crimean region to the Soviet Socialist Republic of Ukraine, and it became a part of independent Ukraine in 1991. This status was recognized by Russia, which pledged to preserve the unity of Ukraine in the Budapest Memorandum on Security Assurances, signed in 1994 (Lozada et al., 2017).

The overthrow of the legitimate president of Ukraine after the Maidan Uprising came as a shock, especially to Russian authorities, who were deeply alarmed when they realized that Ukraine no longer wished to participate in the Eurasian Union,

but preferred membership in the European Union. An even greater concern was Russia's military security, since only the former president Yanukovych could ensure that Ukraine would remain Russia's military ally. After the overthrow of President Yanukovych, the situation changed and Ukraine began to drift slowly towards the NATO. Russian authorities saw this as a threat to their country's national security due to the NATO coming closer and closer to Russian borders (Russia's neighbours: Poland, Lithuania, Latvia, and Estonia had already become NATO members). A threat was also perceived to the security of the Russian Black Sea Fleet, which had its official primary headquarters and facilities in Sevastopol, the Crimean Peninsula. Ukraine's possible membership in the NATO alliance meant the loss of Russia's strategic military positions in the Black Sea region (Atroshchenko, 2017).

On 27 February 2014, Russian troops captured strategic sites across Crimea. Groups of armed men surrounded the airports in Simferopol and Sevastopol (*Encyclopaedia Britannica*, 2022). At least two dozen heavily armed men occupied the Crimean parliament building and the nearby headquarters of the regional government, and raised there a Russian flag (Shuster, 2014). Pro-Russian lawmakers dismissed the sitting government and installed Sergey Aksyonov, the leader of the Russian Unity Party, as Crimea's Prime Minister. Voice and data communication links between the Crimea and Ukraine were severed. Although Russia initially claimed their military was not involved in the events, Russian authorities later acknowledged that they had moved troops into the region (Pifer, 2020; *Encyclopaedia Britannica*, 2022). According to Atroshchenko (2017), in response to Ukraine's steps towards the NATO, Russian authorities decided to annex the Crimea through both the military intervention and the process of so-called self-determination of people. This was done by, first, occupying and securing the main administrative centres of the peninsula, and then by holding a referendum that inevitably determined the people's desire the Crimea to become a subject of the Russian Federation (Atroshchenko, 2017). The Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol was a joint resolution adopted on 11 March 2014 by the Supreme Council of Crimean and the Sevastopol City Council that proclaimed the Autonomous Republic of Crimea and the city of Sevastopol a sovereign state titled the Republic of Crimea (Somin, 2014). The Crimean status referendum was held on 16 March 2014 in the Autonomous Republic of Crimea and the local government of Sevastopol. It was a violent and unlawful temporary rejection of Crimean autonomy and Sevastopol by Ukraine and their accession to the Russian Federation on the rights of the so-called subjects of the federation, proclaimed by Moscow on 18 March 2014 (allegedly as a result of the "referendum" held on 16 March 2014).

Ukraine and many other countries have condemned the annexation and considered it to be a violation of international law and Russian-signed agreements

safeguarding the territorial integrity of Ukraine, including the 1991 Belavezha Accords that established the Commonwealth of Independent States, the 1975 Helsinki Accords, the 1994 Budapest Memorandum on Security Assurances, and the 1997 Treaty on Friendship, Cooperation and Partnership between the Russian Federation and Ukraine. It led to the other members of the G8 suspending Russia from the group and then introducing a first round of sanctions against the country. The United Nations General Assembly also rejected the referendum and annexation, adopting a resolution affirming the "territorial integrity of Ukraine within its internationally recognised borders." The United Nations resolution also "underscores that the referendum having no validity, cannot form the basis for any alteration of the status of [Crimea]"; it called upon all states and international organizations not to recognize or to imply the recognition of Russia's annexation. In 2016, the UN General Assembly reaffirmed non-recognition of the annexation and condemned "the temporary occupation of part of the territory of Ukraine—the Autonomous Republic of Crimea and the city of Sevastopol." According to Grant (2017), this was the first time in the history of the United Nations when the annexation following the use of force was made by a permanent member of the Security Council against a member of the United Nations. The Russian Federation opposes the "annexation" label, with President Putin defending the referendum as complying with the principle of people's self-determination.

Rather than abide by international norms, Russia engaged in a worrisome military build-up in the Crimea, including moving nuclear-capable aircraft and missiles, weapons, and ammunition onto the peninsula. It increased its military presence in the Black Sea, the Sea of Azov, and the Kerch Strait. Russian forces harassed commercial shipping and mounted other provocations, for example, the attack on the Ukrainian Navy, seizure of three Ukrainian vessels, and detention of 24 Ukrainian service members. In a December 2020 resolution, the UN General Assembly condemned the militarization of the Crimea and called for Russia, as the occupying power in the Crimea, to withdraw its forces from the peninsula and end its occupation of Ukrainian territory. Annexation of the Autonomous Republic of Crimea and Sevastopol by Russia is considered a part of the wider Russo-Ukrainian War.

Assessing the political and economic consequences of the annexation of the Crimean Peninsula by Russia, Lozada et al. (2017) note that it caused serious structural economic imbalances and led to instability and uncertainty in Ukraine. In addition, the situation resulted in the disruption of some large investment projects in the energy sector, compromised the regular practice of logistics and foreign trade through the Black Sea, had a negative impact on grain markets, etc. The military escalation meant an increased risk to Ukraine's national security and the potential new open conflict with Russia both in short and long terms.

Having researched the connection between the annexation of the Crimea by Russia and financial and economic crimes in Ukraine, Galeotti (2014) suggests that after the collapse of the USSR, the Crimea and the port of Simferopol became heavens for smuggling, black marketeering and embezzlement schemes. After Ukraine became an independent country, organized crime flourished in Crimea, and local businessmen were forced to pay tribute and sell smuggled and illicit goods. By the 2000s, the power and impact of gangsters-turned-businessmen was increasingly dominant. Close ties were maintained with Russian criminal networks. Later former organized criminals moved into local government and politics, and started defrauding the state's money. According to Idris (2022), the connections between the Crimean organized crime groups and Russian criminal networks, as well as corruption, were significant factors which implied that it would be easy for Russia to occupy the Crimea when Yanukovych fled Ukraine. Galeotti (2014) explains that organized criminal groups operating in the Crimea (in particular, Bashmaki and Salem) knew that cooperation with Russia would benefit them. Sergei Aksyonov, the "Head of the Republic of Crimea" (de facto prime minister) is said to have been a member of the Salem organized criminal group in the 1990s, going by the nickname 'Goblin' (Galeotti, 2014). In other words, the criminal and corrupt connections were used as an instrument to implement Russian policies (Idris, 2022).

War in the Donbas. In March 2014, following the Maidan Uprising, protests by pro-Russian anti-government separatist groups arouse in the east of Ukraine: the Donetsk and Luhansk regions, collectively called the Donbas. Armed Russian-backed separatists seized government buildings throughout the Donbas, held a vote in favour of self-proclaimed governments, declared the Donetsk and Luhansk People's Republics and proclaimed sovereignity of these pseudo-republics (Grytsenko, 2014; Atroshchenko, 2017). In response to these events, a military counter-offensive against the separatists was launched by Ukraine in April 2014 (*BBS News*, 2014) to subdue the rebelling regions and retake the control over them. By late August 2014, Ukrainian forces managed to reduce the territory controlled by pro-Russian separatists and approached the Ukrainian-Russian border. Under a threat of losing the territories controlled by favourable forces, on 22 August Russia began a stealth military invasion in the Donbas that was disguised as a "humanitarian convoy" and denied by Russian official bodies (Kofman et al., 2017). With the help of Russian military forces, the separatists in the Donetsk and Luhansk regions managed to recover most of the territory which had been lost during Ukraine's counter-offensive.

Nevertheless, the terms of the protocol were repeatedly violated by both parties, warlords took control over the rebelling territories, which led to further destabilization (Vasilyeva, 2014). The second ceasefire protocol Minsk II was signed on 12 Feb-

ruary 2015, but like the first protocol, it was not effective. Both fighting parties began fortifying their positions and the area remained a war zone (Whitmore, 2016). As of August 2017, there were 10,225 people killed and 24,541 wounded as a result of the armed conflict since the beginning of the Donbas conflict in April 2014.

According to Atroshchenko (2017), the war in the Donbas, which began at a similar time as the annexation of the Autonomous Republic of Crimea and Sevastopol by Russia, was the reaction of the Russian Federation to the overthrow of President Yanukovych after the Maidan Uprising and his replacement by the pro-western government. By escalating unrest and military conflicts, the Russian Federation sought to create problems for the Ukrainian government and maintain and expand its sphere of influence. As a result, Ukraine became unstable, with separatist territorial control and distracted government.

The conflict has been international in nature and is considered a part of the Russian armed aggression against Ukraine. On 21 February 2022, Russia officially recognised the Donetsk and Luhansk People's Republics, openly moved military forced into these terriroties on 22 February 2022, and on 24 February 2022 began a full-scale invasion of Ukraine.

Analyzing the relationship between corruption and the war in the Donbas region, Idris (2022) suggests that corruption and crime served for pro-Russian protests and rebellion in this region, and later for the declaration of the Donetsk and Luhansk People's Republics. The author provides the evidence that organised crime groups and political elites/oligarchs were involved in symbiotic partnerships. The preconditions to the Donbas conflict were created by such factors as poor governance, corruption and criminality, and organized criminal groups have been involved in the fighting. In the territories occupied by the separatist government, the laws and control of the country's central government do not work, which creates extremely favourable conditions for transnational crime. Organized crime intertwined with corruption means that the situation can only get worse in the future. At the moment, Ukraine cannot resolve the problem of the Donbas on its own. It can only hope that the costs of the occupation, including the financial and economic sanctions imposed by Western countries, will become too high for Russia and the war will end in favour of Ukraine. Only then will Ukraine be able to expand anti-corruption reforms and build a successful and prosperous state (Pifer, 2020).

2022 Russian invasion of Ukraine. If, as noted by Barrett (2018) before Russia's large-scale invasion of Ukraine on 24 February 2022, both Western states and Russia were using their "hard" and "soft" powers to affect the Ukrainian reform efforts—Western states used to provide financial aid to bolster civil society and election monitoring groups (Sushko and Prystayko, 2006; Delcour and Wolczuk, 2015),

whereas Russia used to rely on historical interconnectedness, lucrative energy contracts as well as administrative and military intervention, as in the cases of Crimea and the Donbas (Vanderhill, 2013)—then, by starting the invasion, Russia sought to use its military advantages to accomplish the political objectives, also known as Russian irredentism (i.e., claims to parts of the former Russian Empire and the former Soviet Union).

After recognizing the Donetsk and Luhansk people's pseudo-republics on 21 February 2022, the Russian Federation sent its troops to the Donbas on a so-called "peacekeeping mission" (Kottasova et al., 2022) and authorized the use of military force outside the Russian Federation (Hodge, 2022). Russia's invasion of Ukraine was widely condemned by the international community and international institutions, such as the United Nations General Assembly, the International Court of Justice, the Council of Europe, and others. The European External Action Service (2022) recognized the invasion as "an unprovoked and unlawful attack on a peaceful country" and a "gross violation of international law, including the UN charter." Many countries have imposed sanctions on Russia and its ally Belarus, and have been providing Ukraine with humanitarian and military aid.

According to the World Economic Forum (2022), the current conflict might be fuelled and perpetuated by long-standing regional corruption. It is argued that corruption, which distorts political priorities, erodes public services, and exacerbates inequality, may fuel authoritarian violence. Based on the 2014 report, provided by Carnegie Endowment for International Peace, countries characterised by high corruption levels tend to suffer a military conflict or state failure. Barrington (2022) suggests that state capture, i.e., systematic corruption when narrow interest groups buy influence in order to control institutions and processes, was actively promoted by Russia in relation to Ukraine, which undermined the latter's national security.

Now, when Ukraine receives tens of billions of dollars and euros in military, economic and direct financial support, the question of a high level of corruption in Ukraine, which has been extremely relevant for a long time, arises again, i.e., there is concern about whether Ukraine is a suitable recipient of the massive infusions of foreign aid. Back in October 2021, when Russia was still amassing its troops near the Ukrainian border and Ukraine was being warned of the potential Russian invasion, the U.S. administration reproached the Ukrainian government for inaction on corruption and expressed their concern about unjustifiable delays in the selection of the Head of the Specialized Anti-Corruption Prosecutor Office, which is considered to be a crucial body in the fight against high-level corruption. That special prosecutor was finally selected in late December 2021, but was never actually appointed to the position. Although there are indications the appointment will happen soon, the dismissal of the Prosecutor General could complicate the matter (the Associated Press, 2022).

Although the issue of corruption remained on the back burner during the first months of the Russian invasion, concerns were renewed after President Volodymyr Zelenskiy fired Ukraine's Prosecutor General Iryna Venediktova, the Head of the Security Service Ivan Bakanov and other senior officials. The Parliament ratified the dismissals on 19 July 2022. The argument was presented that these officials were involved in corruption. It was stated that officials who occupied high positions in the state governance structure could have betrayed the public trust, which could have helped Russian forces to capture quickly the southern part of Ukraine (Kherson, Melitopol, Mariupol) while Ukrainian forces were blocking the progress of the occupiers around the capital. In March 2022, Andriy Naumov, former Head of the Department of Internal Security at the Security Service of Ukraine, and Serhiy Kryvoruchko, former Head of the Security Service of Ukraine in Kherson, were accused of treason.

In addition, concern is expressed over the possibility that military equipment provided by the Western partners can be smuggled and sold on the black market, although Ukraine, whose military budget is ten times smaller than about $70 billion military budget of the Russian Federation, cannot afford to waste any resources. There are fears that the ongoing war will only deepen the existing corruption problems in Ukraine and pose new risks when the massive inflows of money, equipment and humanitarian aid become a bait for easy personal gain, since the government's attention is focused on the defence of the country (Savoy, 2022). There is also concern that corruption and the influence of the oligarchs may hinder the process of rebuilding Ukraine after the war (Shin, 2022). Zero tolerance of corruption may require Ukrainian leaders to use their enormous wartime powers to create effective institutions (the police, prosecutor's office, judicial system), which would help fight corruption, and ensure a high level of transparency, which would show foreign partners that the allocated support is used as intended. To preserve the trust of foreign partners and secure support in the future, it is necessary to ensure a higher degree of transparency and a greater sense of public interest than Ukrainian authorities have shown so far (*GIS Feature*, 2022).

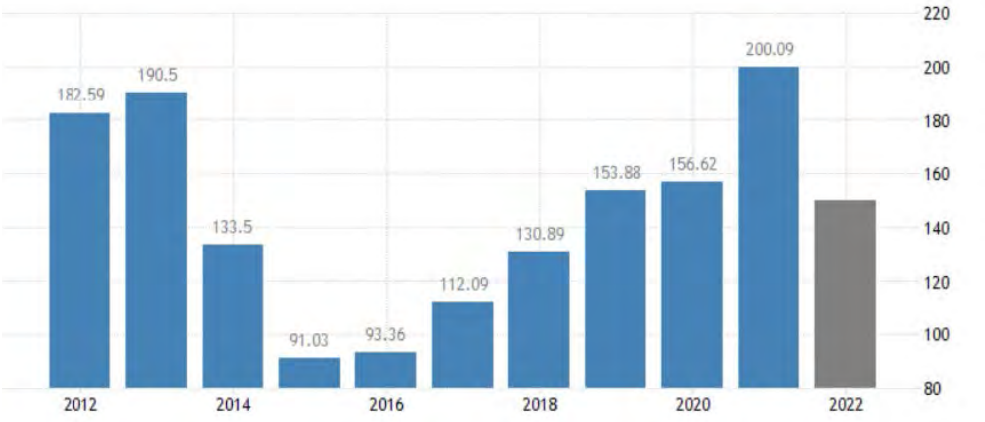
3.2. Economic Environment

The economic situation in Ukraine has been difficult due to ongoing political confrontation, instability of reforms and armed conflicts. For instance, the Maidan Uprising, which took place from 21 November 2013 to 21 February 2014, led to a profound and unprecedented political, economic and social crisis, which affected the devaluation of the national currency (the hryvnia, UAH) while the

corresponding prices for imported goods were predominantly in dollars or euros, cut Ukraine's credit rating to CCC, caused stratification and impoverishment of the population, determined minimization of wages, devastation of the state budget, etc. (*Bloomberg News*, 2014). The war in the east led to the hryvnia plummet by more than 50 percent against the U.S. dollar in 2014, which, in its turn, caused an increase in the country's real public and private debt burden (mostly denominated in foreign currencies). In 2014, the inflation rate reached 24.7 percent, which had a negative impact on consumer good prices, thus hitting the entire population (Duvell and Lapshyna, 2015). President Poroshenko's economic reforms, partially carried out by raising tariffs to cover the costs of producing heat and electricity (Pifer, 2020), led to tax and fee increases, a hike in energy prices, and spending cuts, which resulted in significant wage and benefit cuts, and job losses (Duvell and Lapshyna, 2015).

The Gross Domestic Product in Ukraine in 2014-2016 (i.e., the period after the Maidan Uprising) decreased dramatically, and since 2017 started to gradually increase again. In 2021, it was worth 200.09 billion U.S. dollars (see Figure 2).

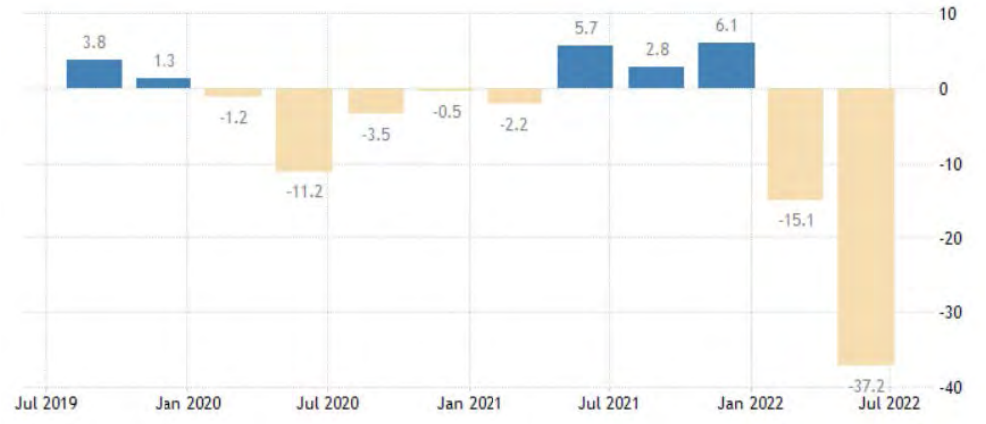
Figure 2. Dynamics of GDP in Ukraine between 2012 and 2022



Source: *Trading Economics*, 2022i

However, the GDP in Ukraine contracted 37.20 percent in the second quarter of 2022 in comparison to the same quarter of the previous year (see Figure 3) because the state's infrastructure, exports and consumption fell sharply following the Russian invasion.

Figure 3. Dynamics of GDP in Ukraine between July 2019 and July 2022



Source: *Trading Economics*, 2022h

GDP from public administration in Ukraine increased to UAH 32294 million in the fourth quarter of 2021 (in the third quarter of 2021, it amounted to UAH 29377 million). In 2021, Ukraine's economy grew 3.4 percent due to increased domestic demand caused by COVID-19 restrictions, and also due to a bigger harvest offset drags from higher global energy prices, and a faster fiscal consolidation. In 2022, Ukraine's economy was projected to shrink as much as 30 percent. The standard of living in the country is decreasing; this is also shown by the decreasing GDP per capita: if in 2017 it was recorded at $3224.56, in 2020 it dropped to $2350.4, and although in 2021 it slightly increased to $2451.90, it is still an extremely low indicator.

According to the forecast based on the global macro models and econometric models of *Trading Economics* (2022i), Ukraine's GDP is expected to reach $100.00 billion by the end of 2022, which is almost twice as less as in 2021, when the country's GDP amounted to $200.09 billion. In 2023, Ukraine's GDP is projected to reach around $80.00 billion, i.e., a further drop in GDP is predicted, and only in 2024 is Ukraine's GDP expected to rise: it should reach around $120.00 billion. GDP from public administration in Ukraine is expected to reach UAH 17,626.00 million by the end of the fourth quarter of 2022, i.e., an almost two-fold drop in this indicator is also expected compared to the same period in 2021. In 2023, Ukraine's GDP from public administration is projected to reach around UAH 14,855.00 million, and only in 2024. This indicator should rise to UAH 15,301.00 million.

Exports in Ukraine decreased from $3166.50 million in June to $2928.50 million in July 2022. The major Ukraine's export commodities are steel, coal, fuel and

petroleum products, chemicals, machinery and transport equipment, and grains, like barley, corn and wheat. Before the war with Russia, more than 60 percent of the exports used to go to the former Soviet countries, such as Russia, Kazakhstan and Belarus. Imports in Ukraine decreased from $4727.80 million in June to $4636.10 million in July 2022. Ukraine mostly imports oil and natural gas, machinery and equipment, and chemicals. The major import partners are Russia and Belarus, but Germany, China, and Poland have also been gaining importance in recent years. Ukraine's trade balance is negative: the country recorded a trade deficit of $1,707.60 million in July 2022. Ukraine's external debt increased from $127,462 million in the first quarter of 2022 to $128,045 million in the second quarter of 2022. Foreign direct investment (FDI) growth was also registered: FDI in Ukraine increased by $439 million in the second quarter of 2022.

According to the forecast based on the global macro models and econometric models of *Trading Economics* (2022g), exports in Ukraine are expected to fall to $1,500.00 million by the end of the fourth quarter of 2022. In 2023, Ukrainian exports are predicted to start slightly increasing and amount to nearly $2,000.00 million, and in 2024 to nearly $3,000.00 million. The country's imports are expected to decrease dramatically by the end of the fourth quarter of 2022 and amount to $1500.00 million. It is projected to remain nearly the same in 2023 and only start rising slowly in 2024, when it should amount to $2,500.00 million (*Trading Economics*, 2022k).

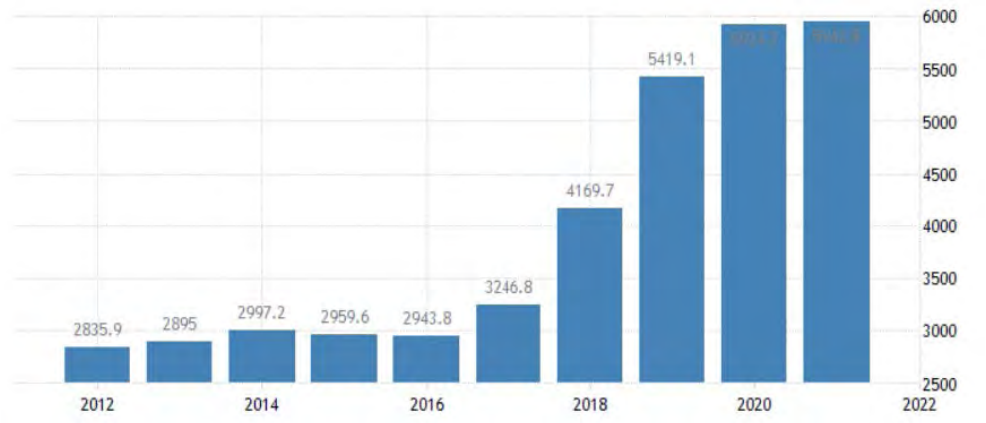
Ukraine recorded a government budget deficit equal to 3.40 percent of the country's GDP in 2021. Over the first seven months of 2022, the country's budget deficit amounted to UAH 411,505.40 million. The current account surplus in Ukraine grew sharply to $2,018 million in August 2022 from $36 million in the corresponding month previous year. The secondary income surplus soared from $373 million to $3,938 million, and the primary income account recorded a surplus of $818 million, switching from a $452 million deficit. Meanwhile, the goods and services deficit rose to $2,738 million from $160 million. Considering the first eight months of the year, the current account balance swung to a $6,674 million surplus from a $714 million gap over the same period in 2021. Government debt in Ukraine increased from nearly UAH 1,255,746.26 million in July 2022 to nearly UAH 1,261,092.54 million in August 2022. Government spending increased from UAH 86,613 million in the third quarter of 2021 to UAH 123,762 million in the fourth quarter of 2021. By the end of 2022, the government budget deficit is expected to reach 15.00 percent of GDP, and from 2023 the government budget deficit is predicted to decrease: in 2023, it is projected to amount to 10.00 percent of GDP, and in 2024 to 5.00 percent of GDP (*Trading Economics*, 2022j).

Regarding the connection of Ukrainian export and import with corruption, it should be noted that the export and import operations are often carried out to laun-

der money obtained through corruption. Illegally acquired money is remitted to accounts of dummy firms and then foreign currency is transferred abroad to pay import contracts. As a rule, "fictitious" or "transit" firms are officially registered for dummies: military men, prisoners or needy and mentally ill persons. Subsequently, these firms vanish, and organizers make no claims (or at least formal ones) on breaking contracts. The import piracy is conducted through authorized banks that are currency control agents. Following the export operation scheme, products are delivered to pre-purchased or established firms abroad. As a rule, foreign firms are supplied with raw materials, but Ukrainian suppliers do not receive any money. Funds do not return to Ukraine; they are legalized abroad. This channel is widely used because it results in decreasing export prices.

Involvement in armed conflicts is gradually decreasing weapons sales in Ukraine: sales volume of weapons (core sets of weapons such as aircraft, air defence systems, anti-submarine warfare weapons, armoured vehicles, artillery, engines, missiles, sensors, satellites, ships) in 2012 amounted to $1,501 million, and in 2020 they fell to $115 million. Military expenditure in Ukraine increased from $5,924.20 million in 2020 to $5,942.80 million in 2021 (see Figure 4).

Figure 4. Dynamics of military expenditure in Ukraine between 2012 and 2021



Source: *Trading Economics*, 2022m

On 21 July 2022, the National Bank of Ukraine devalued the hryvnia by 25 percent against the U.S. dollar to help the country cope with the growing economic impact of the war with Russia. The new hryvnia rate was set at 36.5686 to the U.S. dollar. The previous rate of 29.25 was set at the start of the Russian invasion (*Reuters*, 2022) (see Figure 5).

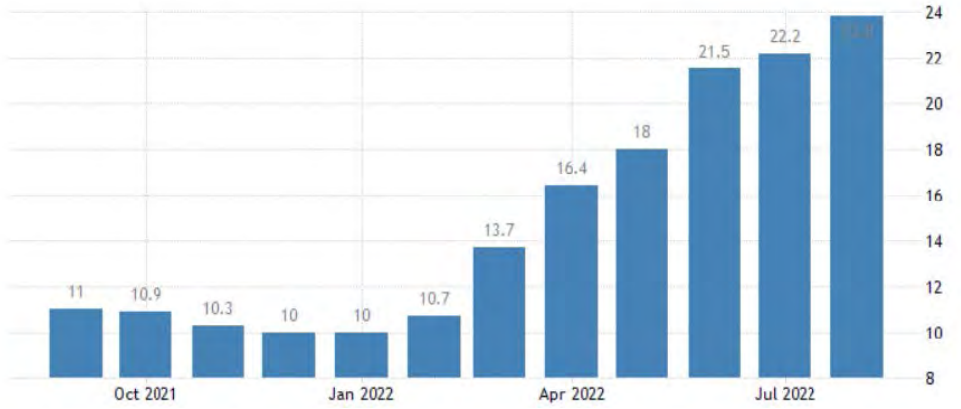
Figure 5. Dynamics of the Ukrainian hryvnia rate to the U.S. dollar between October 2021 and October 2022

Source: *Trading Economics*, 2022p

The Ukrainian hryvnia is expected to be further devalued and trade at 38.34 against the U.S. dollar by the end of the fourth quarter of 2022. It is estimated to trade at 42.91 against the U.S. dollar in 12 months' period (*Trading Economics*, 2022p). Hardie (2022) notes that the economic pressure on Ukraine is increasing, largely due to limited financial support without which Ukraine is likely to face a falling currency and rising inflation.

The annual inflation rate in Ukraine increased to 23.8 percent in August 2022 (in July 2022, it amounted to 22.2 percent) (see Figure 6). This is the highest inflation recorded since February 2016, exceeding the Central Bank's estimate of 23 percent, given that the country endured six months of Russia's invasion.

Figure 6. Dynamics of the inflation rate in Ukraine between October 2021 and August 2022



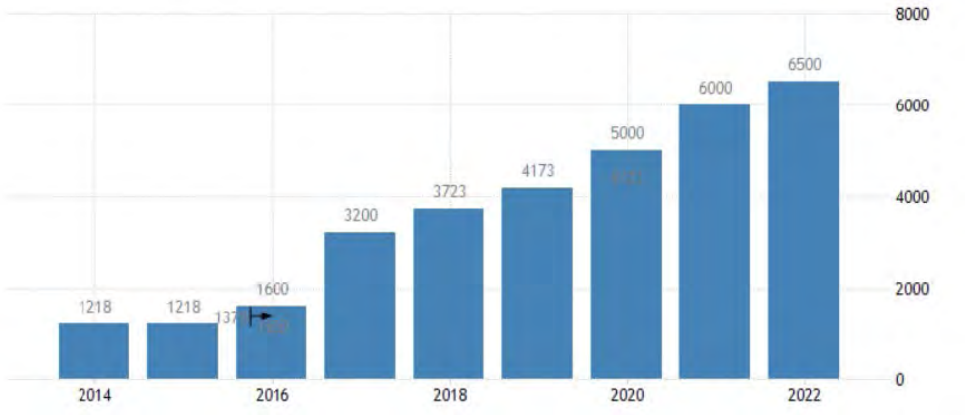
Source: *Trading Economics*, 2022l

The record high level of inflation was caused by the soaring prices of food and non-alcoholic beverages, in particular sugar and eggs (an increase of 30.7 percent vs 28.9 percent in July), and household items and furnishings (an increase of 21.6 percent vs 16.2 percent in July). Cost of food increased 30.70 percent in August of 2022 over the same month in the previous year. In the service sector, the prices charged by restaurants and hotels increased the most (an increase of 17.2 percent vs 16.4 percent in July). Transport prices also remain soaring (at 40.4 percent). On a monthly basis, consumer prices rose by 0.8 percent (compared to the 0.5 percent increase in the prior month). Core consumer prices in Ukraine increased from 116.70 points in July of 2022 to 119.10 points in August. Producer prices decreased from 692 points in January of 2022 to 677.80 points in February. The country's inflation rate is expected to reach 27.00 percent by the end of the fourth quarter of 2022, i.e., it is expected to continue to grow at a record high level. The price growth is projected to slow down significantly in 2023, when the inflation rate is estimated to reach around 12.00 percent; in 2024, it should drop to 8.00 percent (*Trading Economics*, 2022l).

Interest has been kept unchanged at a 25 percent rate by the National Bank of Ukraine and should remain at this level until the second quarter of 2024. When making this decision, representatives of the National Bank of Ukraine argued that in the time of war, high borrowing costs are sufficient to maintain exchange rate stability and broadly control inflation. It was further observed that the resumption of grain exports through the Black Sea under the UN-brokered safe trade deal should raise demand for the national currency hryvnia, thus further increasing the attractiveness of the national currency.

Statistically, the dynamics of the minimum wages in Ukraine between 2014 and 2022 (i.e., in the long term) has been positive, and the minimum wages have been gradually increasing (see Figure 7).

Figure 7. Dynamics of the minimum wages in Ukraine between 2014 and 2022



Source: *Trading Economics*, 2022n

However, following the changes in the average monthly wages in 2022, it can be noticed that compared to December 2021, in January 2022, when the Russian invasion of Ukraine was expected to start any time, the average monthly wages dramatically decreased: from UAH 17,453 to UAH 14,577 (see Figure 8).

Figure 8. Dynamics of the average monthly wages in Ukraine between February 2021 and January 2022

Source: *Trading Economics*, 2022c

The average monthly wages are expected to reach 15,744.00 UAH/month by the end of the fourth quarter of 2022, i.e., they should increase slightly compared to the beginning of the year. In 2023, the average monthly wages are projected to grow more significantly and amount to nearly 21,118.00 UAH/month, and in 2024 to nearly 23,019.00 UAH/month. Minimum wages in Ukraine are expected to reach 7,000.00 UAH/month by the end of 2022, and keep growing through 2023 and 2024, when they are projected to reach 7,200.00 UAH/month and 8,000.00 UAH/month, respectively (*Trading Economics*, 2022c).

The Corporate Tax Rate in Ukraine stands at 18 percent, as well as the Personal Income Tax rate. The Sales Tax rate stands at 20 percent. The Social Security Rate for Companies in Ukraine stands at 22 percent, while for employees at 0 percent (since 2016), respectively (*Trading Economics*, 2022o). Tax rates represent the area of the economy that is unaffected by the war—the war is not expected to raise tax rates in the country.

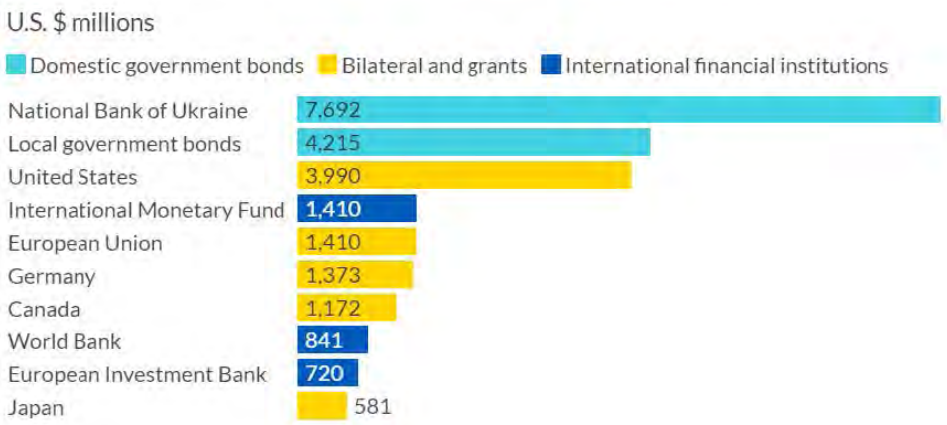
Ukrainians' demand for cash substantially increased in 2020, when cash in circulation grew by 34 percent year-over-year. Being an emerging market and characterized by a high share (nearly 45 percent) of the shadow economy as percentage of GDP (Medina and Schneider, 2018) and dollarization (Khvedchuk et al., 2019), Ukraine is bound to rely on cash transactions. Honcharenko's (2021) research, based on the analysis of the data from the National Bank of Ukraine, revealed that apart from conventional determinants, such as interest rate, the demand for cash in Ukraine is affected by the share of the employed in the construction sector, the consequences of the COVID-19 pandemic, and the degree of uncertainty.

The demand for cash increased even more during the Russian invasion. Even before the beginning of the Russian military invasion of Ukraine, in June 2021, the Ukrainian government issued the brochure titled *How to Prepare for an Emergency*. Civilians were recommended to keep some cash at home in case payment cards and ATMs were not working. Cash withdrawals had been increasing until the end of 2021, alongside Russia's military build-up. But it was not yet a cash crunch. On 23 February 2022 (i.e., the day before the full-scale Russian invasion), the National Bank of Ukraine confirmed that banks and exchange offices had adequate cash holdings to meet the public's demand. Foreign cash deliveries were also proceeding as planned (Bautista-Gonzalez, 2022). However, when the large-scale Russian invasion began the next day, thousands of people rushed to ATMs to withdraw some cash and flee the cities. As a result, many ATMs, especially in the breakaway regions, ran out of cash. Cash, once again, revealed its critical importance in times of a crisis and uncertainty (ESTA, the Cash Management Companies Association, 2022). To manage the crisis, the National Bank of Ukraine moved to secure the cash supply and ensure that banks are generally able to replenish ATMs with cash. The

National Bank of Ukraine, in its turn, was supplying banks with cash and liquidity. At the same time, the limit on cash withdrawals to UAH 100,000 a day and the prohibition on release of cash from client accounts in foreign currency were established (Bautista-Gonzalez, 2022). Ukrainians were encouraged to make cashless payments as safest and most reliable in wartime for two reasons: first, additional risks posed by cash collection; second, reduction in the effectiveness of the monetary policy caused by a substantial increase in cash circulation (Honcharenko, 2021).

Foreign donations are a significant support for Ukraine during the war. The donations are provided by 40 countries, specifically the EU member states, other members of the G7, as well as Australia, South Korea, Turkey, Norway, New Zealand, Switzerland, China, Taiwan, and India (Kiel Institute for the World Economy, 2022). Between 24 February and 16 August 2022, the obligations of foreign countries to Ukraine amounted to more than $100 billion. More than $17.6 billion of grant funding was provided during June-July 2022. The funding is primarily intended for humanitarian aid purposes and the maintenance of the essential infrastructure. Early in the war, the EU announced two major packages of $353 million and $535 million, respectively, intended for humanitarian help. Also, in cooperation with the international movement Global Citizen and the Canadian government, the EU pledged €600 to support Ukraine. In addition to providing the humanitarian grant funding, the EU has provided several packages of loans both directly and through the European Investment Bank. At the event in Poland, which took place in May, donors and governments made pledges for $10.1 billion, and at the meeting of the Group of Seven, the pledges for $19.8 billion in grants and loans were made. The largest grant provided on 16 August 2022 amounted to $4.5 billion; it was provided by the United States via the World Bank. €2 billion in loan finance was made available to Ukraine by the European Bank for Reconstruction and Development, partly owned by the European Investment Bank and the EU. Ukraine was also provided $69.3 billion in loans and other repayable finance intended for maintaining the country's economy during the war (Ainsworth, 2022). Figure 9 illustrates top ten sources of Ukraine's state budget financing during the period from 24 February to 21 July 2022.

Figure 9. Top ten sources of Ukraine's state budget financing between 24 February and 21 July 2022



Source: *GIS Feature*, 2022

The data in Figure 9 indicate that Ukraine's state budget was supplemented by around $25 billion in the first five months since the Russian invasion. Nearly half of the total amount was borrowed through bond sales by the Ukrainian government or the central bank. The major donators are the USA, the International Monetary Fund, and the EU. Nevertheless, Ukraine runs at least $5 billion monthly budget deficit (*GIS Feature*, 2022).

The financial support for Ukraine during the current war with Russia is really huge, for example, compared to the total development funding for Ukraine, which amounted to $1.8 billion, and humanitarian aid commitments which amounted to just $168 million in 2020 (Ainsworth, 2022). The bitter truth, however, is that armed conflicts tend to exacerbate existing corruption challenges. Massive inflows of money provide more opportunities for corruption and bribery, when the attention of the country's government and public authorities is focused on defence and citizen protection. In times of war, civil society cannot fulfil their role in monitoring the work of public institutions because part of the society participates in the war, while another part is forced to flee from the war. Anti-corruption institutions lack personnel to be able to perform their functions properly, and normal activities are disrupted due to the need to perform emergency tasks. Savoy (2022) presents the results of the survey conducted in Ukraine in mid-April, which show that as many as 84 percent of anti-corruption experts were forced to abandon their direct functions. The review provided by the Transparency International Ukraine (2022) proposes that the National Agency on Corruption Prevention (NACP)—which before the

full-scale Russian invasion of Ukraine were obliged to shape anti-corruption policies, protect whistle-blowers, check declarations, monitor the lifestyle of officials and control the transparency of political party financing—had to discontinue much of its mandated work, in particular, checks of declarations and lifestyle monitoring. Instead, the NACP has initiated some new activities relevant to the war: tracing the assets possessed by sanctioned Russian citizens and seizing these assets for the purpose of Ukraine's reconstruction, establishing the Humanitarian Aid Headquarters to support the Ukrainian Army and the victims of Russian aggression, etc. All this clearly shows that the priorities are currently given to security and aid issues, while the issues of corruption remain in the background. Nevertheless, Ukraine's Euro-Atlantic partners require that anti-corruption reforms should not cease being a priority. Savoy (2022) argues that thus far, Ukraine has not had any high-profile cases that would be related to extortion of donations that were intended for military equipment, budget funding or humanitarian aid. However, according to the author, the scattered reports of bribery involving state officials indicate that the risk of corruption in Ukraine has not disappeared, and the country must take measures to solve the problem, because otherwise questions may arise about the continuity of support from western countries.

Summarizing, the economic situation in Ukraine has been difficult due to ongoing political confrontations, instability of reforms and armed conflicts. Following the Russian invasion on 24 February 2022, the state's infrastructure, exports, imports and consumption have fallen sharply, which poses further economic pressure on the state. The economic instability alongside the increased demand for cash in the period of uncertainty opens up more opportunities for corruption, as does the dependence of the country's economy on massive inflows of Western support, without which Ukraine's economy would possibly collapse. The problem of corruption is further deepened by the fact that during the war, the civil society cannot fulfil its role in monitoring the work of public institutions, and anti-corruption institutions not only lack the staff to perform their normal functions, but are also forced to discontinue much of their mandated work in favour of the new activities relevant to the war (e.g., tracing the assets possessed by sanctioned Russian citizens and seizing these assets for the purpose of Ukraine's reconstruction, establishing the Humanitarian Aid Headquarters to support the Ukrainian Army and the victims of Russian aggression, etc.). Nevertheless, although the country's priorities during the war are security and aid issues, Ukraine's Euro-Atlantic partners require the continuation of anti-corruption reforms, because otherwise questions may arise regarding the continuation of support from western countries.

3.3. Social Environment

Corruption perception. Ukraine scored 32 points out of 100 on the 2021 Corruption Perceptions Index (CPI) reported by Transparency International (see Figure 10) and was ranked 122nd out of 180 countries worldwide. By the value of this indicator, Ukraine is ahead of neighbouring Russia, which was ranked 136th with 29 points, but lags behind other neighbours (Moldova with 36 points, Belarus with 41 point, Hungary with 43 points, Slovakia with 52 points, Romania with 45 points, and Poland with 56 points) (Transparency International Ukraine, 2021).

Figure 10. Dynamics of Ukraine's Corruption Perceptions Index between 2012 and 2022

Source: *Trading Economics*, 2022f

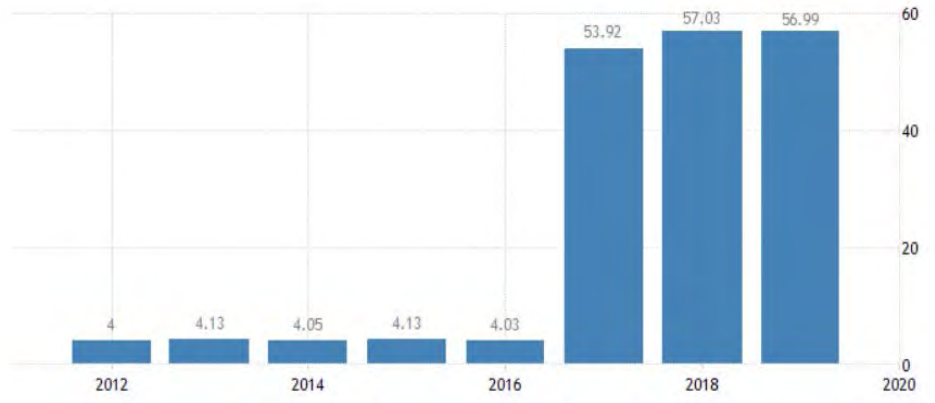
In a year's time from 2020, Ukraine lost one point in its CPI. When assessing the period of the last three years, it can be noticed that the indicator has stagnated, i.e., the country's efforts to fight corruption have reached a dead end. Transparency International Ukraine (2021) notes that the major reasons for stagnation of the fight against corruption are first, postponement or freezing of the urgent anti-corruption reforms and goals, and second, negative past experience in implementation of similar reforms. It is also noted that the decrease in the Ukrainian CPI index could have been caused by the decision of the Constitutional Court of 27 October 2020, which discharged high-ranking officials, civil servants and judges from liability for false declaration; the amendments to the anti-monopoly legislation concerning the long absence of permanent managers in institutions; the amendments to the anti-monopoly legislation concerning preventing businesses from protecting their rights when contesting public procurement; the postponement of the Anti-Corruption

Strategy in the second reading; aggravation of the interference in the work of the High Anti-Corruption Court; and the delay in the judicial reform.

According to Domashova and Politova (2019), corruption leads to an increase in income inequality and poverty because it hinders development, implementation of social programs, reduces the quality of education, and determines biased ownership of assets. Kos (2022) presents the results of the survey that was conducted in Ukraine in April 2022 (i.e., after the start of the large-scale Russian invasion) and aimed to assess the country's anti-corruption efforts. The survey involved 169 anti-corruption experts. First of all, it revealed that although 93 percent of the anti-corruption experts did not leave the country after the start of Russia's military invasion on 24 February 2022, as many as 84 percent of them were forced to stop performing their anti-corruption functions due to the war, and 5 percent lost their jobs. 47 percent of the experts have admitted that they feel their lives are in danger if they continue to perform anti-corruption functions. The positive aspect is that such state anti-corruption agencies as the National Anti-Corruption Bureau of Ukraine (NABU), Specialized Anti-Corruption Prosecution (SAPO), and the National Anti--Corruption Prevention Commission (NACP) have remained institutionally capable.

Competitiveness, ease of doing business, and business confidence. When assessing Ukraine's competitiveness, it should be noted that the country scored 56.99 points out of 100, according to the 2019 Global Competitiveness Report, announced by the World Economic Forum (see Figure 11).

Figure 11. Dynamics of Ukraine's competitiveness index between 2012 and 2020

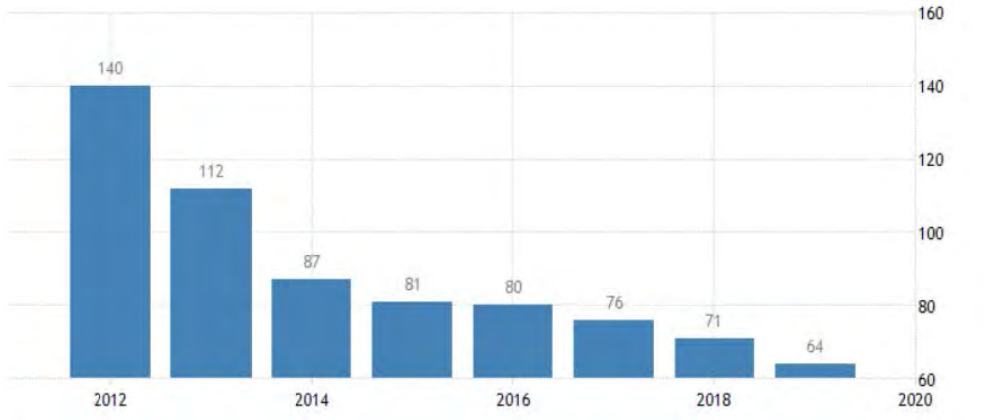


Source: *Trading Economics*, 2022e

The Global Competitiveness Report assesses 140 economies. The final index is estimated with consideration of 98 variables, the most important of which are institutions, infrastructure, ICT adoption, macroeconomic stability, health, skills, product market, labour market, financial system, market size, business dynamism, and innovation capability. After 2018, considering the impact of the 4th Industrial Revolution, some additional variables, such as the role of human capital, innovation, resilience and agility, have been included in the methodology. The higher the numerical value of the indicator, the higher the degree of competitiveness of a country. Ukraine's score of 56.99 indicates that the country's competitiveness has increased significantly since 2016, and in 2019 was slightly higher than the average among 140 countries.

In 2019, Ukraine was ranked 64th among 190 economies worldwide by its Ease of Doing Business Index (see Figure 12).

Figure 12. Dynamics of Ukraine's Ease of Doing Business index between 2012 and 2020



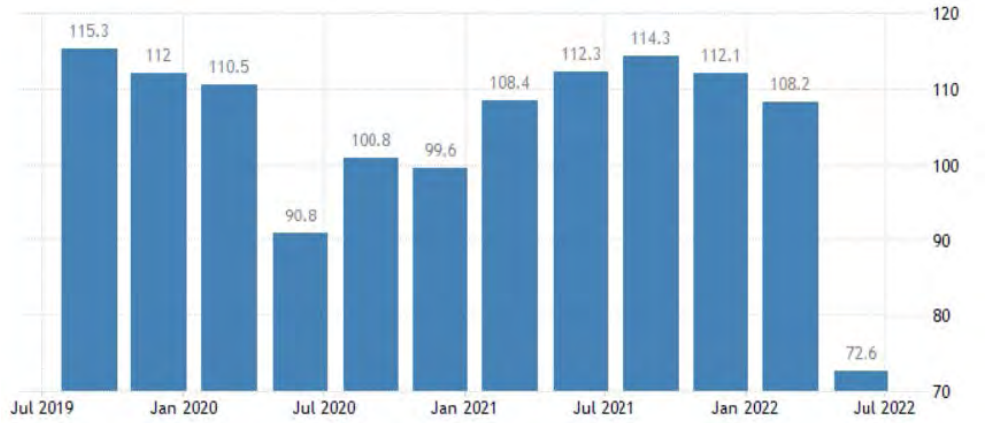
Source: *Trading Economics*, 2022a

The World Bank methodologies for calculating the Ease of Doing Business Index consider the regulatory environment and take into account how this environment is conducive to business operation and protection of property rights. Top-ranked economies have business-friendly regulatory environment, and vice versa. Figure 12 indicates that doing business in Ukraine has become significantly easier since 2012, the regulatory environment has improved, but in the situation of the current war with Russia, it can be expected that the conditions for doing business in the country will become more difficult. Many businesses have already been closed down or stopped operations for safety reasons, moreover employees are being forced to

relocate either domestically or internationally and males join the Armed Forces of Ukraine.

The Business Confidence Index is based on a sample size of around 1,236 enterprises covering all industry sectors, including small, medium and large enterprises from different regions. It measures presidents'/managers' assessments of the current and future business activity, inflation and exchange rate expectations, as well as the changes in the country's business environment (see Figure 13).

Figure 13. Dynamics of Ukraine's Business Confidence index between July 2019 and July 2022

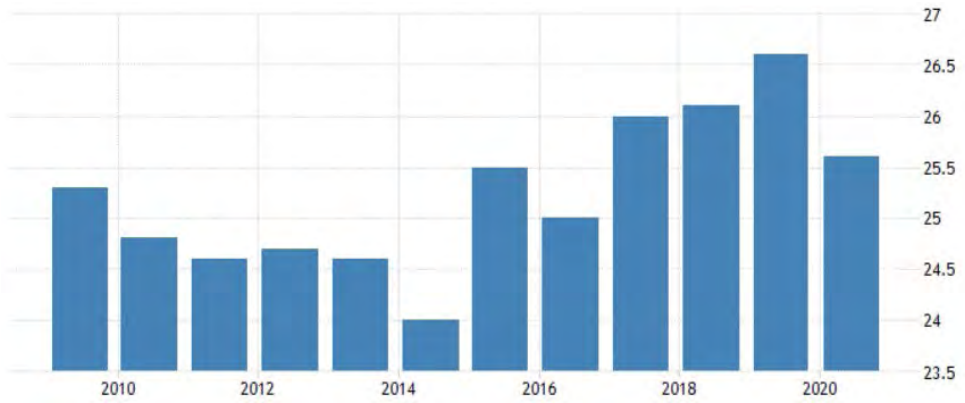


Source: *Trading Economics*, 2022d

Figure 13 indicates that the Business Confidence Index estimated for Ukraine was approximately the same in January 2020 and 2022, but due to the effects of the war with Russia, which causes a high degree of uncertainty, it dramatically decreased from 108.20 points in the first quarter of 2022 to 72.60 points in the second quarter of 2022. Disruption of supply chains, manufacturing operations, difficulties in managing workforce and finances, and retaining customers are indicated as the major business problems. Many businesses and employees combine their usual activities with volunteering. Entrepreneurs are recommended to pay close attention to industry specifics, and use technology to increase business efficiency, agility and resilience (*Accenture Strategy*, 2022). In the medium term, the post-war consumption in Ukraine is expected to increase with local and international consumers boycotting Russian goods and switching to Ukrainian-made goods (*Eureporter*, 2022).

Income inequality. The statistical data show that income inequality in Ukraine tends to increase since the beginning of the military conflicts in 2014 (see Figure 14).

Figure 14. Dynamics of Ukraine's GINI index between 2009 and 2020



Source: *Trading Economics*, 2022b

Income inequality is usually measured by the GINI index, which shows the extent to which the distribution of income among individuals or households within an economy deviates from a perfectly equal distribution (0 represents perfect income equality, while 100 stands for perfect income inequality). Figure 14 indicates that the GINI Index, estimated for Ukraine, was comparatively low in 2011-2014, but significantly rose afterwards. One of the reasons is believed to be the intensification of organized crime and smuggling after Russia's occupation of the part of the territory of Ukraine. In 2020, the country's GINI index amounted to 25.6, i.e., it slightly dropped from 26.6 in 2019. The GINI index has not yet been calculated for the current time of the intensive war.

Education. The Ukrainian education system has a long tradition, but its reputation has suffered from increased quality problems, many of which are the result of the former Soviet rule and the rapid social transformation that took place after the collapse of Communism. According to Denisova-Schmidt and Prytula (2017), as in most post-Soviet countries, corruption in the Ukrainian education system is a growing trend rather than an exception. Ukraine's economic crisis of the 1990s led to a decline in the financing of education, including research and development, which conditioned marketization of the country's education system at all levels. In combination with a lack of transparency mechanisms, characteristic of post-Soviet states, the application of wild market principles in the education system led to the

skyrocketing corruption and a decline in the quality of education. Mid- and low-level local education authorities are involved in corruption schemes and are not likely to be prosecuted. Corruption in public education can be observed at various levels, ranging from pre-school to upper secondary and postgraduate education: the limited number of vacancies are available for children in municipal kindergartens, electronic enrolment systems are not reliable, parental financial contributions and school budgets are misused due to the lack of control mechanisms (Pelcastre et al., 2019). Osipian's (2009) research proposes that at least 30 percent of Ukrainians enter higher education institutions by paying bribes, while many others take advantage of personal connections with the administration of these institutions. Corruption is also characteristic of academic teaching and learning processes, and administering standardized tests for high school graduates (Osipian, 2008). Osipian (2008) argues that corruption in the Ukrainian education system is a spillover of political graft in the academy. This is how the institutionally based culture of corruption is formed.

In response to the above-mentioned problems, Ukrainian authorities adopted a series of reforms to increase transparency, accountability and integrity in the country's education system. One of the reforms was implemented according to the Threshold Agreement of 2006-2009. In the area of higher education, the national mandatory standardized external testing was introduced as the primary criterion of higher education admissions. The standardized testing system benefitted from the establishment of test security systems, development of test materials and procurement of equipment to secure test printing and scoring. According to the data provided by the Millennium Challenge Corporation (2022), perceptions of corruption during the standardized external testing were extremely low (only 9 percent among students, and 6 percent among parents); only 0.8 percent of graduates reported having experienced corruption during the standardized testing.

Another reform—which included a new law on higher education issued in July 2014, the law on research and scientific activity issued in 2015, and the law on education issued in 2017 (Pelcastre et al., 2019)—was aimed at increasing the autonomy of universities. The reform, however, proved to be ineffective and failed to shift education policies in the right direction. Public dissatisfaction with the reform and the armed conflict in eastern Ukraine contributed to growing outbound student flows since 2014. International students were considered "cash cows," bringing hard currency to universities. In spring 2014, international students sat examinations earlier than scheduled—in May instead of June—in order to be able to leave Ukraine safely. Some students escaped even earlier as political violence in the country escalated (Osipian, 2015).

The annexation of the Crimea by the Russian Federation made it impossible to carry out any reforms at the education institutions in the Crimea.

According to Denisova-Schmidt and Prytula (2017), it is practically impossible to eliminate endemic corruption from the Ukrainian education system completely, but it can be mitigated. Anti-corruption policies should be targeted at stipulating zero tolerance for corruption, respecting the needs of specific academic groups, and revealing the negative results of academic dishonesty, which in particular cases (e.g., education of medical personnel, technicians, engineers) causes direct and indirect risks to human lives.

The war with Russia, which started on 24 February 2022, has dramatically changed the situation in the Ukrainian education system. It has caused displacement of students and educators, and has resulted in nearly 665,000 students (i.e., 16 percent of the total number of enrolled students) and over 25,000 teachers (i.e., 6 percent of the total number of educators in the country) to flee the country. Displacement has had an extremely negative impact on education service delivery. According to the data provided by the Ministry of Education and Science of Ukraine, as of 6 May 2022, 1,635 schools and universities (5 percent of the total number of education institutions) have been damaged and 126 have been destroyed. Current efforts are being made to sustain education service delivery and student enrolment so that students could successfully complete the academic year of 2022. Currently, around 86 percent of schools in Ukraine have resumed classes following short-term closures after the invasion, but they work almost exclusively online (World Bank, 2022).

To sum up, the high level of corruption in the Ukrainian education system leads to inequality among citizens seeking higher education, reduces the quality of educational services, and undermines the credentials of academic degrees. Corruption within education is one of the most socially damaging types of small-scale economic crime. Although the country is fighting for its survival, bribery scandals in the education system remain, so the war must prompt the Ukrainian academia to reshape itself. Although it is practically impossible to eliminate endemic corruption from the Ukrainian education system completely, it can be mitigated by implementing targeted reforms that should respond to the rapidly changing economic environment and the new social order.

Trust in government. In 2020, the trust of Ukrainians in the country's government was low. According to the results of a public survey provided by the Ukrainian independent news agency Unian (2020) (the survey was conducted from 3 to 9 July 2020 through face-to-face interviews in all regions of Ukraine, except the Crimea and Donetsk and Luhansk regions occupied by Russia; the sample of the survey covered 2,022 adult respondents; the margin of error did not exceed 2.3 percent), 78 percent of the respondents indicated that they did not trust the country's agencies and officials, and 36.5 percent of the respondents indicated that they did not trust

the country's government at all. Another 41.2 percent said they rather did not trust agencies and officials, while 13.3 and 1.4 percent were more likely to trust or completely trusted the country's government, respectively. The results of the poll also revealed that the state agencies in general had the highest trust-distrust balance of 63 percent. These results indicated the poor communication between the public and Ukraine's government agencies, except the Armed Forces, the State Border Guard Service, the National Guard of Ukraine, and the State Emergency Service that were directly responsible for country's defence and citizens' safety. 72 percent of the respondents said that they did not trust the Cabinet of Ministers, i.e., the distrust in the Cabinet of Ministers increased significantly compared to the results obtained in December 2019, when no confidence in the Cabinet of Ministers was expressed by 51.5 percent of the respondents. Comparing the situation in 2019 and 2020, the Verkhovna Rada had 54 and 75 percent trust in 2019 and 2020, respectively, while the president had 31 and 49 percent trust, respectively. Ukrainians also expressed distrust in the country's judicial system as a whole (as indicated by 77.5 percent of the respondents), as well as the Supreme Court (as indicated by 69 percent of the respondents), and local courts (as noted by 67.5 percent of the respondents). 73 percent of the survey participants said they did not trust in the Prosecutor's Office. Public dissatisfaction with the country's anti-corruption institutions was also extremely high: 73 percent of the respondents expressed their distrust in the National Anti-Corruption Bureau of Ukraine, 70.5 percent in the Specialized Anti-Corruption Prosecutor's Office, 70 percent in the High Anti-Corruption Court, and 70 percent in the National Agency for Corruption Prevention.

However, after Russia's full-scale invasion of Ukraine on 24 February 2022, public confidence in the government and its institutions increased dramatically. Based on the results of the survey conducted by the National Democratic Institute of Sociology (the survey was conducted between 2 and 11 May 2022 through telephone interviews with 2,500 respondents who live in Ukraine-controlled territories and use a mobile phone; the margin of error did not exceed 3 percent), 97 percent of Ukrainians trust the Armed Forces of Ukraine, and 85 percent trust the country's President Volodymyr Zelenskyy. The country's government and the Verkhovna Rada also enjoy high rates of trust, at 56 and 40 percent, respectively (Balachuk, 2022). The Council of Europe (2022) emphasizes the necessity of increasing trust in local self-government to promote the democratic development of Ukraine.

Population. The population of Ukraine on 1 July 2022 was estimated to amount to 39,701,739 people (World Population Review, 2022). Ukraine ranks 35th in the list of countries (and dependencies) by population. 69.4 percent of the population is urban (Worldometer, 2022).

Even before Russia's large-scale invasion of Ukraine on 24 February 2022, the country's population was declining rapidly. Since the 1990s, Ukraine's population has been shrinking due to high emigration rates, low birth rates, and high death rates. Ukraine's birth rate is 9.2 births per 1,000 people, which has dropped by over 2 percent every year the past several years, and its death rate is 15.193 deaths per 1,000 people (World Population Review, 2022). Mainly due to the sharp excess of deaths over births, in the last decade the state has been losing annually from more than 400 thousand people (in 2000) to 80 thousand people (in 2013). Huge by volumes is the labour and educational migration (several million people). Many people go abroad because Ukraine is the second-poorest country in Europe, has been in conflict with Russia, and is beset by corruption (World Population Review, 2022). Duvell and Lapshyna (2015) suggest that the previous economic crisis and the armed conflicts with Russia in the south and east of the country led to a significant increase in the number of workers and professionals desiring to work abroad. The authors cite the 2015 HeadHunter study which showed that 80 percent of applicants for middle- and senior-management positions would like to work abroad. 41 percent or the respondents expressed their anxiety about the tense political situation, the desire to ensure a stable future for their children, and low salaries in Ukraine as major motivators. Any option to leave Ukraine, including training, skills development, or even an unpromising job abroad, was considered.

After Russia's large-scale invasion of Ukraine on 24 February 2022, the situation of the Ukrainian population became extremely difficult. The agencies of the United Nations estimate that, as of 17 August 2022, 17.7 million people were in need of humanitarian aid and protection assistance, including at least 2.1 million children; 6.6 million people were internally displaced (the UN Office for the Coordination of Humanitarian Affairs, 2022). The number of civilian casualties as of 10 October 2022 amounted to 15,592, including 6,221 people killed (at least 2,417 men, 1,662 women, 164 girls, and 195 boys, as well as 37 children and 1,746 adults whose sex is yet unknown), and 9,371 people injured (at least 1,960 men, 1,441 women, 199 girls, and 277 boys, as well as 238 children and 5,256 adults whose sex is yet unknown) (the Office of the United Nations High Commissioner for Human Rights, 2022).

People are fleeing Ukraine to seek international protection in neighbouring countries and further afield. As of 23 August 2022, 6.9 million people fled Ukraine and were registered in European countries, including 2.2 million in the Russian Federation, 1.3 million in Poland, 971,000 in Germany, 413,000 in the Czech Republic, 160,000 in Italy, 145,000 in Turkey, and 133,000 in Spain (Border Security Report, 2022).

Smuggling. Ukraine has a long history of illegal arms trade, the most prominent case being the Ukrainian cargo ship *MV Faina*, which was captured by Somali pirates in 2009 while transporting tanks, artillery and assault rifles to Sudan. During the war, smuggling of arms remains one of the most sensitive problems in Ukraine. Although the vast majority of weapons delivered to Ukraine are in the hands of the Ukrainian Armed Forces, the potential of illegal arms smuggling remains high. Given the conditions of the war in Ukraine, Europol warns that the supply of firearms and explosives to Ukraine may increase the number of firearms and ammunition entering the EU through established smuggling routes or online platforms. This threat may be even greater once the military conflict is over (Europol, 2022b).

In response to this problem, the EU creates the Support Hub for International Security and Border Management, the major aim of which is to prevent weapons, supplied by Ukrainian partners (mostly NATO members), from being smuggled out of Ukraine and intercepted by criminal gangs. The Hub will work following "a single window" principle: it will allow the EU's border guard agency Frontex to support local border agencies and will enable Europol to share information.

Each member state will also assign law enforcement officers to the central headquarter which will operate from Chisinau, the capital of Moldova, building local capacity and also combating human trafficking. The new Hub is being created in response to Ukrainian President Volodymyr Zelensky's requests to increase the supply of arms and ammunition to Ukraine in the war with the Russian Federation (Van Gaal, 2022). Europol closely cooperates with Ukrainian officials to mitigate the threat of arms trafficking into the European Union (Europol, 2022b).

The risks of trafficking in persons and smuggling in migrants are also considered very high. They arise from both human trafficking inside the country and migrant smuggling of people fleeing the country. According to the extensive research published by the United Nations Office on Drugs and Crime in 2018, the risks of human trafficking in the territories affected by an armed conflict increase because of the following factors: a lack of opportunities for income generation, interruption in the provision of essential public services (e.g., healthcare, education), violations of the rule of law, internal displacement, and the risk of exploitation in the armed conflict. Residents of military conflict zones can choose detrimental coping strategies to gain access to essential products and ensure their own safety and security. The war in Ukraine is increasing the risk for local people (especially children, national minorities, survivors of sexual and gender-based violence, the elderly and the disabled) to become victims of sex trafficking or labour trafficking, illegal adoption and exploitation in the armed conflict (Cockbain and Sidebottom, 2022). Vulnerability of the population is increasing due to displacement and the circumstances that arise during travel and upon arrival to a host country. To respond to the crisis, the

EU's Common Anti-Trafficking Plan was launched on 6 May 2022. According to this plan, the investigations have been initiated in a number of the EU countries on potential cases and the threat of trafficking in persons (the European Union, 2022).

The situation in Ukraine concerning drug smuggling is expected to improve. According to Demony (2022), Russia's invasion of Ukraine is triggering shifts in the smuggling routes for illegal drugs to Europe. Drug traffickers have no interest to continue to use the traditional trafficking routes out of Afghanistan that used to pass through Ukraine, which is now at war, and the Black Sea ports, that are now out of reach. Drug trafficking is likely to be conducted through Greek islands and the southern Mediterranean.

Organized crime. According to the data provided by the Global Initiative against Transnational Crime (2021), in 2021 Ukraine was ranked 34th of 193 countries worldwide and 3rd of 44 European countries. The country's criminality score was 6.18. Since the dissolution of the Soviet Union, Ukraine has suffered a strong presence of organized mafia-style groups. After the collapse of the Soviet Union, many levels and forms of the oppresive control disappeared, but the administrative and political elites remained in their privileged positions. The privileges and the absence of control systems created favourable conditions for the development of organized crime. In fact, the development of organized crime in Ukraine was similar to that in other post-Soviet countries: the collapse of state structures, the crisis of authority and law, a profound shift in the principles of economic management, the reorientation of external relations, the increasing openness of the economy and society were those factors which facilitated the development of organized crime (Williams and Picarelli, 2002).

Although the presence of mafia-style groups has been declining over time, many continue to operate. Apart from local organized criminals, there are criminals with Chechen, Russian, Georgian, South Ossetian or Azerbaijani backgrounds. Mafia-style groups tend to operate in multiple criminal markets, but their major focus is on arms trafficking, extortion, robbery, murder for hire, kidnapping and raider hijacking (taking control of legal business). Mafia clans are involved in cross-border drug, weapon and human trafficking and international smuggling. They take over the country's economy, sales and illegal privatizations. This shows that organized criminals in Ukraine are pervasive, powerful and have been able to acquire a significant economic and political force, develop corruptive relationships with the country's political elite, and exert influence over many sectors of the economy (Williams and Picarelli, 2002). Due to the activities of influential mafia-style groups, Ukraine is facing pernicious structural failures, especially in terms of transition to a democratic policy.

Galeotti and Arutunyan (2022) propose that the connections between crime, war and insurrection were noticeable even during the Ukrainian-Russian conflict in the Donbass region in 2014. The hybrid insurrection, which led to proclamation of the pseudo-republics of the Donetsk and Luhansk, not only promoted criminalisation, but was based on it: large-scale smuggling (of practically everything from coal, cigarettes and alcohol to drugs) helped to maintain these pseudo-republics, while the status of unrecognized states meant the absence of law enforcement, which allowed criminal groups to take full advantage of the situation. Klein (2022) suggests that density of criminality, promoted by weakness of local institutions, served as preconditions for gangsters to convert money and violence into *de facto* political power. This trend is observed throughout Ukraine, and especially in the Donbas. The situation is complicated by the fact that the efforts of the Ukrainian central government to reduce dependence on the Donbas coal by purchasing resources from South Africa and Australia were ineffective, so Ukraine needs the Donbas resources, especially for its power stations, while the Donbas needs Ukraine as a resource buyer (Klein, 2022).

The conflicts in Ukraine, causing social, economic and political chaos and instability, have always been a fertile ground for organized crime. The current war with Russia, which started on 24 February 2022, is no exception. According to Scaturro (2022), a black market for medical supplies and lifesaving drugs (e.g., insulin) has opened since the end of March 2022. Many of the medicines are counterfeit and therefore especially dangerous. In addition, the need to quickly reconstruct the destroyed infrastructure before the war ends causes the risk that national and international funds may be taken over by the mafia through corruption, public procurement and money laundering channels. In this way, the mafia can gain more opportunities to invest and purchase real estate in Ukraine. The increase in the risk of organized crime in Ukraine during the war is also confirmed by Europol (2022a).

To improve the situation, international bodies, such as Interpol and Europol, must cooperate with similar regional organizations through information-sharing platforms, channels of intelligence sharing, and coordinate their operations. Non-governmental organizations could contribute by monitoring the potential risks and the development of organized crime operations in the most problematic areas (Scaturro, 2022). To address the threats of organised crime related to the war in Ukraine, the EU Ministers of Interior endorsed the initiative of mobilising the European Multidisciplinary Platform Against Criminal Threats (the EMPACT) framework. The steps that are going to be undertaken in this capacity include gathering of more intelligence, implementation of emergency operational actions based on the EMPACT flexibility and adaptation culture, setting up ad hoc joint action days, and potential allocation of additional grants to fund operational activities targeting

organized crime (Europol, 2022a). The EMPACT shall unite different national authorities, including police, gendarmerie, customs and border guards, as well as judicial authorities. The initial intelligence analysis is expected to reveal crime patterns (e.g., human trafficking, online fraud, cybercrime, and firearms trafficking).

3.4. Technical Environment

Border guarding. Ukrainian borders are guarded by the State Border Guard Service of Ukraine. It is an independent law enforcement agency of special assignment, whose head answers to the President of Ukraine. At present, this service is within the structure of the Ministry of Internal Affairs of Ukraine. During wartime, units of the State Border Guard Service of Ukraine fall under the command of the Armed Forces of Ukraine. Components: Ground Forces; Sea Guard; Aerial Support. It is also responsible for running temporary detention centres, in which refugees are held.

The principal functions of the State Border Guard Service of Ukraine are policing the border of the state on land, sea, rivers, lakes and other water bodies, exercising border control, safeguarding the state's sovereign rights in its exclusive (maritime) economic zone, carrying out intelligence, information and analytical, and operational criminal investigation activities, participating in the fight against organized crime and counteracting illegal migration, and others (the State Border Guard Service of Ukraine, 2019b). After the beginning of the war with Russia, the border guards became military units and took positions along with the Armed Forces of Ukraine to prevent the enemy breakthrough (Voss, 2022).

Since 2014, one of the priorities of the State Border Guard Service of Ukraine is the creation of an intelligent system of state border guard, i.e., implementation of the technical components for more effective protection of the country's borders. Based on the Strategy of the State Border Service of Ukraine No. 1189-r, approved by the Cabinet of Ministers of Ukraine on 23 November 2015, creation of the intelligent system of state border guard includes deployment of tower integrated network (technical surveillance equipment: radars, optical-electronic cameras; means of data transmission), wireless monitoring systems (smartdec and GSM cameras), video surveillance and alarm systems (multispectral cameras and sensors), mobile technical surveillance systems and other digital equipment (the State Border Guard Service of Ukraine, 2019a). The use of digital systems can help fight illegal activities at the border (e.g., smuggling, arms and human trafficking) and reduce the risk of official corruption.

Customs. The State Customs Service of Ukraine is the central executive authority which implements the state's customs policy and combats the offences related to customs affairs. The activities of the service are coordinated by the Cabinet of Ministers of Ukraine through the Ministry of Finance of Ukraine. The State Customs Service of Ukraine has been providing customs security since 16 July 2019, when the former State Fiscal Service was reorganised by establishing the State Customs Service and the State Tax Service.

Ukraine is not a member of the Customs Union with Russia, Belarus, and Kazakhstan. The Customs Union of Ukraine with the EU is a long-term option. In 2006-2009, on the basis of the Threshold Agreement, the internal system linking Ukrainian customs and transport to the EU New Computerized Transit System (NCTS) was developed. This aimed at rationalizing and regulating international trade and cargo transiting. The Millennium Challenge Corporation (2022) report proposes that simplification of customs declaration processes, changes in the relevant legal provisions, and intensification of information exchange through the NCTS helped to fight corruption and increase compliance with customs regulations.

Customs is one of the major areas mentioned in the EU-Ukraine Association Agreement, signed in 2014. Within the scope of this agreement, the assistance to Ukraine is provided through various programs and projects, with a focus on specific areas. For instance, the Reform Support Teams (RST) of the Ministry of Finance of Ukraine and the State Customs Service of Ukraine, funded by the European Union, focus on the expert and organizational assistance; the EU4PFM (EU Public Finance Management Support Program for Ukraine) focuses on the expert, technical, and financial assistance. Technical and expert assistance is also provided through US TAPAS, USAID, and other projects (Central Project Management Agency, 2021).

In August 2022, Ukraine deposited its instruments of accession to the EU-Common Transit Countries' Convention on a Common Transit Procedure, and the Convention on the Simplification of Formalities in Trade in Goods and can operate common transit from 1 October 2022. Accession to this Convention will facilitate the movement of goods between Ukraine and the EU and the other common transit countries (Norway, Iceland, Switzerland, North Macedonia, Serbia, Turkey, and the UK) (Directorate-General for Taxation and Customs Union, 2022), and will reduce the risk of corruption when performing customs procedures.

Special anti-corruption measures. In 2014, the OECD and Ukraine signed a Memorandum of Understanding for Strengthening Cooperation. To implement the Memorandum, the Action Plan was approved in 2015. The plan set out the key areas for the OECD's intervention in Ukraine with consideration of the priorities of the Ukrainian government. The consistent priority defined in the Memorandum and

the Action Plan was anti-corruption. Based on the mutual agreement, the OECD disseminated its standards and best practices among various Ukrainian ministries and monitored how the Action Plan was implemented. The Action Plan was revised in 2019 considering the priorities for 2019-20. The plan specifies that the OECD will provide recommendations to Ukraine on improving policy making, will assist with institutional capacity building, will monitor adherence to the relevant legal instruments to meet international standards, will involve Ukraine in the work of the relevant OECD bodies to enhance international dialogue and knowledge sharing, will provide reports to identify the most common corruption schemes (especially in the energy sector) and focus on high-level corruption to ease detection and investigation of corruption crimes, and will contribute to information and data exchange (OECD, 2020).

The EU provides a great deal of anti-corruption capacity-building assistance to Ukraine through various pre-invasion programs, such as the European Union Advisory Mission Ukraine (for legal and policy making reforms) or the EU Anti-Corruption Initiative in Ukraine (for technical assistance). According to Shin (2022), thus far there have been no major corruption scandals related to the improper use of the EU funds, partly because the EU has high transparency standards.

The need to fight corruption during Ukraine's post-war reconstruction is also perceived. To this end, a memorandum of understanding to provide Ukraine's officials with necessary anti-corruption tools during post-war reconstruction was signed between the National Agency on Corruption Prevention (NACP) and the International Anti-Corruption Academy (IACA). According to this memorandum, when providing assistance to Ukraine, the greatest attention will be paid to exchange of experience and information between Ukrainian and international experts on the detection and prevention of corruption, and the implementation of modern educational practices and technologies in the area of corruption prevention (the International Anti-Corruption Academy, 2022). The Head of the NACP noted that their agency continues to perform its direct functions since the first day of Russia's large-scale invasion of Ukraine, so that Ukraine's capabilities are not wasted and the country can successfully resist the invaders. The principles on the basis of which Ukraine is intended to be rebuilt after the war with Russia are defined in the Lugano Declaration. The major one is that the recovery process must be twinned with structural reforms, especially in terms of fighting endemic corruption (Agence France-Presse, 2022).

E-government. The broad digitalisation of public services is proposed as one of the methods that can help reduce the size of corruption in Ukraine because digitalisation reduces human interaction, and thus limits the opportunities for corrupt

transactions (AFP, 2022). Korchak (2022) notes that the effective fight against corruption requires not only high-quality anti-corruption legislation and strong anti-corruption bodies, but also the development and application of the relevant digital tools. Digital technologies, above all, should be used for creating and developing e-government platforms.

Thus far, Ukraine has managed to implement a comprehensive platform of digital government services, called Diia (which means 'action' in Ukrainian), which was launched in December 2019. In 2019, digitalisation became the major priority of the Ukrainian government, and a new Ministry of Digital Transformation was formed. Additionally, a Chief Digital Transformation Officer and Deputy Minister position was appointed in all other ministries to monitor the digitalisation process (Deacon, 2022). Currently, 70 key public services are provided through the Diia system (the major goal is to digitize all, that is, over 2,000, government services by 2024). It enjoys participation of half of the adult population, with 18 million total users (Love, 2022). Interaction of state registries is ensured through the TREMBITA system (a secure data exchange platform), which was finalized in 2018. The interaction is regulated by Decree No. 357 on Some Questions on Electronic Interaction Between State Electronic Information Resources, issued by the Cabinet of Ministers of Ukraine. The Ministry of Digital Transformation of Ukraine coordinates the interaction of four base registries: (i) the State Demographic Registry (State Migration Service of Ukraine), (ii) the State Business Registry (Ministry of Justice of Ukraine), (iii) the State Registry of Vehicles and Their Owners (Ministry of Internal Affairs of Ukraine), and (iv) State Land Cadastre (the State Service of Ukraine for Geodesy, Cartography and Cadastre) (Deacon, 2022).

The Diia ecosystem is easily accessible online through the Diia Mobile Application (Diia App) and Web Portal. The ecosystem covers particular blocks, for instance, administrative services (Diia website and Diia application), small and medium-size business support (Diia Business), education (Diia Education), and the legal framework development for the IT industry (Diia City). In September 2022, with Ukraine already being in the full-scale war with Russia, Diia App simplified 25 public services and digitized 16 documents (Deacon, 2022). According to Deacon (2022), Diia's success has been determined by such factors as its logic, simplicity and user-friendliness (i.e., the system allows to create a positive user experience). The information provided in the official website of the Government of Ukraine (2022) suggests that digitalization of government services helps to prevent chaos and bureaucracy, thus increasing the quality of public services and diminishing the risk of corruption. Korchak (2022) adds that digitalisation of government and public services represents a qualitative characteristic of the entire system of public administration; it also allows to automate the internal management processes in the NAPC,

thus providing it with institutional autonomy, which is extremely significant in the fight against corruption.

To accomplish the ambitious goals of transferring 100 percent of government services online, the Ministry of Digital Transformation of Ukraine will still need to ensure the 95 percent coverage of transport infrastructure and settlements across the country with high-speed Internet, boost the share of information and communication technologies (ICTs) in the country's gross domestic product (GDP) to 10 percent, and raise the levels of smartphone penetration and population's digital literacy (Deacon, 2022).

3.5. Summary of the PEST Analysis Results

To assess the environment for corruption in Ukraine both before the beginning of the large-scale Russian invasion (preconditions) and during it (newly emerged factors), it is necessary to take into account the totality of political, economic, social, and technical factors and consider the major positive and negative effect elements. The summary of the results of the PEST analysis of Ukraine in the context of corruption in wartime is presented in Table 3.

Table 3. Summary of the PEST analysis of Ukraine in the context of corruption in wartime

Factors	Major Positive Effect Elements	Major Negative Effect Elements
POLITICAL ENVIRONMENT		
Type of government	• Division of legislative, executive and judicial power • Justice administered solely by courts • Democratic elections	• Conflicts between law enforcement institutions
Privatization	• Transfer of ownership from the state to private hands • Cancellation of some suspicious auctions • Improvement of large- and small-scale privatization laws in 2018 • Launch of the special electronic platform 'Prozorro.Sale' for small-scale auctions	• Focus on the fiscal role of privatization rather than the goals • Controversial and ever changing privatization laws and programs • Priorities for political rather than strategic investors' interests • Discriminatory conditions • Thin and opaque stock market

Factors	Major Positive Effect Elements	Major Negative Effect Elements
The Orange Revolution of 2004	• Direction towards democracy and access to increased foreign funds • Anti-corruption efforts and programs • Increased quality and quantity of publicly available information • Increased involvement of the civil society • Free media landscape	• Dominance of political and economic power of oligarchs • Favouritism and nepotism • High level of social inequality • Failure to fully implement anti-corruption reforms
The Maidan Uprising	• Direction towards the European integration • Public requirements of deeper democracy, justice, rule of law, respect for human rights • Civil society expertise and advice to public authorities regarding the necessary reforms • Consolidation of the banking sector, more transparent public procurement	• Lack of trust in the national political system • Dissatisfaction with inefficient public policies • Conflict of democratic and pro-Russian powers • Difficulties to prosecute oligarchs • Conflicts between anti-corruption agencies
Annexation of the Autonomous Republic of Crimea and Sevastopol by Russia	• Rejection of the referendum and annexation by the United Nations General Assembly • International non-recognition of the occupied territory	• Conflict of democratic and pro-Russian powers • Structural economic imbalances, instability, uncertainty • Compromised logistics and foreign trade through the Black Sea • Military escalation
War in the Donbas	• International non-recognition of the occupied territory • Assistance of foreign partners	• Creation of uncontrolled separatist regions • Symbiotic partnership between the oligarchs and organised crime groups • Inoperative laws and control of the central government
2022 Russian invasion of Ukraine	• Inflows of foreign donations • Enlarged wartime powers of the country's leaders	• Distorted political priorities, eroded public services • Problems to deal with the massive inflows of foreign aid transparently

Factors	Major Positive Effect Elements	Major Negative Effect Elements
economic environment		
GDP	-	• Undermined infrastructural and economic potential • Decreased consumption
Foreign trade	• Opening western markets • The growth trend in the consumption of Ukrainian goods	• Drop in the exports of major commodities • Loss of big eastern markets • Money laundering through import and export operations
Currency	• Corrections of the national currency exchange rate against the US dollar by the National Bank of Ukraine • The demand for the national currency could rise due to resumption of grain exports	• Devaluation of the national currency
Inflation	-	• Record high inflation • Soaring prices of food
Interest rate	• Kept unchanged at a 25% • High borrowing costs help to maintain exchange rate stability and control inflation	• High borrowing costs for individuals and businesses
Wages	• A slight increase in the average monthly wages	• Declining minimum wages
Taxes	• Stable tax rates	-
Payments	• Cash supply by the National Bank of Ukraine to ensure liquidity • Limits on cash withdrawals per day • Prohibited release of cash from client accounts in foreign currency	• Great demand for cash
Foreign donations	• Grants, loans and other repayable finance	• Weak monitoring • Lack of institutional personnel • Discontinuity of mandatory work of public institutions, which need to address wartime problems

Factors	Major Positive Effect Elements	Major Negative Effect Elements
social environment		
Corruption perception	• Capability and (at least partial) functioning of anti-corruption institutions	• Stagnating anti-corruption effort • Postponement/freezing of the reforms
Business	• Growing business competitiveness • Improved regulatory environment for business	• Business disruption and closing during the war • Lower business confidence
Income inequality	-	• Increasing income inequality in society
Education	• Acknowledgement of the need for zero-tolerance of corruption (reforms)	• Widespread bribery in the education system • Displacement of students and teachers during the war
Trust in government	• High trust in the Parliament and the President	• Dissatisfaction with the work of anti-corruption institutions • Distrust in the Prosecutor's Office
Population	• Increased resilience of the society in emergency situations • Increasing social integration and association	• Killed and injured people during the war • Population's displacement
Smuggling	• Reduced risks of drugs smuggling through previously accessible routes • Establishment of the EU Support Hub for International Security and Border • Cooperation with Europol • The launch of the EU's Common Anti-Trafficking Plan	• High risks of arms smuggling • High risks of person smuggling
Organised crime	• Cooperation with Interpol and Europol • Intelligence sharing • Contribution of non-governmental organisations • Mobilisation of the EMPACT framework	• Presence of organised mafia-style groups • Influence over the country's policies and economy • Lack of basic resources and medicines during the war • The need to rebuild the damaged infrastructure very quickly

Factors	Major Positive Effect Elements	Major Negative Effect Elements
technical environment		
Border guarding	• Creation of the intelligent system of state border guard • Use of digital technology systems	• During wartime, the State Border Guard Service is a military unit under the command of the Armed Forces
Customs	• Simplification of customs declaration processes • Information exchange • Links to the EU New Computerized Transit System • The expert, technical, financial and organisational assistance based on the EU-Ukraine Association Agreement • Accession to the EU-Common Transit Countries' Convention on a Common Transit Procedure, and the Convention on the Simplification of Formalities in Trade in Goods	• Fragile and war affected borders
Special anti-corruption measures	• Provision of recommendations, institutional capacity building, reports identifying the most common corruption schemes, based on cooperation with the OECD (Action Plan) • The EU Advisory Mission in Ukraine; the EU Anti-Corruption Initiative in Ukraine • Memorandum of understanding to provide Ukraine's officials with necessary anti-corruption tools during post-war reconstruction • Definition of the principles of recovery in the Lugano Declaration	-
E-government	• Digitalisation of government services through the Diia system • Interaction of state registries through the TREMBITA system	• The need to extend the coverage of high-speed Internet • The need to raise the level of smartphone penetration • The need to raise digital literacy in society

The Table 3 shows that in the context of *the political environment*, corruption in Ukraine is to the largest extent determined by the oligarchy that formed in the process of faulty privatization, the chaos caused by revolutions, the existence of separatist regions where the laws and control of the central government do not apply, and the ongoing military conflict with Russia. Corruption is likely to be diminished by the type of the country's government (the division of legislative, executive and judicial power; democratic elections), the manifestation of the will of civil society (e.g., the cases of the Orange Revolution of 2004 and the Maidan Uprising), free media landscape, and the direction towards the European integration.

In the context of *the economic environment*, corruption in Ukraine is stimulated by the economic crisis caused by the war with Russia: the country's damaged infrastructure and undermined economic potential, decreasing consumption, drop in the exports of major commodities, record high inflation, devaluation of the national currency, and declining minimum wages. The factors that reduce corruption from the economic perspective are stable tax and interest rates, although it must be recognized that the latter means high borrowing costs for private individuals and businesses, which can encourage these entities to look for informal sources of borrowing. The risk of corruption is also heightened by the extremely increased demand for cash in wartime conditions and weak monitoring of the massive inflows of foreign donations, although the latter are essential for the Ukrainian economy not to collapse completely.

When assessing *the social environment*, it should be noted that corruption can be stimulated by the risk to the health and life of the population in wartime (e.g., the cases when men eligible for draft bribe their way out of the country), population's displacement, stagnant anti-corruption efforts and postponed or frozen reforms, low trust in business in wartime, rising income inequality, endemic corruption in the education system, increased risks of arms and person smuggling and the influence of the organized mafia-style groups, which may increase during the war due to the lack of basic resources and the need to quickly restore destroyed critical infrastructure. The social environment factors that tend to reduce corruption are the capability and (at least partial) functioning of anti-corruption institutions in war conditions, slightly rising business competitiveness (especially in view of the trend of increasing consumption of Ukrainian goods in western countries, which is expected to provide positive results in the medium and long term), extremely high public trust in the country's Parliament and President, tight social integration, and cooperation and information exchange with European and international law enforcement, international security and border institutions.

The PEST analysis revealed that *the technical environment* is the strongest environment for fighting corruption in Ukraine. The weakest factors of the technical en-

vironment in wartime are fragile and war affected borders, and distortion of the regular work of the State Border Guard Service, which has become a military unit and is under the command of the Armed Forces of Ukraine. However, the country's border guard and customs capabilities are being strengthened by creating the intelligent system of state border guard, simplifying customs declaration processes, exchanging information with European and international institutions, gaining access to the EU-Common Transit Countries' Convention on a Common Transit Procedure, and the Convention on the Simplification of Formalities in Trade in Goods, receiving expert, technical, financial, and organizational assistance based on the EU-Ukraine Association Agreement. Within the scope of the Action Plan developed in cooperation with the OECD, the EU Advisory Mission in Ukraine and the EU Anti-Corruption Initiative in Ukraine, the country is provided with the relevant assistance, insights and recommendations concerning the anti-corruption policy making and institutional capacity building. The target analysis reports help to identify the most common corruption schemes. Based on the principles of logic, simplicity and user-friendliness, the e-government service provision system Diia is considered one of the most advanced and attractive in the world. The system has not stopped working despite the ongoing war with the Russian Federation; on the contrary, it has even been extended: Diia App simplified 25 public services and digitized 16 documents; 70 key public services are currently provided through the Diia system. In the technical environment of Ukraine, favourable preconditions are gradually being created for the fight against corruption during the post-war period. For instance, the Memorandum of understanding to provide Ukraine's officials with necessary anti-corruption tools during post-war reconstruction as well as the definition of the principles of recovery, indicated in the Lugano Declaration, provide prerequisites for reducing corruption after the war, when the reconstruction of the country will be carried out.

Conclusions

1. Literature analysis shows that corruption, i.e., abuse of entrusted power for illicit private gain, with its negative effects not only on a state's economic development, but also on political stability, democracy and sustainable peace, is extremely detrimental in war-surviving states, which are trying to maintain the activities of public institutions, restore social trust, and help the economy to survive.
2. The potential for corruption in a time of war tends to increase because of the combination of weak institutions and governance structures, inability of the

state's main social control systems to perform their functions properly, a lack of public accountability, disruption of ordinary market transactions, and massive inflows of foreign aid. Thus, corruption is promoted by structural opportunities, the weakness of a state's governance, the influence of military structures, and spoiler-specific factors (illicit profits).

3. The results of the PEST analysis of Ukraine in the context of corruption in wartime revealed that:

1) in the context of *the political environment,* corruption in Ukraine is stimulated by the oligarchy formed in the process of faulty privatization, the existence of separatist regions where the laws and control of the central government do not apply, and the intensification of the war. Corruption is diminished by the division of legislative, executive and judicial power, democratic elections, manifestation of the will of civil society, free media landscape, and the direction towards the European integration;
2) in the context of *the economic environment,* corruption in Ukraine is stimulated by the war-caused economic crisis: the country's damaged infrastructure and undermined economic potential, decreasing consumption, drop in the exports of major commodities, record high inflation, devaluation of the national currency, declining minimum wages. The risk of corruption is also heightened by the demand for cash in wartime and weak monitoring of the massive inflows of foreign donations. The factors that reduce corruption from the economic perspective are stable tax and interest rates;
3) in the context of *the social environment,* corruption is stimulated by the risk to the health and life of the population, population's displacement, stagnant anti-corruption efforts, business collapse, income inequality, increased risks of arms and person smuggling, and the influence of the organized mafia-style groups, which may increase due to the lack of basic resources and the need to quickly restore destroyed critical infrastructure. Corruption tends to be reduced by the capability of anti-corruption institutions (partial as it is), slightly growing business competitiveness (the increasing trend of consumption of Ukrainian goods in western countries), extremely high public trust in the Parliament and President, tight social integration, and the cooperation with European and international law enforcement, international security and border institutions;
4) in the context of *the technical environment,* corruption is stimulated by fragile and war affected borders, and distortion of the regular work of the State Border Guard Service. Corruption is reduced by strengthening the border protection and customs capacities, information exchange with European and international institutions, expert, technical, financial and organizational assistance provided following the bilateral and international agreements, and the capacity of the e-gov-

ernment service provision system Diia. In the technical environment of Ukraine, favourable preconditions are gradually being created for the fight against corruption during the post-war period (the Memorandum of understanding to provide Ukraine's officials with necessary anti-corruption tools during post-war reconstruction; the definition of the principles of recovery, indicated in the Lugano Declaration).

Discussion

The war in Ukraine will have a significant impact not only on the country's political, but also on legal and economic situation, both at the national and international levels. Whereas a high level of corruption in any country negatively affects the adherence to the principle of the rule of law, the level of democracy and social justice, a deteriorating corruption situation can have particularly detrimental effects in a time of war.

Sustaining the rule of law in warring and war-surviving countries requires a multi-dimensional approach, which goes beyond the implementation of ordinary reforms. First of all, the determination of the national government to fight corruption (political will) is important. In times of war, corruption should not go unnoticed and unpunished, although the main focus is on the security of the country and the safety of the population. That is why it is important to take measures to maintain the relevant legal framework or to create it if it did not exist before. It is important to realize that the extent of corruption can increase during the war, so ensuring law enforcement is particularly vital. Public control of state institutions must be a continuous process. This means that even in wartime, active civil society must show public authorities that corruption is unacceptable.

International support should be used to increase public security, rebuild and reform local security forces. It could also support more effective border controls to limit illicit, and promote legitimate, trade (such as curbing regional smuggling rings and spoiler networks) to the extent possible in wartime.

Aid mechanisms, whereby aid is provided directly to the population through local or international non-governmental organizations, are a popular tool. On the one hand, this method is seen as positive since the necessary assistance is provided directly to the population. However, Boucher et al. (2007) argue that the aid which bypasses government structures can undermine the government's ability to formalize and distribute aid legitimately. As a result, the quality of services provided by the government does not improve, and by necessity the population continues to turn to

third parties for support, work and earn income in the informal sector. This hinders reduction of corruption in the country.

Although it is perceived that the widely proposed measures to fight corruption—the creation of a reliable justice system and independent courts, the implementation of transparent and accountable political processes, a stronger and more capable public administration system, government accountability to the public, effective government regulation and the stimulation of an open market economy—are much more effective after the war, when relative security is restored, even in wartime it is important to recognize that corruption can disrupt the country's political stability, reduce military capacity, and stimulate conflicts, dissatisfaction and the search for the "guilty" in society. In addition, corruption can diminish the benefits of any aid and undermine the negotiating capacity of the country's leadership at the international level.

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Chapter 6

Кримінальне провадження в Україні в режимі воєнного стану

ABSTRACT

Criminal Procedure of Ukraine in the Martial Law Regime

The chapter is devoted to the study of military transformations of criminal proceedings in Ukraine after the start of a full-scale war with the russian federation. Such aspects of criminal proceedings under martial law as the history of the formation of "wartime" provisions in legislation; evaluation of the evidence obtained under Art. 615 of the Criminal Procedure Code of Ukraine; ensuring the balance of security interests and human rights during the transformation of the military section of the Criminal Procedure Code of Ukraine; other transformations of criminal proceedings caused by the war; implementation of provisions governing cooperation with the International Criminal Court in the Criminal Procedure Code of Ukraine; prospective criminal procedural legislation of Ukraine in the context of the relevant practice of the ECtHR are considered.

It was stated that before the start of the full-scale war with the russian federation, the criminal proceedings under martial law had a very limited and fragmented nature. A differentiated order of criminal proceedings began to form only after a full-scale war, and this rule-making process continues to this day.

The main transformations of the "military" section of the Criminal Procedure Code of Ukraine are subjected to critical analysis, in particular, the issue of starting a pre-trial investigation under martial law, delegating powers of the investigating judge, applying measures to ensure criminal proceedings, terms of pre-trial investigation and court proceedings, administration of justice under martial law, implementation of the right to protection

in the conditions of martial law, recovery of lost materials, etc. The normative regulation of cooperation with the International Criminal Court and its compliance with the Rome Statute were separately investigated.

Some author's proposals regarding changes and additions to the Criminal Procedure Code of Ukraine.

Keywords: criminal proceedings, criminal proceedings under martial law, evaluation of evidence, International Criminal Court, European Court of Human Rights

Вступ

Війна росії проти України, яка триває з 2014 року, є найбільшим викликом для України з моменту набуття нашою державою незалежності у 1991 році. Ба більше, це глобальний виклик світовій безпеці, попри доволі широке нерозуміння цього факту на початкових етапах конфлікту, перший з яких був пов›язаний із вторгненням на територію Автономної Республіки Крим, підготовкою та примусовим проведенням нелегітимного референдуму у Криму щодо статусу півострова, який відбувся 16 березня 2014 року, і не визнаний ні Україною, ні міжнародною спільнотою.

Європейський суд з прав людини (далі – ЄСПЛ), розглядаючи питання щодо прийнятності справи «Україна проти Росії (щодо Криму)» (case of Ukraine v. Russia (re Crimea) (application nos. 20958/14 and 38334/18)), визнав, що насправді ефективний контроль російська федерація здійснювала над Кримом з 27 лютого 2014 року. ЄСПЛ встановив, що хоча російські війська на півострові не перевищили встановлену межу в 25 тис., як було передбачено у відповідних двосторонніх угодах, цифри продемонстрували, що вони зросли майже вдвічі упродовж короткого проміжку часу, збільшившись з приблизно 10 000 наприкінці січня 2014 року до приблизно 20 000 у середині березня 2014. На думку Суду, посилення військової присутності Росії в Криму в цей період було принаймні значущим. Він також зазначив, що російський уряд не заперечував твердження про те, що російські військові в Криму переважали українські війська в техніко-тактичному, військовому та якісному значенні. Російський уряд жодним чином не виправдовував таке збільшення російської військової присутності конкретними доказами того, що була загроза військам, які на той час перебували в Криму.

Крім того, збільшення відбулося без згоди чи співпраці української влади, про що свідчать дипломатичні комюніке, які заперечують проти розгортання та переміщення. Ба більше, всупереч аргументам російського уряду про те,

що їхні солдати, дислоковані в Криму, були пасивними спостерігачами, український уряд надав дуже детальну, хронологічну та конкретну інформацію, а також достатні докази, що свідчать про активну участь російських військовослужбовців у блокуванні українських військ.

Український уряд надав узгоджену інформацію про спосіб, місце та час передбачуваних подій, які призвели до передачі влади новим місцевим органам влади, які тоді організували «референдум», проголосили незалежність Криму та вжили активних кроків до його інтеграції до Росії. Суд звернув особливу увагу на дві незаперечені заяви президента Путіна. Першу було зроблено на зустрічі з керівниками силових структур у ніч з 22 на 23 лютого 2014 року, на якій він прийняв рішення "розпочати роботу з повернення Криму до складу Російської Федерації", а другу – під час телевізійного інтерв'ю 17 квітня 2014 року, де він прямо визнав, що Росія «роззброїла [військові] частини української армії та правоохоронних органів» і що «російські військовослужбовці допомагали силам кримської самооборони» (Complaints brought by Ukraine against Russia concerning a pattern of human rights violations in Crimea declared partly admissible).

На цьому росія не зупинилася, і воєнним шляхом тимчасово окупувала частини Донецької та Луганської області під вигаданим приводом захисту населення (яке, насправді, ніхто не питав) від «українських націоналістів». Україна відстоювала і відстоює свій ефективний контроль над цими територіями та захищала і захищає громадян України, у тому числі воєнним шляхом, що триває вже вісім років. Зазначимо, що Законом України «Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України» (Закон України «Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України» від 15 квітня 2014 року № 1207-VII) визнано, що датою початку тимчасової окупації Російською Федерацією окремих територій України є 19 лютого 2014 року. Автономна Республіка Крим та місто Севастополь є тимчасово окупованими Російською Федерацією з 20 лютого 2014 року. Окремі території України, що входять до складу Донецької та Луганської областей, є окупованими Російською Федерацією (у тому числі окупаційною адміністрацією Російської Федерації) починаючи з 7 квітня 2014 року.

Міжнародна спільнота засудила такі дії рф, про що зазначено в Резолюціях Генеральної Асамблеї ООН: 68/262 «Territorial integrity of Ukraine» (Resolution adopted by the General Assembly on 27 March 2014, 68/262. Territorial integrity of Ukraine), 71/205 «Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)» (Resolution adopted by the General Assembly on 19 December 2016, 71/205. Situation of human rights in the Autonomous

Republic of Crimea and the city of Sevastopol (Ukraine)), 72/190 «Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine» (Resolution adopted by the General Assembly on 19 December 2017, 72/190), 73/263 «Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine» (Resolution adopted by the General Assembly on 22 December 2018, 73/263), 74/168 «Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine» (Resolution adopted by the General Assembly on 18 December 2019, 74/168), 75/192 «Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine» (Resolution adopted by the General Assembly on 16 December 2020, 75/192).

Офіс Прокурора Міжнародного кримінального суду визнав наявність міжнародного збройного конфлікту між Україною та рф на території Криму, який почався найпізніше 26 лютого 2014 (p. 158), і на сході України з 14 липня 2014 паралельно з неміжнародним збройним конфліктом (p. 169) (Report on Preliminary Examination Activities, 2016).

Широкомасштабна агресія рф знову ж під приводом захисту населення тимчасово окупованих частин Луганської та Донецької областей (фейкові «народні» республіки) почалася вранці 24 лютого 2022 року, і стала проявом найжорстокішої агресії проти України та Українського народу.

Масштабні воєнні злочини призвели до початку розслідування Міжнародним кримінальним судом (Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation), створення Радою з прав людини Міжнародної комісії з розслідування в Україні (Independent International Commission of Inquiry on Ukraine), створення міжнародних слідчих груп (Eurojust supports joint investigation team into alleged core international crimes in Ukraine, Офіс прокурора МКС приєднався до спільної слідчої групи України, Литви та Польщі щодо розслідування злочинів РФ), початку розслідування деякими країнами (Pancevski, 2022) із застосуванням механізмів універсальної юрисдикції.

Світова спільнота вже засудила цю агресію.

Зокрема, Генеральна асамблея ООН резолюцією ES-11/1 «Aggression against Ukraine» засудила заяву рф про проведення «спеціальної воєнної операції» в Україні, визнала, що ніякі територіальні придбання в результаті загрози силою або її застосування не повинні визнаватися законними; зазначила, що вимагає, щоб Російська Федерація негайно припинила застосування сили проти України та утримувалася від будь-якої подальшої протиправної загрози силою або її застосування проти будь-якої держави-члена та щоб Російська Федерація негайно, повністю та беззастережно вивела всі свої збройні сили з території України у її міжнародно визнаних кордонах; негайного та беззa-

стережного скасування рішення щодо статусу окремих районів Донецької та Луганської області України (Resolution adopted by the General Assembly on 2 March 2022 A/RES/ES-11/1).

Парламентська асамблея Ради Європи визнала дії рф злочином проти миру та злочином агресії (Consequences of the Russian Federation's aggression against Ukraine: Opinion of PACE of 15.03.2022 no. 300, 2022).

Міжнародний суд ООН 16 березня 2022 року прийняв рішення про тимчасові заходи, згідно з яким зобов'язав рф припинити військові дії, які вона розпочала 24 лютого 2022 року на території України. Крім того, щодо заяви постійного представника російської федерації при ООН про те, що «донецька народна республіка» та «луганська народна республіка» звернулися до російської федерації з проханням надати військову підтримку, Суд вказав, що рф також повинна забезпечити, щоби будь-які військові або нерегулярні збройні формування, які можуть керуватися або підтримуватися нею, а також будь-які організації та особи, які можуть зазнаватиконтролю чи керівництва з її боку, не вживали жодних кроків для сприяння цим військовим операціям (Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation, 16 march 2022).

ЄСПЛ за правилом 39 Регламенту в межах справи № 11055/22, Ukraine v. Russia (X), прийняв рішення вказати уряду Росії утримуватися від військових нападів на цивільне населення та цивільні об›єкти, включаючи житлові приміщення, автомобілі швидкої допомоги та інші цивільні об›єкти, що особливо охороняються, такі як школи та лікарні, а також негайно забезпечити безпеку медичних установ, персоналу та транспортних засобів екстреної допомоги на території, що атакується або перебуває в облозі російських військ (The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory).

Як і було очікувано, жодне з цих рішень виконане не було. Ба більше, рф навіть вийшла з Конвенції про захист прав людини і основоположних свобод, що вказує на повну зневагу до людини, її прав, верховенства права, усієї світової спільноти, світового правопорядку, поважних міжнародних судових інституцій та умисел на подальше порушення норм міжнародного права прав людини та міжнародного гуманітарного права.

Європейський Парламент закликав Європейський Союз підтримати створення спеціального міжнародного трибуналу для покарання злочину агресії, вчиненого проти України, щодо якого Міжнародний кримінальний суд не має юрисдикції (Ukraine: MEPs want a special international tribunal for crimes of aggression).

Бюро демократичних інститутів і прав людини ОБСЄ підготувало Звіт про порушення міжнародного гуманітарного права та прав людини, воєнні злочини та злочини проти людяності, вчинені в Україні починаючи з 24 лютого 2022 року, де зазначило, що хоча детальна оцінка більшості заяв про порушення МГП та воєнних злочинів щодо деяких інцидентів була неможливою, Місія виявила чіткі ознаки таких порушень російськими збройними силами щодо більшості досліджуваних питань, і зокрема, зазначило, що «неможливо уявити, щоб так багато мирних жителів було вбито та поранено, а також стільки цивільних об'єктів, включно з будинками, лікарнями, культурними пам'ятками, школами, багатоповерховими житловими будинками, адміністративними будівлями, пенітенціарними установами, поліцейськими дільницями, водопостачальними станціями та системами електропостачання було б пошкоджено або знищено, якби Росія дотримувалася своїх зобов'язань у сфері МГП щодо вибірковості, пропорційності та запобіжних заходів під час ведення бойових дій в Україні. Яскравим прикладом є ведення облоги Маріуполя. Значною мірою, поведінка російських збройних сил у тих частинах України, які вона окупувала до і після 24 лютого 2022 року, в тому числі через своїх агентів, самопроголошені Донецьку та Луганську «республіки», так само порушує МГП щодо воєнної окупації» (Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine since 24 February 2022). У іншому Звіті (Report of the OSCE Moscow Mechanism's mission of experts entitled 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine (1 April – 25 June 2022)') викладені ці ж позиції. Про порушення під час війни підготовлено звіт щодо порушень міжнародного гуманітарного права та міжнародного права прав людини в Україні (Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine, 20 July 2022). Національна статистика зареєстрованих в Україні воєнних злочинів вражає: 28423 злочини станом на 15 серпня 2022 року (Офіційний сайт Офісу Генерального прокурора).

Завдання усього Світу – боротьба за мир і справедливість проти росії. Це питання виживання не тільки України та її народу, проти якого росія здійснює геноцид і який її пропагандисти прямо закликають знищити («Заклики до геноциду»: яке покарання чекає на кремлівських пропагандистів?), через що Верховна Рада винесла постанову про Заяву Верховної Ради України "Про вчинення Російською Федерацією геноциду в Україні", у якій звертається до Організації Об'єднаних Націй, Європейського Парламенту, Парламентської Асамблеї Ради Європи, Парламентської Асамблеї ОБСЄ, Парламентської Асамблеї НАТО, урядів та парламентів іноземних держав щодо визнання вчинення

Російською Федерацією геноциду Українського народу, а також злочинів проти людяності та воєнних злочинів на території України (Постанова Верховної Ради України Про Заяву Верховної Ради України "Про вчинення Російською Федерацією геноциду в Україні"), а й усього світу. Ряд країн світу в особі своїх очільників визнали діяльність рф в Україні геноцидом (Whatcott, 2022).

Зважаючи на неможливість за наявних умов притягнути очільників рф до відповідальності за міжнародний злочин агресії у межах юрисдикції Міжнародного кримінального суду, з'явилися ідеї створення спеціального трибуналу щодо злочину агресії рф, і ці ідеї, як і потенційно можливі механізми їх реалізації активно обговорюються у міжнародній правничій спільноті (Dannenbaum, 2022; McDougall, 2022; Komarov, Hathaway, 2022a; Trahan, 2022; Sands, 2022); відмітимо, що, на жаль, висловлено і аргументи проти створення такого трибуналу (Heller, 2022), з якими, з урахуванням специфіки ситуації, погодитись не можна, і відповідний трибунал потрібно створити, адже агресія не може і не має бути безкарною.

На це вказують і документи поважних міжнародних організацій. Зокрема, Резолюцією Парламентської асамблеї Ради Європи «Consequences of the Russian Federation's continued aggression against Ukraine: role and response of the Council of Europe» 2433 (2022) (Resolution «Consequences of the Russian Federation's continued aggression against Ukraine: role and response of the Council of Europe» 2433, 2022) закликала терміново створити ad hoc міжнародний кримінальний трибунал для розслідування злочину агресії, вчиненого політичним і військовим керівництвом російської федерації, й притягнення до відповідальності винних, а також надання необхідної фінансової підтримки (11.20; 14.2). У Резолюції Парламентської асамблеї Ради Європи «The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes» 2436 (2022) (Resolution «The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes» 2436, 2022) є заклик терміново створити ad hoc міжнародний кримінальний трибунал, який повинен: отримати мандат на розслідування та судове переслідування злочину агресії, ймовірно вчиненого політичним та військовим керівництвом російської федерації; застосувати визначення злочину агресії, встановлене міжнародним звичаєвим правом, яке також надихнуло визначення злочину агресії в статті 8 bis Римського статуту МКС; мати повноваження видавати міжнародні ордери на арешт і не бути обмеженим державним імунітетом або імунітетом глав держав і урядів та інших державних посадових осіб; бути створеним, зокрема, групою держав-однодумців у формі багатостороннього договору, схваленого Генеральною Асамблеєю Організа-

ції Об'єднаних Націй та за підтримки Ради Європи, Європейського Союзу та інших міжнародних організацій (11.6). Парламентська асамблея Організації з безпеки і співробітництва в Європі також закликає швидко створити ефективні правові механізми переслідування та покарання винних у таких злочинах, у тому числі спеціальний міжнародний кримінальний трибунал (Resolution on The Russian Federation's War of Aggression Against Ukraine and Its People, and Its Threat to Security Across the OSCE Region). Без сумніву, цей трибунал має бути створений, і агресія та усі, хто у ній винен, мають бути засуджені. Інакше світовий правопорядок завжди буде під загрозою.

Світ не для того переміг нацизм у 1945, щоб здатися рашизму у 2022.

Історія формування «воєнних» положень у КПК України

У первісній редакції КПК України 2012 року не було диференційованого порядку кримінального провадження в умовах воєнного стану. Втім, після анексії території Автономної республіки Крим та міста Севастополя, а також початку бойових дій на Сході України стало зрозумілим, що реалізація багатьох гарантій прав особи в сфері кримінальної юстиції неможлива в таких умовах і кримінальне процесуальне законодавство потребує адаптації до нових реалій. Тому, впровадження у національне кримінальне процесуальне законодавство положень, які регламентували порядок його здійснення в умовах екстраординарних правових режимів стало по суті ретроспективною реакцією законодавця на зміну військово-політичної обстановки в Україні навесні 2014 року.

Перші зміни та доповнення до КПК України, пов'язані із війною та окупацією окремих регіонів України, були внесені ще у квітні 2014 року, коли Верховною Радою України було прийнято Закон України «Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України» від 15 квітня 2014 року (Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України: Закон України № 1207-VII від 15 квітня 2014 року). Стаття 12 цього Закону, яка має назву «Заходи правового реагування на тимчасово окупованій території», містить низку положень, які стосуються зміни територіальної підсудності справ, які підсудні судам, що перебувають на тимчасово окупованій території України, підслідності кримінальних правопорушень, вчинених на тимчасово окупованій території, порядку вручення повістки про виклик особи, стосовно якої існують достатні підстави вважати, що така особа виїхала та/або перебуває на тимчасово окупованій території України. Із набуттям чинності даного закону

до кримінального процесуального законодавства було впроваджено термін «справа, що пов'язана із окупацією». Закон передбачав доповнення ст. 114 КПК України частиною 3 такого змісту: «Судові справи щодо спорів, що випливають з факту окупації чи правопорушень, пов'язаних з окупацією, відносяться до окремої категорії справ, які розглядаються за відповідними процесуальними нормами з урахуванням особливостей, встановлених Законом України «Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України». Справа визнається такою, що пов'язана з окупацією, вмотивованою ухвалою судді. У разі участі в справі іноземного елемента судові доручення, повістки та інші судові документи вручаються не пізніше ніж за 15 діб до початку процесуальної дії. Якщо в справах, пов'язаних з окупацією, стороною кримінального провадження або цивільним відповідачем є іноземний суб'єкт державної власності, включаючи його органи, установи чи організації, або іноземна юридична особа, передбачена частиною другою статті 96^4 Кримінального кодексу України, зносини здійснюються через посольство або постійне представництво».

Знаменною датою для формування вітчизняної воєнної кримінальної юстиції стало 12 серпня 2014 року, коли Верховною Радою України було прийнято одразу три закони, що безпосередньо пов'язані зі здійсненням кримінального провадження в умовах воєнного стану: 1) Закон України «Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції» № 1631-VII від 12 серпня 2014 року; 2) Закон України «Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції» № 1632-VII від 12 серпня 2014 року; 3) Закон України «Про внесення змін до Закону України «Про боротьбу з тероризмом» щодо превентивного затримання у районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, на строк понад 72 години» № 1630-VII від 12 серпня 2014 року.

Закон України «Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції» передбачав доповнення КПК України розділом IX (Complaints brought by Ukraine against Russia concerning a pattern of human rights violations in Crimea declared partly admissible) (Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції: Закон України № 1631-VII від 12 серпня 2014 року), який у первісній редакції до 2022 року містив лише одну ст. 615,

відповідно до якої на місцевості (адміністративній території), на якій діє правовий режим воєнного, надзвичайного стану, проведення антитерористичної операції, у разі неможливості виконання у встановлені законом строки слідчим суддею повноважень, передбачених статтями 163, 164 (тимчасовий доступ до речей і документів), 234, 235 (надання дозволів на проведення обшуку), 247 та 248 (надання дозволів на проведення негласних (слідчих) розшукових дій) КПК України, а також повноважень щодо обрання запобіжного заходу у вигляді тримання під вартою на строк до 30 діб до осіб, які підозрюються у вчиненні злочинів, передбачених статтями 109-114-1, 258-258-5, 260-263-1, 294, 348, 349, 377-379, 437-444 Кримінального кодексу України, ці повноваження виконує відповідний прокурор (Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції: Закон України № 1631-VII від 12 серпня 2014 року). Отже, основний зміст впровадженого в кримінальне процесуальне законодавство України особливого режиму досудового розслідування полягав лише в делегуванні деяких повноважень слідчого судді щодо здійснення судового контролю прокурору.

Закон України «Про здійснення правосуддя і кримінального провадження у зв'язку з проведенням антитерористичної операції» (Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції: Закон України № 1632-VII від 12 серпня 2014 року) містить низку положень, пов'язаних зі здійсненням кримінального провадження у зв'язку з проведенням бойових дій на Сході України, зокрема визначення територіальної підсудності у районі проведення антитерористичної операції (в разі зміни меж району або завершення антитерористичної операції); визначення підслідності кримінальних правопорушень, вчинених в районі проведення антитерористичної операції (у тому числі в разі зміни меж району або завершення антитерористичної операції). Законом була передбачена зміна територіальної підсудності судових справ, підсудних розташованим у районі проведення антитерористичної операції судам, які не можуть здійснювати правосуддя та закріплено обов'язок забезпечити розгляд цивільних справ, справ про адміністративні правопорушення, адміністративних справ, господарських справ і кримінальних проваджень місцевими та апеляційними судами, що визначаються Головою Верховного Суду (ст. 1 Закону України «Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції»).

Що стосується визначення підслідності в умовах АТО, у Законі встановлювалося, що підслідність кримінальних правопорушень, вчинених у районі

проведення АТО, у разі неможливості здійснювати досудове розслідування визначається Генеральним прокурором. Матеріали досудового розслідування щодо злочинів, стосовно яких кримінальні провадження є на стадії досудового слідства, у разі неможливості здійснювати досудове розслідування передаються органам досудового розслідування, визначеним Генеральним прокурором, упродовж десяти робочих днів із дня визначення підслідності (ст. 2 Закону України «Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції»).

Законом України «Про внесення змін до Закону України «Про боротьбу з тероризмом» щодо превентивного затримання в районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, на строк понад 72 години» (Про внесення змін до Закону України «Про боротьбу з тероризмом» щодо превентивного затримання у районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, на строк понад 72 години: Закон України № 1630-VII від 12 серпня 2014 року) останній було доповнено ст. 15 (яка регламентує порядок здійснення превентивного затримання осіб, причетних до проведення антитерористичної операції. І хоча КПК України не містить покликання на такий захід, в українській фаховій літературі зазначається, що превентивне затримання не може вважатися позапроцесуальним заходом (Teteryatnik, 2020, с. 83). Превентивне затримання це захід, який полягає в затриманні особи з метою відвернення терористичних загроз у районі проведення антитерористичної операції та здійснюється відповідно до кримінального процесуального законодавства України з урахуванням особливостей, встановлених Законом України «Про боротьбу з тероризмом». Підставою для превентивного затримання є наявність обґрунтованої підозри у вчиненні особою терористичної діяльності. Його граничний строк не може перевищувати 30 діб. Превентивне затримання особи не може продовжуватися після розгляду слідчим суддею, судом клопотання про обрання належного запобіжного заходу стосовно цієї особи (ст. 15 Закону України «Про боротьбу з тероризмом»). Порядок превентивного затримання регламентовано також Інструкцією про порядок превентивного затримання у районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, та особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції, затвердженого Наказом Міністерства внутрішніх справ України, Генеральної прокуратури України, Служби безпеки України від 26.08.2014 № 872/88/537 (Про затвердження Інструкції про порядок превентивного затримання у районі проведення антитерористичної операції осіб, причетних до терористичної діяльності, та особливого режиму досудового розсліду-

вання в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції: Наказ Міністерства внутрішніх справ України, Генеральної прокуратури України, Служби безпеки України від 26.08.2014 № 872/88/537) (далі – Інструкція).

В українській правовій доктрині розвернулася широка дискусія щодо співвідношення превентивного затримання з іншими видами затримання і запобіжним заходом у вигляді тримання під вартою. Т.Г. Фоміна із цього приводу зазначає, що закріплення превентивного затримання викликає сумнів у законності його регламентації та зумовлює питання щодо відповідності законодавчих положень про строки та порядок його здійснення Конституцією України. Дослідниця звертає увагу на те, що в ст. 15^1 Закону України «Про боротьбу з тероризмом» йдеться про превентивне затримання, а в ст. 615 КПК України – про тримання під вартою, а тому, незрозуміло, чи в цих положеннях законодавець веде мову про один захід, допустивши різне термінологічне його визначення, чи мова йде про різні заходи (Fomina, 2019, c. 240-246).

Схожої думки дотримується і В.А. Сущенко, вказуючи на те, що затримання на строк до 30 діб не узгоджується із конституційними 72 годинами, після закінчення яких особа має бути звільнена за браком відповідного судового рішення. На його думку, таке затримання однозначно треба кваліфікувати як протиправне, при тому, що Конституція України не передбачає винятків із правила 72 годин, не дозволяє продовжувати цей строк та не передбачає будь-яких інших альтернатив цьому терміну (Suschenko, 2019, c. 171-177).

Превентивне затримання так і не було інкорпороване в КПК України, незважаючи на численні зміни та доповнення до нього, тому відповідна проблема залишається актуальною. Однак, з огляду на те, що превентивне затримання здійснюється лише на місцевості (адміністративній території), де проводиться антитерористична операція (п. 2.5 Інструкції), а особливий режим кримінального провадження, передбачений розділом IX-1 КПК України здійснюється натепер лише в умовах воєнного стану, можна припустити, що процедура превентивного затримання в межах цього правового режиму не є застосовною.

У наступні роки законодавцем також було прийнято низку законів, безпосередньо пов'язаних зі збройним конфліктом та окупацією. До їх числа умовно можна віднести й Закон України «Про внесення змін до Кримінального та Кримінального процесуального кодексів України щодо невідворотності покарання за окремі злочини проти основ національної безпеки, громадської безпеки та корупційні злочини» № 1689-VII від 7 жовтня 2014 року (Про внесення змін до Кримінального та Кримінального процесуального кодексів України щодо невідворотності покарання за окремі злочини проти основ національної

безпеки, громадської безпеки та корупційні злочини: Закон України № 1689-VII від 7 жовтня 2014 року), яким у кримінальне процесуальне законодавство було впроваджено інститут спеціального кримінального провадження (in absentia). Свідченням цього є й те, що одночасно були внесені доповнення до Закону України «Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції», які допускали застосування такого порядку до підозрюваного, обвинуваченого, який перебуває в районі проведення антитерористичної операції без дотримання вимоги про його оголошення у міжнародний або міждержавний розшук.

Безумовно, повноцінний і деталізований порядок здійснення кримінального провадження в умовах воєнного стану почав формуватися після початку повномасштабної війни рф з Україною 24 лютого 2022 року.

Законодавець доволі швидко відреагував на ці події, запровадивши необхідні зміни в КПК України. Уже Законом України «Про внесення змін до Кримінального процесуального кодексу України та Закону України «Про попереднє ув'язнення» щодо додаткового регулювання забезпечення діяльності правоохоронних органів в умовах воєнного стану» (Про внесення змін до Кримінального процесуального кодексу України та Закону України «Про попереднє ув'язнення щодо додаткового регулювання забезпечення діяльності правоохоронних органів в умовах воєнного стану : Закон України № 2111-IX від 3 березня 2022 року) від 3 березня 2022 року було внесено перші зміни та доповнення до ст. 615 КПК України, які в основному торкнулися таких аспектів як: 1) особливості початку досудового розслідування; 2) особливості фіксування процесуальних дій; 3) розширення кола повноважень слідчого судді, які можуть бути передані керівнику досудового розслідування (в попередній редакції – прокурору); 4) можливість зупинення досудового розслідування за браком об'єктивної можливості звернення до суду з обвинувальним актом; 5) можливість автоматичного продовження строку дії рішення про застосування запобіжного заходу у вигляді тримання під вартою в підготовчому судовому провадженні та в стадії судового розгляду в разі неможливості розгляду судом цього питання, але не більше ніж на 2 місяці.

Наступний етап розширення нормативного змісту ст. 615 КПК України відбувся вже 15 березня із прийняттям Закону України «Про внесення змін до Кримінального процесуального кодексу України та Закону України «Про електронні комунікації» щодо підвищення ефективності досудового розслідування «за гарячими слідами» та протидії кібератакам» № 2137-IX (Про внесення змін до Кримінального процесуального кодексу України та Закону України «Про електронні комунікації» щодо підвищення ефективності досудового розслідування «за гарячими слідами» та протидії кібератакам: Закон

України № 2137-IX від 15 березня 2022 року). Так, відповідна стаття була доповнена частиною 7, відповідно до якої «строк письмового повідомлення про підозру затриманій особі, визначений частиною другою статті 278 цього Кодексу, з урахуванням обставин, передбачених цією статтею, продовжується до сімдесяти двох годин з моменту її затримання. У разі якщо особі не вручено повідомлення про підозру впродовж сімдесяти двох годин із моменту її затримання, така особа підлягає негайному звільненню». Частина 8 ст. 615 КПК України в редакції Закону України № 2137-IX була викладена таким чином: «кримінальних провадженнях, в яких жодній особі не було повідомлено про підозру на дату введення в Україні або окремих її місцевостях воєнного, надзвичайного стану, проведення антитерористичної операції чи здійснення заходів із забезпечення національної безпеки й оборони, відсічі і стримування збройної агресії Російської Федерації та/або інших держав проти України, строк від дати введення до дати скасування або закінчення відповідного стану або заходів не зараховується до загальних строків, передбачених статтею 219 цього Кодексу».

Також КПК України було доповнено ст. 616, яка регламентує процесуальний порядок скасування запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період або зміна запобіжного заходу з інших підстав. Треба зазначити, що відповідна процедура в частині звернення застави на користь Збройних сил України застосовувалася на практиці раніше, ніж набула нормативного закріплення, адже була передбачена ще в Листі Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» від 3 березня 2022 року (Лист Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» № 2/0/2-22 від 03 березня 2022 року).

Чи не найбільше змін та доповнень до розділу IX[1] України було внесено відповідно до Закону України «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного стану» № 2201-IX від 14 квітня 2022 року (Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного стану: Закон України № 2201-IX від 14 квітня 2022 року). По-перше, із набуттям ним чинності, положення розділу IX[1] КПК України стосуються виключно здійснення провадження в умовах воєнного стану, покликання на інші екстраординарні правові режими були виключені із його назви. Низка його положень спричинили серйозну дискусію у фахових колах, зокрема, це стосується: 1) встановлення спеціальних правил розподілу матеріалів кримінального провадження між суддями за браком доступу до Єдиної судо-

вої інформаційно-телекомунікаційної системи; 2) відстрочки виконання певних процесуальних дій (у разі відсутності об'єктивної можливості виконання процесуальних дій у строки, визначені статтями 220, 221, 304, 306, 308, 376, 395, 426 КПК України, такі процесуальні дії мають бути проведені невідкладно за наявності можливості, але не пізніше ніж через 15 днів після припинення чи скасування воєнного стану); 3) розширення підстав та порядку затримання особи без ухвали слідчого судді та встановлення правила відповідно до якого строк затримання особи без ухвали слідчого судді, суду чи постанови керівника органу прокуратури під час дії воєнного стану не може перевищувати двохсот шістнадцяти годин із моменту затримання, який визначається згідно з вимогами ст. 209 КПК України; 4) встановлення спеціальних правил підсудності в умовах воєнного стану (під час дії воєнного стану обвинувальні акти, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності скеровуються та розглядаються судами, в межах територіальної юрисдикції яких закінчено досудове розслідування, а в разі неможливості з об'єктивних причин здійснювати відповідним судом правосуддя – найбільш територіально наближеним до нього судом, що може здійснювати правосуддя, або іншим судом, визначеним у порядку, передбаченому законодавством); 5) відмова від суду присяжних; 6) можливість використання в суді позасудових свідчень (ч. 11 ст. 615 КПК України); 7) впровадження інституту дистанційної участі захисника; 8) надання слідчому, дізнавачу та прокурору повноважень здійснювати переклад показань, пояснень та документів підозрюваного, потерпілого у разі, якщо вони володіють відповідною мовою; 9) впровадження інституту відновлення втрачених матеріалів кримінального провадження в умовах воєнного стану.

Аналізуючи історію формування воєнних положень у КПК України можна прийти до висновку, що до початку повномасштабної війни з рф, інститут кримінального провадження в умовах воєнного стану мав дуже обмежений та фрагментарний характер. Диференційована кримінальна процесуальна форма почала формуватися лише після повномасштабної війни й цей нормотворчий процес продовжується натепер, хоча такі зміни й надалі являють собою ретроспективною відповіддю на потреби правозастосовної практики.

Досвід оцінки доказів, отриманих за ст. 615 КПК України (2014-2022)

В українській кримінальній процесуальній доктрині оцінка доказів розглядається як розумова діяльність суб'єктів доказування з вирішення питання про належність, допустимість, достовірність доказів (Alenin et al., 2020, с. 201). У ст. 94 КПК України встановлено, що слідчий, прокурор, слідчий суддя, суд за своїм внутрішнім переконанням, яке ґрунтується на всебічному, повному й неупередженому дослідженні всіх обставин кримінального провадження, керуючись законом, оцінюють кожний доказ щодо належності, допустимості, достовірності, а сукупність зібраних доказів – щодо достатності та взаємозв'язку для прийняття відповідного процесуального рішення.

З огляду на контекст нашого дослідження, у межах цього параграфу ми зупинимось докладніше на питанні оцінки допустимості доказів, отриманих в порядку ст. 615 КПК України, яка регламентує процесуальний порядок здійснення кримінального провадження в умовах воєнного стану. За ч. 1 ст. 87 КПК України недопустимими є докази, отримані внаслідок істотного порушення прав та свобод людини, гарантованих Конституцією та законами України, міжнародними договорами, згода на обов'язковість яких надана Верховною Радою України, а також будь-які інші докази, здобуті завдяки інформації, отриманій внаслідок істотного порушення прав та свобод людини. Допустимість доказів визначається за такими критеріями як: 1) належний суб'єкт отримання; 2) належне джерело отримання доказу; 3) належний порядок отримання доказу; 4) належне фіксування доказу. Ця система критеріїв не має закріплення на рівні КПК України, однак є практично загальноприйнятою у доктрині. Вона ґрунтується на положеннях ст. 86 КПК України, згідно з якою доказ визнається допустимим, якщо він отриманий у порядку, встановленому цим Кодексом, а також положеннях ст.ст. 92, 93 КПК України щодо суб'єктів збирання доказів та обов'язку доказування, через які ідентифікуються належні суб'єкти збирання та перевірки доказів. Такими, за КПК України, є: сторони кримінального провадження, потерпілий, представник юридичної особи. Для цих категорій суб'єктів нормативно передбачені диференційовані способи збирання та перевірки доказів (що також є критерієм допустимості). До них віднесено такі: для сторони обвинувачення – проведення слідчих (розшукових) дій та негласних слідчих (розшукових) дій, витребування та отримання від органів державної влади, органів місцевого самоврядування, підприємств, установ та організацій, службових та фізичних осіб речей, документів, відомостей, висновків експертів, висновків ревізій та актів перевірок, проведення інших процесуальних дій, передбачених КПК

України; для сторони захисту, потерпілого, представника юридичної особи, щодо якої здійснюється провадження: витребування та отримання від органів державної влади, органів місцевого самоврядування, підприємств, установ, організацій, службових та фізичних осіб речей, копій документів, відомостей, висновків експертів, висновків ревізій, актів перевірок; ініціювання проведення слідчих (розшукових) дій, негласних слідчих (розшукових) дій та інших процесуальних дій, а також за допомогою здійснення інших дій, які здатні забезпечити подання суду належних і допустимих доказів. Зазначимо, що ці положення не повністю відображають специфіку правового положення та правового статусу цих суб'єктів, і в доктрині зверталася увага на те, що, по-перше, є сумніви в практичній реалізації зазначених способів, зокрема, для потерпілого (Starenkyi, 2017, с. 189-193; Alenin et al., 2020 с. 200); по-друге, некоректність вказання як засобу збирання ініціювання проведення слідчих (розшукових) дій, негласних слідчих (розшукових) дій та інших процесуальних дій (Alenin et al., 2020, с. 199-200); по-третє, на нормативну неповноту цих способів. Дійсно, «слідчий та прокурор можуть одержувати докази й іншим чином, а саме, вирішуючи питання про залучення до кримінального провадження тих речей та документів, які надають сторона захисту, потерпілий та інші учасники кримінального провадження. Якщо, наприклад, потерпілий надає слідчому наявні в нього документи на підтвердження вартості та певних ознак речей, які були викрадені, то суб'єктом одержання доказів буде саме слідчий, він вирішує питання про належність таких документів, тобто вирішує, чи дійсно з їх допомогою можна буде встановити, що знайдені у підозрюваного речі належали потерпілому. Слідчий вирішує також питання про допустимість доказів» (Alenin et al., 2020, с. 199). Крім того, дискусійним є питання щодо віднесення до суб'єктів доказування слідчого судді та суду. Підходи є протилежними, тобто від категоричного невизнання такої можливості (Pogoretskyi, 2017, с. 63-79; Starenkyi, 2014, с. 232-236) до її обстоювання (Wapnyarchuk, 2014, с. 160-168; Alenin et al., 2020, с. 204-205; Litwin, 2016, с. 164). Треба виходити з позиції, що суд та слідчий суддя є суб'єктами доказування (зважаючи на те, що доказування є нерозривним процесом, який включає такі елементи, як збирання, перевірка, оцінка; навіть якщо щодо елементу збирання можуть бути сумніви, зважаючи на обмежені повноваження суду та слідчого судді збирати докази з власної ініціативи, щодо перевірки таких сумнівів немає, а як суб'єкти оцінки слідчий суддя та суд прямо визначені у ст. 94 КПК України).

Щодо належного джерела, то законодавець перелічує джерела доказів: показання, речові докази, документи, висновки експертів (ч. 2 ст. 84 КПК України) та додаткові джерела для кримінальних проступків: пояснення осіб,

результати медичного освідування, висновок спеціаліста, показання технічних приладів і технічних засобів, що мають функції фото- і кінозйомки, відеозапису, чи засобів фото- і кінозйомки, відеозапису (ч. 1 ст. 298-1 КПК України). Водночас слушним є зауваження, що належне джерело, як критерій допустимості доказу означає, що створено (одержано) таке джерело внаслідок проведення тих дій, які пристосовані для одержання інформації певного роду – для показань – це допит, а не інша слідча дія, для даних про можливість вчинення певних дій (бачити, чути, подолати якусь відстань) – слідчий експеримент, для одержання відомостей, які потребують спеціальних знань, – проведення експертизи (Alenin et al., 2020, c. 181).

Правила щодо фіксування кримінального провадження (протокол, технічні заходи фіксування) регламентуються главою 5 КПК України.

Недопустимі докази не можуть бути використані під час прийняття процесуальних рішень, на такі дані не може посилатися суд під час ухвалення судового рішення (ч. 2 ст. 86 КПК України). КПК України,з огляду на положення ст. 89, виділяє два порядки визнання доказів недопустимими (залежно від характеру підстави): визнання доказів очевидно недопустимим під час судового розгляду та під час прийняття підсумкового судового рішення. Суд вирішує питання допустимості доказів під час їх оцінки в нарадчій кімнаті під час ухвалення судового рішення. У разі встановлення очевидної недопустимості доказу під час судового розгляду суд визнає цей доказ недопустимим, що тягне за собою неможливість дослідження такого доказу або припинення його дослідження в судовому засіданні, якщо таке дослідження було розпочате. Є судове роз'яснення, що застосоване законодавцем під час надання визначення поняття "докази" формулювання "фактичні дані, отримані у передбаченому КПК порядку" та положення ч. 3 ст. 17 КПК про те, що обвинувачення не можуть ґрунтуватися на доказах, отриманих незаконним шляхом, свідчать, що відомості, матеріали та інші фактичні дані, отримані органом досудового розслідування в непередбаченому процесуальним законом порядку чи з його порушенням, є очевидно недопустимими, а це відповідно до ч. 2 ст. 89 КПК тягне за собою неможливість дослідження такого доказу або припинення його дослідження в судовому засіданні, якщо таке дослідження було розпочате. Зазначене правило застосовується і щодо доказів, отриманих унаслідок істотного порушення прав та свобод людини (ст. 87 КПК) за умови підтвердження сторонами кримінального провадження їх очевидної недопустимості. В іншому випадку суд вирішує питання допустимості доказів під час їх оцінки в нарадчій кімнаті під час ухвалення судового рішення (Лист Вищого спеціалізованого суду з розгляду цивільний і кримінальних справ 05.10.2012 № 223-1446/0/4-12 «Про деякі питання порядку здійснення судово-

го розгляду в судовому провадженні у першій інстанції відповідно до Кримінального процесуального кодексу України»).

Саме тому, при аналізі досвіду оцінки доказів, здобутих у порядку ст. 615 КПК України ми будемо дотримуватися саме цієї концепції.

Стаття 615 КПК України у своїй первісній редакції, передбаченій Законом України № 1631-VII від 12 серпня 2014 року лише одну особливість кримінального провадження, що здійснюється в межах екстраординарного правового режиму, а саме делегування прокурору повноважень слідчого судді передбачених статтями 163, 164, 234, 235, 247 та 248 КПК України, а також повноважень щодо обрання запобіжного заходу у вигляді тримання під вартою на строк до 30 діб до осіб, які підозрюються у вчиненні злочинів, передбачених статтями 109-114[1], 258-258[5], 260-263[1], 294, 348, 349, 377-379, 437-444 Кримінального кодексу України в разі неможливості їх виконання останнім у встановлені законом строки на місцевості (адміністративній території), на якій діє правовий режим воєнного, надзвичайного стану, проведення антитерористичної операції.

З огляду на той факт, що три із чотирьох делегованих повноважень (розгляд та вирішення клопотань про тимчасовий доступ до речей і документів; розгляд та вирішення клопотань про надання дозволу на проведення обшуку в житлі чи іншому володінні особи; розгляд та вирішення клопотань про надання дозволу на проведення негласних слідчих (розшукових) дій) були безпосередньо пов'язані зі збиранням доказів, у тогочасній літературі доволі швидко актуалізувалося питання про допустимість доказів, отриманих у порядку ст. 615 КПК України.

Аналіз положень ст. 615 КПК України (в редакції Закону України № від 12 серпня 2014 року) дав змогу нам свого часу виділити низку критеріїв допустимості доказів, отриманих в межах встановленого нею правового порядку: 1) проголошення на певній місцевості (адміністративній території) правового режиму воєнного, надзвичайного стану або режиму проведення антитерористичної операції; 2) неможливість виконання у встановлені законом строки слідчим суддею певних повноважень; 3) належний суб'єкт реалізації делегованих повноважень; 4) отримання доказів в межах реалізації лише тих повноважень, що прямо передбачені диспозицією ст. 615 КПК України (Zavtur, 2020, v. 3, c. 270).

Правовий порядок проголошення на певній місцевості (адміністративній території) правового режиму воєнного, надзвичайного стану або режиму проведення антитерористичної операції та визначення належного суб'єкта реалізації делегованих повноважень чітко передбачено на рівні національного законодавства, тому ми зупинимось докладніше на таких аспектах, які

в правозастосовній практиці виявилися проблемними: неможливість виконання у встановлені законом строки слідчим суддею певних повноважень та отримання доказів у межах реалізації лише тих повноважень, що прямо передбачені диспозицією ст. 615 КПК України.

Ключовою умовою застосовності ст. 615 КПК України визначалася саме неможливість виконання у встановлені законом строки слідчим певних окремих повноважень, втім, законодавство не визначало ані суб'єкта, ані порядку встановлення цієї неможливості. У фаховій спільноті ця проблема обговорювалася (Pashkovskyi). Очевидно, що відповідні норми були призначені для випадку потенційної загрози активних бойових дій, особливо тяжких надзвичайних ситуацій техногенного та природного характеру, а також інших суспільно небезпечних явищ, що загрожують життю та здоров'ю громадян, наявність яких є підставою введення екстраординарних правових режимів, коли делегування повноважень могло стати дієвою гарантією ефективної реалізації завдань кримінального провадження. У цьому аспекті треба нагадати, що в Україні до 2022 року був досвід введення воєнного стану: у 2018 році після агресії прикордонних кораблів рф у Керченській протоці проти кораблів Військово-Морських Сил України, Указом Президента України № 390/2018 від 26 листопада 2018 року було запроваджено воєнний стан у 10 областях України. Однак реальні бойові дії на той час не велися, суди працювали у штатному режимі, а тому підстав для застосування ст. 615 КПК переважно не було.

Серед розповсюджених випадків застосування ст. 615 КПК України, визнаних правомірними в судовій практиці протягом 2014-2022 років було надання прокурором дозволів на проведення негласних слідчих (розшукових) дій через те, що у приміщенні Апеляційного суду Донецької області, не створено режимно-секретний відділ, а це відповідно до законодавства України є обов'язковою умовою розгляду відповідних клопотань (e.g. Вирок Новоайдарського районного суду Луганської області від 4 грудня 2018 року (справа № 419/703/16-к).

Деякі проблеми виникали й у контексті кола делегованих повноважень. По-перше, делегуванню підлягали повноваження щодо надання дозволів на проведення тих процесуальних дій, що найбільше обмежують конституційні права особи (обшуки, негласні слідчі (розшукові) дії). Такий підхід виглядав не зовсім логічним, адже, якщо мова йде про розвантаження роботи судів в умовах воєнного стану, доцільніше було б робити це делегуючи повноваження щодо застосування менш інтрузивних заходів.

Інше питання виникало в контексті техніко-юридичного викладення норм ст. 615 КПК України. Законодавець, формулюючи перелік повноважень, що підлягають делегуванню, покликається лише на деякі статті КПК України,

якими вони передбачені. І це викликало проблеми у визначенні правильного алгоритму застосування таких норм. Наприклад, у КПК України є ст. 233, яка регламентує порядок проведення обшуку в невідкладних випадках і надає слідчому, дізнавачу або прокурору повноваження до постановлення ухвали слідчого судді увійти до житла чи іншого володіння особи лише з метою врятування життя людей та майна чи безпосереднього переслідування осіб, які підозрюються у вчиненні кримінального правопорушення. У такому разі прокурор, слідчий, дізнавач за погодженням із прокурором зобов'язаний невідкладно після здійснення таких дій звернутися до слідчого судді із клопотанням про проведення обшуку. Зазначене повноваження не було делеговане, хоча в умовах воєнного стану надзвичайні обставини, пов'язані із рятуванням життя людей можуть мати перманентний характер і через це виникала проблема у виборі належної процедури отримання дозволу на обшук у житлі чи іншому володінні особи.

Аналогічна проблема мала місце й у контексті негласних слідчих (розшукових) дій. У ст. 615 КПК України в первісній редакції було покликання на ст. 247 та 248, які регламентують процесуальний порядок надання слідчим суддею дозволів на проведення негласних слідчих (розшукових) дій, але водночас не містилася згадка про ст. 250 КПК України, яка передбачала можливість проведення негласної слідчої (розшукової) дії до постановлення ухвали слідчого судді у виняткових невідкладних випадках, пов'язаних із врятуванням життя людей та запобіганням вчиненню тяжкого або особливо тяжкого злочину, передбаченого розділами I, II, VI, VII (статті 201 та 209), IX, XIII, XIV, XV, XVII Особливої частини Кримінального кодексу України. У такому випадку прокурор зобов'язаний невідкладно після початку такої негласної слідчої (розшукової) дії звернутися з відповідним клопотанням до слідчого судді.

Натепер ця проблема вирішена на законодавчому рівні, адже чинна редакція ст. 615 містить посилання і на ст. 233, і на ст. 250 КПК України, однак підхід до техніко-юридичного викладення норм залишився таким, яким він був у первісній редакції.

Нова редакція ст. 615 КПК України, про яку йшла мова в попередньому параграфі, породила й нові питання щодо забезпечення оцінки допустимості доказів. У ч. 5 ст. 87 КПК України в редакції, передбаченої Законом України № 2201-IX від 14.04.2022 р. зазначено, що в умовах воєнного стану положення цієї статті застосовуються з урахуванням особливостей, визначених ст. 615 КПК України. Це має бути витлумачено такий спосіб, що, з огляду на положення оновленої ст. 615 КПК України, ці особливості стосуватимуться збирання доказів за постановою керівника органу прокуратури без ухвали слідчого судді (обшук, «легалізація» проникнення за ч. 3 ст. 233 КПК України,

отримання зразків для експертизи, негласні слідчі (розшукові) дії, «легалізація» початку негласної слідчої (розшукової) дії в порядку ст. 250 КПК України) – п. 1 ч. 2 (здійснення процесуальних дій, які потребують попереднього дозволу суду, без такого дозволу або з порушенням його суттєвих умов), п. 4 ч. 3 (під час виконання ухвали про дозвіл на обшук житла чи іншого володіння особи, якщо така ухвала винесена слідчим суддею без проведення повної технічної фіксації засідання) ст. 87 КПК України. Щодо інших частин ст. 87 КПК України немає обумовлень (Glovyiuk, Zavtur, 2022).

Практика застосування цих положень наразі не є достатньо усталеною, але деякі проблеми можна спрогнозувати вже сьогодні.

П.1 ч. 1 ст. 615 КПК України передбачає, що в разі введення на території України воєнного стану та за відсутності технічної можливості доступу до Єдиного реєстру досудових розслідувань – рішення про початок досудового розслідування приймає дізнавач, слідчий, прокурор, про що виноситься відповідна постанова, яка повинна містити відомості, передбачені ч. 5 ст. 214 КПК України. У невідкладних випадках до винесення дізнавачем, слідчим, прокурором постанови про початок досудового розслідування може бути проведений огляд місця події (постанова приймається невідкладно після завершення огляду). Відомості, що підлягають внесенню до Єдиного реєстру досудових розслідувань, вносяться до нього за першої можливості. Тлумачення підстав застосування цього порядку повинно визначатися з урахуванням обставин, що склалися на певній території, але у літературі вже зазначається, що такими підставами можуть бути вихід комп'ютерного, мережевого обладнання зі строю, перебої з електроенергією та зв'язком, Інтернетом, брак доступу до них, проблеми з транспортом, блокування та захоплення адміністративних будівель (Glovyiuk and others, 2022, c. 13).

Цей аспект в українській правовій системі має вкрай велике значення, адже початок досудового розслідування в межах ординарної процедури є формалізованим і починається із внесення відомостей до Єдиного реєстру досудових розслідувань. У ч. 1 ст. 214 КПК України встановлено, що слідчий, дізнавач, прокурор невідкладно, але не пізніше 24 годин після подання заяви, повідомлення про вчинене кримінальне правопорушення або після самостійного виявлення ним із будь-якого джерела обставин, що можуть свідчити про вчинення кримінального правопорушення, зобов'язаний внести відповідні відомості до Єдиного реєстру досудових розслідувань, розпочати розслідування та через 24 години з моменту внесення таких відомостей надати заявнику витяг із Єдиного реєстру досудових розслідувань. Збирання доказів до цього моменту, за деякими винятками, є неприпустимим та тягне за собою визнання їх недопустимими. Нормативною основою для цього є положення

ч. 3 ст. 214 КПК України: здійснення досудового розслідування, крім випадків, передбачених цією частиною, до внесення відомостей до реєстру або без такого внесення не допускається і тягне за собою відповідальність, встановлену законом. У невідкладних випадках до внесення відомостей до Єдиного реєстру досудових розслідувань може бути проведений огляд місця події (відомості вносяться невідкладно після завершення огляду).

У судовій практиці можуть виникнути питання щодо виправданості застосування спеціального порядку застосування п.1 ч. 1 ст. 615 КПК України в контексті допустимості доказів, отриманих у межах такої процедури.

Питання допустимості доказів, отриманих у порядку ст. 615 КПК України можуть виникнути й через дотримання належного порядку фіксування доказів. Пункт 1 ст. 615 КПК України встановлює, що процесуальні дії під час кримінального провадження фіксуються у відповідних процесуальних документах, а також за допомогою технічних засобів фіксування кримінального провадження, крім випадків, якщо фіксування за допомогою технічних засобів неможливе з технічних причин. За відсутності можливості складання процесуальних документів про хід і результати проведення слідчих (розшукових) дій чи інших процесуальних дій фіксація здійснюється доступними технічними засобами з подальшим складенням відповідного протоколу не пізніше сімдесяти двох годин із моменту завершення таких слідчих (розшукових) дій чи відповідних процесуальних дій.

Ординарна процедура передбачає дотримання більш складних формалізованих вимог. Відповідно до ч. 1 ст. 105 КПК України у випадках, передбачених КПК України, хід і результати проведення процесуальної дії фіксуються у протоколі. Протокол під час досудового розслідування складається слідчим або прокурором, які проводять відповідну процесуальну дію, під час її проведення або безпосередньо після її закінчення (ст. 106 КПК України). Ця норма має вкрай велике практичне значення, адже є гарантією точного та максимально повного фіксування слідів кримінального правопорушення.

Що стосується використання технічних засобів, чинний КПК України містить загальне положення про те, що рішення про фіксацію процесуальної дії за допомогою технічних засобів під час досудового розслідування приймає особа, яка проводить відповідну процесуальну дію. За клопотанням учасників процесуальної дії застосування технічних засобів фіксування є обов'язковим (ч. 1 ст. 107 КПК України). Водночас виконання ухвали слідчого судді, суду про проведення обшуку в обов'язковому порядку фіксується за допомогою звуко- та відеозаписувальних технічних засобів. У ч. 2 ст. 105 КПК України чітко прописано, що дії та обставини проведення обшуку, не зафіксовані в записі, не можуть бути внесені до протоколу обшуку та використані як доказ

у кримінальному провадженні. У випадку фіксування процесуальної дії під час досудового розслідування за допомогою технічних засобів про це зазначається в протоколі (ч. 2 ст. 105 КПК України).

Очевидно, що під час судового розгляду кримінальних проваджень з'ясування можливості або неможливості використання технічних засобів і вплив цих обставин на допустимість доказів, отриманих у такому порядку може мати проблемний характер.

Та саме стосується і залучення понятих у разі проведення певних слідчих (розшукових) дій. У п.1 ч. 1 ст. 615 КПК України зазначається, що в разі, якщо в умовах воєнного стану за проведення обшуку або огляду житла чи іншого володіння особи, обшуку особи, залучення понятих є об'єктивно неможливим або пов'язано з потенційною небезпекою для їхнього життя чи здоров'я, відповідні слідчі (розшукові) дії проводяться без залучення понятих. У такому разі хід і результати проведення обшуку або огляду житла чи іншого володіння особи, обшуку особи в обов'язковому порядку фіксуються доступними технічними засобами за допомогою здійснення безперервного відеозапису.

У межах загальної процедури кримінального провадження слідчий, прокурор зобов'язаний запросити не менше двох незаінтересованих осіб (понятих) для пред'явлення особи, трупа чи речі для впізнання, огляду трупа, у тому числі пов'язаного з ексгумацією, слідчого експерименту, освідування особи. Винятками є випадки застосування безперервного відеозапису ходу проведення відповідної слідчої (розшукової) дії. Поняті можуть бути запрошені для участі в інших процесуальних діях, якщо слідчий, прокурор вважатиме це за доцільне. Втім, обшук або огляд житла чи іншого володіння особи, обшук особи здійснюються з обов'язковою участю не менше двох понятих незалежно від застосування технічних засобів фіксування відповідної слідчої (розшукової) дії (ч. 7 ст. 223 КПК України).

Наразі не достатньо зрозумілим є те, як буде оцінюватись об'єктивна неможливість та потенційна небезпека для життя чи здоров'я понятих у судовій практиці та як це буде впливати на допустимість доказів, отриманих за результатами проведення таких слідчих (розшукових) дій.

Воєнні зміни КПК України торкнули й такого фундаментального для українського кримінального процесу аспекту як врахування судом позасудових свідчень. За загальним правилом, відповідно до КПК України суд досліджує докази безпосередньо й показання учасників кримінального провадження дістає усно. Винятком із цього правила є випадки, коли наявні підстави вважати, що свідок або потерпілий не зможуть бути допитані в суді через існування небезпеки для їх життя і здоров'я, тяжку хворобу або інші обставини, що можуть унеможливити їх допит у суді або вплинути на повноту чи достовірність

показань. У такому випадку свідок або потерпілий можуть бути допитані слідчим суддею під час досудового розслідування в межах спеціальної процедури, яка регламентована ст. 225 КПК України та іменується в літературі депонуванням показань.

Водночас ст. 615 КПК України в редакції, передбаченої Законом України № 2201-IX від 14.04.2022 року містить ч. 11, яка встановлює, що показання, отримані під час допиту свідка, потерпілого, у тому числі одночасного допиту двох чи більше вже допитаних осіб, у кримінальному провадженні, що здійснюється в умовах воєнного стану, можуть бути використані як докази в суді виключно у випадку, якщо хід і результати такого допиту фіксувалися за допомогою доступних технічних засобів відеофіксації. Вочевидь така регламентація зумовлена неможливістю повною мірою реалізувати засаду безпосередності дослідження показань в умовах воєнного стану, масового переміщення населення, існування небезпеки для життя людей тощо. Втім, цей порядок породжує питання щодо дотримання такого елементу права на справедливий суд як право на конфронтацію, що передбачене підпунктом d пункту 3 статті 6 Конвенції. ЄСПЛ неодноразово зазначав, що право на допит свідків не є абсолютним («Аль-Хавайя і Тахєрі проти Сполученого Королівства», «Шачашвілі проти Німеччини», «Сітневський і Чайковський проти України»), але обвинувачення не може повністю або переважно ґрунтуватися на показаннях відсутнього свідка. Вважаємо, що ці стандарти мають бути застосовними в контексті процедури, передбаченої ч. 11 ст. 615 КПК України за здійснення оцінки загальної справедливості судового розгляду кримінальних проваджень в умовах воєнного стану. Так само, якщо, наприклад, у процесі судового розгляду виникнуть сумніви у достовірності таких показань, і перевірити їх за допомогою безпосереднього допиту свідків або потерпілих не буде можливості, такі сумніви мають тлумачитися на користь обвинуваченого.

Норма ч. 11 ст. 615 КПК України передбачає також, що показання, отримані під час допиту підозрюваного, у тому числі одночасного допиту двох чи більше вже допитаних осіб, у кримінальному провадженні, що здійснюється в умовах воєнного стану, можуть бути використані як докази в суді виключно у випадку, якщо в такому допиті брав участь захисник, а хід і результати проведення допиту фіксувалися за допомогою доступних технічних засобів відеофіксації. Така регламентація викликає заперечення з погляду дотримання права на свободу від самовикриття. Наприклад, суд не завжди матиме змогу перевірити чи не отримані такі показання під тиском або примусом, а будь-які неспростовні сумніви в цьому плані мають тлумачитися на користь обвинуваченого. Якщо ж обвинувачений дає показання в судовому засідання під час судового розгляду, доцільність цієї процедури взагалі є сумнівною, адже

з'ясовувати причини розбіжності в показаннях обвинуваченого неприпустимо через його імунітут від самовикриття. Якщо змоделювати ситуацію, за якої обвинувачений відмовляється давати показання в суді, то врахування його показань, наданих раніше в статусі підозрюваного може бути розцінено як санкція за відмову від надання показань, що знову ж таки, порушує принцип свободи від самовикриття. ЄСПЛ робив подібні висновки у справі «Хіні і МакГіннесс проти Ірландії» (Довідник із статті 6 Європейської конвенції з прав людини. Право на справедливий суд (кримінально-процесуальний аспект). З цих міркувань нами вже висловлювалася позиція, що другий абзац ч. 11 ст. 615 КПК України може бути потенційно застосовним лише в спеціальному судовому провадженні (in absentia), в ситуації, коли провадження здійснюється за відсутності обвинуваченого і суд враховує його показання, які були надані ним під час досудового розслідування в статусі підозрюваного (Зауваження та пропозиції Національної асоціації адвокатів України до проекту Закону «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного, надзвичайного стану» (реєстр. № 7183 від 20.03.2022 р.)).

Натепер стає очевидним, що впровадження окремої диференційованої кримінальної процесуальної форми провадження в умовах воєнного стану вплине на оцінку доказів отриманих у межах такого порядку. Втім, її застосування пов'язане із винятковою необхідністю, яка полягає у веденні бойових дій, браку технічних можливостей здійснити певні процесуальні дії, наявності небезпеки для життя людей тощо. Такі обставини наразі мають місце не в усіх регіонах України, а тому перед системою правосуддя повстає завдання не допустити зловживання застосуванням спрощеної процедури кримінального провадження, у випадках, коли це не є виправданим.

Трансформації «воєнного» розділу: баланс безпеки та прав людини (2022)

Як указувалося вище, основну історію змін «воєнний» розділ КПК України (Кримінальний процесуальний кодекс України від 13 квітня 2012 року № 4651-VI.) має саме у 2022 році. І ряд положень стосовно цих норм викликали бурхливе обговорення в правничій спільноті якраз у аспекті меж спрощення кримінально-процесуальних процедур. Тобто основне питання полягає у забезпеченні балансу між правами людини (зважаючи на те, що загалом КПК України ґрунтується на європейських стандартах прав людини та справед-

ливого судочинства). Проте, «воєнні» зміни зробили ухил у бік публічного інтересу забезпечення функціонування кримінальної юстиції в умовах триваючого міжнародного збройного конфлікту різного ступеня інтенсивності.

Поблоково ці зміни торкнулися: (1) початку кримінального провадження; (2) фіксування кримінального провадження; (3) повноважень слідчого судді; (4) заходів забезпечення кримінального провадження, у тому числі запобіжних заходів; (5) строків у досудовому розслідуванні та судовому провадженні; (6) здійснення правосуддя; (7) доказування; (8) участі захисника; (9) відновлення втрачених матеріалів кримінального провадження.

За КПК України ***початок кримінального провадження*** пов'язується за загальним правилом, із внесенням відомостей до Єдиного державного реєстру досудових розслідувань, хоча більш правильною є позиція, що кримінально-процесуальні відносини виникають із моменту звернення із заявою або повідомленням про кримінальне правопорушення до органів та осіб, які уповноважені на їх прийняття та реєстрацію. Ба більше, до внесення відомостей до Єдиного державного реєстру досудових розслідувань можливо проведення огляду місця події, а щодо кримінальних проступків – також відібрано пояснення, проведено медичне освідування; отримано висновок спеціаліста і знято показання технічних приладів та технічних засобів, що мають функції фото- і кінозйомки, відеозапису, чи засобів фото- і кінозйомки, відеозапису; вилучено знаряддя і засоби вчинення кримінального проступку, речі йдокументи, що є безпосереднім предметом кримінального проступку, або які виявлені під час затримання особи, особистого огляду або огляду речей.

Єдиний державний реєстр досудових розслідувань це створена за допомогою автоматизованої системи електронна база даних, відповідно до якої здійснюються збирання, зберігання, захист, облік, пошук, узагальнення даних, які використовуються для формування звітності, а також надання інформації про відомості, внесені до Реєстру, з дотриманням вимог кримінального процесуального законодавства та законодавства, яким врегульовано питання захисту персональних даних та доступу до інформації з обмеженим доступом (Положення про Єдиний реєстр досудових розслідувань, порядок його формування та ведення, затверджене Наказом Генерального прокурора від 30.06.2020 № 298).

Зважаючи на те, що в умовах бойових дій, може не бути фізичного доступу до цієї системи, у тому числі через знеструмлення або знищення комп'ютерної техніки, законодавець передбачив спеціальних порядок початку досудового розслідування в умовах воєнного стану, а саме: якщо немає технічної можливості доступу до Єдиного реєстру досудових розслідувань, то постанову про початок досудового розслідування приймає дізнавач, слідчий, прокурор. Ця

постанова має містити такі дані: 1) дату надходження заяви, повідомлення про кримінальне правопорушення або виявлення з іншого джерела обставин, що можуть свідчити про вчинення кримінального правопорушення; 2) прізвище, ім'я, по батькові (найменування) потерпілого або заявника; 3) інше джерело, з якого виявлені обставини, що можуть свідчити про вчинення кримінального правопорушення; 4) короткий виклад обставин, що можуть свідчити про вчинення кримінального правопорушення, наведених потерпілим, заявником чи виявлених з іншого джерела; 5) попередня правова кваліфікація кримінального правопорушення із зазначенням статті (частини статті) закону України про кримінальну відповідальність; 6) прізвище, ім'я, по батькові та посада службової особи, яка внесла відомості до реєстру, а також слідчого, прокурора, який вніс відомості до реєстру та/або розпочав досудове розслідування; 7) інші обставини, передбачені положенням про Єдиний реєстр досудових розслідувань (ч. 5 ст. 214 КПК України).

Як і в загальній процедурі, у невідкладних випадках до винесення дізнавачем, слідчим, прокурором постанови про початок досудового розслідування може бути проведений огляд місця події, тоді постанова приймається невідкладно після завершення такого огляду.

У доктрині слушно указано, що тлумачення п. 1 ч. 1 ст. 615 КПК України дає змогу констатувати, що вона не відміняє вимог ч.ч. 6, 7, 9 ст. 214 КПК України (Glovyiuk and others, 2022, c. 14), тобто невідкладного повідомлення керівника органу прокуратури про початок досудового розслідування, доручення проведення досудового розслідування з урахуванням правил підслідності, повідомлення Національне агентство з питань запобігання корупції про початок досудового розслідування за участю викривача.

КПК України має низку вимог щодо ***фіксування кримінального провадження***. Традиційно основною формою фіксування процесуальних рішень є протокол, проте, натепер поступово є рух у бік діджиталізації кримінального провадження. Зокрема, іншою формою є фіксування за допомогою технічних засобів (аудіо, відео), яка стає все більш поширеною (хоча й не є повною альтернативою протокольній формі). До того ж з 2012 року є можливість не вносити текст показань у протокол, якщо жоден з учасників процесуальної дії не наполягає на цьому, проте, це не є поширеним на практиці. Крім того, відомості щодо кримінального провадження вносяться до Єдиного державного реєстру досудових розслідувань.

Натепер законодавець передбачив рух у бік більшої діджиталізації кримінального провадження, закріпивши існування інформаційно-телекомунікаційної системи досудового розслідування – системи, яка забезпечує створення, збирання, зберігання, пошук, оброблення і передачу матеріалів та

інформації (відомостей) у кримінальному провадженні. У її межах можливо і дослідження матеріалів досудового розслідування. Разом з тим, ця система натепер поширена на кримінальні провадженнях, досудове розслідування в яких здійснюється детективами Національного антикорупційного бюро України (Положення про інформаційно-телекомунікаційну систему досудового розслідування "іКейс". Затверджено Наказом Національного антикорупційного бюро України, Офісу Генерального прокурора, Ради суддів України, Вищого антикорупційного суду від 15 грудня 2021 року № 175/390/57/72).

Проте, умови воєнного часу висунули нові вимоги щодо фіксування, зокрема його технічного складника, передбачивши певний «відхід» порівнюючи із загальною формою. Зокрема, в умовах воєнного стану процесуальні дії під час кримінального провадження фіксуються у відповідних процесуальних документах, тобто протоколах, а також за допомогою технічних засобів фіксування кримінального провадження, крім випадків, якщо фіксування за допомогою технічних засобів неможливе з технічних причин. Якщо неможливо скласти документи в паперовому вигляді, фіксація здійснюється будь-якими доступними технічними засобами з подальшим складенням відповідного протоколу не пізніше сімдесяти двох годин із моменту завершення процесуальних дій. Так, як прописано в ст. 615 КПК України, стає зрозумілим, що має бути забезпечення фіксування у двох формах, у разі неможливості одночасно це зробити – пріоритет віддається технічним засобам фіксування, проте, за появи можливості протокол теж має бути складений. Пріоритет технічних засобів у сучасному світі інформаційних технологій цілком закономірний, зважаючи ще й на те, скільки процесуальних дій проводиться, а записи, зроблені технічними засобами, легше зберігати на електронних носіях або хмарних середовищах та передавати спільним слідчим групам та МКС. Зауважимо, що створено портал для подання доказів воєнних злочинів: https://warcrimes.gov.ua/. У Офісу Генерального прокурора є база даних I-DOC, яка дає змогу здійснювати аналіз та систематизацію цих злочинів. Ця аналітична система інтегрована з ресурсом warcrimes.gov.ua (https://www.gp.gov.ua/ua/posts/warcrimesgovua-golovna-platforma-zboru-dokaziv-zlociniv-rf). Крім того, і громадські організації займаються документуванням воєнних злочинів, наприклад, коаліція з документування воєнних злочинів "Україна. П'ята ранку / Ukraine 5 AM Coalition" (Україна. П'ята ранку. Коаліція правозахисних організацій, які збирають та документують воєнні злочини і злочини проти людяності, вчинені в ході російської збройної агресії в Україні.), до якої ввійшло 30 громадських організацій та індивідуальні експерти (станом на 15 серпня 2022 року).

В Україні дотепер передбачена участь понятих при проведенні процесуальних дій. Зокрема, у разі проведення пред'явлення особи, трупа чи речі для впізнання, огляду трупа, у тому числі пов'язаного з ексгумацією, слідчого експерименту, освідування особи, крім ситуацій, коли здійснюється безперервний відеозапис. Поняті можуть бути запрошені для участі в інших процесуальних діях, якщо слідчий, прокурор вважатиме це за доцільне.

Проте для слідчих (розшукових) дій, які проводяться в житлі чи іншому володінні особи, передбачені більш жорстві правила: обшук або огляд житла чи іншого володіння особи, обшук особи здійснюються з обов'язковою участю не менше двох понятих незалежно від застосування технічних засобів фіксування відповідної слідчої (розшукової) дії (ч. 7 ст. 223 КПК України). Проте, за умов воєнного стану ці правила уточнені, адже якщо залучення понятих є об'єктивно неможливим або пов'язано з потенційною небезпекою для їхнього життя чи здоров'я, ці слідчі (розшукові) дії проводяться без залучення понятих, проте, фіксуються доступними технічними засобами за допомогою здійснення безперервного відеозапису. Зазначимо, що слушним є розуміння такої потенційної небезпеки, що може полягати в «необхідності проведення обшуку на території, яка є наближеною до бойових дій, не розмінованої ділянки місцевості, а також у разі подання сигналу повітряної тривоги» (Zaika, Zaicev, 2022, c. 78-81).

На практиці виникало питання, у який спосіб це має доводитись. Ми вже звертали увагу, що жодних критеріїв тлумачення «об'єктивної неможливості» залучення понятого або «потенційної небезпекою для їхнього життя чи здоров'я» у КПК України немає. Саме тому, це питання має вирішувалися з урахуванням реальної військової обстановки за місцем проведення відповідних слідчих (розшукових) дій та безпосередньо в час їх проведення. Ідентифікація цієї обставини покладається на дізнавача, слідчого, прокурора (Добірка відповідей на актуальні запитання, підготовлених лекторами Ірина Гловюк та Виктор Завтур по матеріалах вебінару: "Особливий режим досудового розслідування та продовження строків тримання під вартою під час судового провадження в умовах воєнного стану").

Повноваження слідчого судді у КПК України не систематизовані, немає одної статті із переліком повноважень цього суб'єкта кримінального провадження, хоча він доволі широкий і останніми роками був розширений. Зауважимо, що саме слідчий суддя має повноваження вирішувати питання правомірності пропонованого стороною обвинувачення обмеження конституційних та процесуальних прав підозрюваного та деяких інших учасників кримінального провадження. Зокрема, саме за ухвалою слідчого судді в Україні вирішується питання про проведення обшуку; проведення огляду жит-

ла чи іншого володіння особи; проведення слідчого експерименту в житлі чи іншому володінні особи; провадження негласних слідчих (розшукових) дій: втручання в приватне спілкування (крім випадків здобуття відомостей з електронних інформаційних систем або її частини, доступ до яких не обмежується її власником, володільцем або утримувачем або не пов'язаний із подоланням системи логічного захисту), обстеження публічно недоступних місць, житла чи іншого володіння особи, установлення місцезнаходження радіообладнання (радіоелектронного засобу) (крім установлення місцезнаходження радіообладнання (радіоелектронного засобу) за заявою його власника), спостереження за особою, моніторинг банківських рахунків, аудіо-, відеоконтроль місця, негласне отримання зразків для порівняльного дослідження, тимчасове обмеження конституційних прав особи під час контролю за вчиненням злочину; продовження строку проведення негласної слідчої (розшукової) дії; застосування заходів забезпечення кримінального провадження ((Розділ 2 КПК України), крім таких заходів: затримання (у порядку ст. 207, 208, 298-2 КПК України), а також превентивного затримання; виклику слідчим, дізнавачем та прокурором; тимчасового вилучення документів, які посвідчують користування спеціальним правом; тимчасового вилучення майна; попереднього арешту майна; відсторонення від посади осіб, що призначаються Президентом України; тимчасового відсторонення судді від здійснення правосуддя; вилучення речей і документів (у процесідізнання); примусове залучення особи для проведення медичної або психіатричної експертизи; примусове отримання зразків для експертизи; перевірка підстав для проникнення до житла чи іншого володіння особи без ухвали слідчого судді; перевірка підстав для проведення негласної слідчої (розшукової) дії виняткових невідкладних випадках тощо. Слідчий суддя здійснює і депонування показань, тобто допит свідка, потерпілого під час досудового розслідування в судовому засіданні. Загалом в Україні за КПК України в загальній процедурі забезпечено дотримання гарантій, передбачених ст. 5 та 8 Конвенції про захист прав людини й основоположних свобод (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950), хоча правозастосовна практика є такою, що призводить до визнання порушень Україною зобов'язань за цими статтями («Korban v. Ukraine» (Korban v. Ukraine (Application no. 26744/16)), «Aleksandrovskaya v. Ukraine» (Aleksandrovskaya v. Ukraine (Application no. 38718/16)), «Grubnyk v. Ukraine» (Grubnyk v. Ukraine (Application no. 58444/15))).

У період воєнного стану законодавець встановив винятки із загальної процедури, передбачивши «делегування» повноважень слідчого судді керівнику органу прокуратури, тобто замінивши судовий контроль наглядом із боку

керівника органу прокуратури. Це можливо лише за умови, коли в слідчого судді відсутня об'єктивна можливість виконання повноважень, вичерпний перелік яких сформульований у ст. 615 КПК України, і вони охоплюють не усі наявні повноваження слідчого судді. Складність нормативного регулювання у цьому випадку полягає в оцінності формулювання, що може спричинити різну оцінку наявності або браку такої можливості. Як пишуть Т. Фоміна та В. Рогальська, «поки не буде конкретизована вищезазначена норма, вважаємо, що можливість/неможливість виконувати слідчим суддею повноваження – повинна визначатися в кожному конкретному випадку окремо, виходячи з наявності реальної загрози життю, здоров'ю та безпеці учасників кримінального провадження, суддів, працівників апарату суду, а також існування інших об'єктивних обставин, що впливають на можливість здійснення судового контролю, зокрема, відсутність доступу до будівлі суду та матеріалів кримінального провадження» (Fomina, Rogalska, 2022). М.В. Тішин вказує, що для встановлення такої неможливості можуть бути використані «будь-які джерела, у тому числі документи, зі змісту яких видно, що слідчий суддя не має можливості здійснювати судовий контроль (довідки суду, ДСА, розпорядження про зміну територіальної підсудності тощо), а також загальновідомі факти щодо перебігу воєнних дій» (Tishin, 2022, с. 284).

Такий підхід треба підтримати, із зауваженням, що така нормативна конкретизація взагалі можлива, і можна сподіватися лише на узагальнені підходи саме правозастосовної практики.

Керівниками органу прокуратури є Генеральний прокурор, керівник обласної прокуратури, керівник окружної прокуратури та їх перші заступники й заступники, які діють у межах своїх повноважень (п. 9 ст. 3 КПК України), і, хоча КПК України прямо цього не передбачає, належать до сторони обвинувачення. При цьому, хоча в «делегованих» повноваженнях керівник органу прокуратури має встановити ті ж обставини, що і слідчий суддя, для прийняття рішення, з позицій його приналежності до сторони обвинувачення неупередженість за винесення рішення може викликати сумнів. Таке законодавче рішення викликало різну реакцію у правничій спільноті (Pelikhos, 2022; Mikitenko, Shapovalova, 2022; Fomina, Rogalska, 2022).

Натепер «делегованими» є такі повноваження:

щодо збирання та перевірки доказів та суміжні з ними: проведення допиту, впізнання в режимі відеоконференції; розгляд клопотання про проведення обшуку у порядку ч. 3 ст. 233 КПК України; розгляд клопотання про обшук у порядку ст. 234 КПК України; отримання зразків для експертизи; проведення негласних слідчих (розшукових) дій;

щодо заходів забезпечення кримінального провадження та перевірки обґрунтованості обмеження свободи особи: привід; тимчасовий доступ до речей і документів; арешт майна; дозвіл на затримання з метою приводу; загальні обов'язки судді щодо захисту прав людини, передбачені ст. 206 КПК України; обрання запобіжного заходу у вигляді тримання під вартою на строк до 30 діб до осіб, які підозрюються у вчиненні злочинів, передбачених 109-115, 121, 127, 146, 146-1, 147, 152-156-1, 185, 186, 187, 189-191, 201, 258-258-5, 255-255-2, 260-263-1, 294, 348, 349, 365, 377-379, 402-444 Кримінального кодексу України, а у виняткових випадках також у вчиненні інших тяжких та особливо тяжких злочинів, якщо затримка в обранні запобіжного заходу може призвести до втрати слідів кримінального правопорушення або втечі особи, яка підозрюється у вчиненні таких злочинів;

інші повноваження: продовження строку досудового розслідування.

Звісно, за таких умов відразу виникло питання щодо кореляції цих змін з положеннями ст. 5 (стосовно тримання під вартою та ст. 206 КПК України) та 8 (стосовно процесуальних дій у житлі) Конвенції про захист прав людини і основоположних свобод. Україна як сторона Конвенції скористалася своїм правом відступу від зобов'язань за Конвенцією за ст. 15. Причому Україна подала декілька заяв, у тому числі окремо стосовно кримінального провадження.

21 травня 2015 року Україна відступила від зобов'язань за статтями 5, 6, 8 та 13 Конвенції про захист прав людини і основоположних свобод, в окремих районах Донецької та Луганської областей України, визначених Антитерористичним центром при Службі безпеки України у зв'язку з проведенням антитерористичної операції, на період до повного припинення збройної агресії російської федерації, відновлення конституційного ладу та порядку на окупованій території України (The Resolution of the Verkhovna Rada of Ukraine of 21 May 2015 № 462-VIII «On derogation from certain obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms). Водночас було окремо було указано про превентивне затримання в Законі України «Про боротьбу з тероризмом» та про особливий режим досудового розслідування, відповідно до якого повноваження слідчих суддів, визначені чинним Кримінальним процесуальним кодексом України, тимчасово передаються відповідним прокурорам, які набувають додаткових процесуальних прав. Особливий режим досудового розслідування діє виключно в районі проведення антитерористичної операції та за умови неможливості слідчого судді виконувати повноваження, визначені чинним Кримінальним процесуальним кодексом України (The Resolution of the Verkhovna Rada of Ukraine of 21 May 2015 № 462-VIII «On derogation from certain obligations under the International Covenant on Civil

and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms).

Після ж 24 лютого 2022 року також було заявлено про дерогацію (Declaration contained in Note verbale № 31011/32-017-19264 from the Permanent Representation of Ukraine, dated 14 March 2022, registered at the Secretariat General on 16 March 2022 – Or. Engl., completed by a Communication from the Permanent Representation of Ukraine, dated 23 March 2022, registered at the Secretariat General on 23 March 2022 (https://rm.coe.int/1680a5ef57)), із покликанням саме на кримінально-процесуальну процедуру, а саме Закон України «Про внесення змін до Кримінального процесуального кодексу України та Закону України "Про попереднє ув'язнення" щодо додаткового регулювання забезпечення діяльності правоохоронних органів в умовах воєнного стану» від 3 березня 2022 року № 2111-IX (Закон України «Про внесення змін до Кримінального процесуального кодексу України та Закону України "Про попереднє ув'язнення" щодо додаткового регулювання забезпечення діяльності правоохоронних органів в умовах воєнного стану» від 3 березня 2022 року № 2111-IX), який став першим у лінії уточнень «воєнного» розділу КПК України у 2022 році і зміст якого вже передбачав «делегування» повноважень. Відступ торкається статей 5, 6, 13 Конвенції про захист прав людини і основоположних свобод. Надалі були повідомлення про продовження воєнного стану в Україні (Declaration contained in Note verbale № 31011/32-119-22401 from the Permanent Representation of Ukraine, dated 26 March 2022, registered at the Secretariat General on 28 March 2022 (Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)/Ukraine); Declaration contained in Note verbale № 31011/32-119-29958 from the Permanent Representation of Ukraine, dated 29 April 2022, registered at the Secretariat General on 29 April 2022 (Ibid.)).

Крім того, через набрання чинності змінами від 14 квітня 2022 року, було здійснено ще одну дерогацію (Communication contained in Note verbale No. 31011/32-119-42777 from the Permanent Representation of Ukraine, dated 17 June 2022, registered at the Secretariat General on 20 June 2022 – Or. Engl. (Ibid.)), за статтями 5, 6, 8 та 13 Конвенції про захист прав людини й основоположних свобод.

Основним питанням, яке надалі може викликати дискусію щодо допустимості доказів, є доведення неможливості здійснення слідчим суддею повноважень.

Ця проблема була й раніше, як і випадки визнання доказів недопустимими, коли встановлювалося в суді, що виконання слідчими суддями повноважень на території було можливе (Вирок Краматорського міського суду Донецької

області від 23 жовтня 2017 року (справа № 220/298/16-к)). Складність ситуації в тому, що спрогнозувати вичерпний перелік випадків, коли слідчий судді не матимуть об'єктивної можливості виконання повноважень слідчим суддею. Це очікувано, зважаючи на те, як веде бойові дії рф: знищує інфраструктуру, у тому числі суди, з яких не встигають вивезти матеріали; унеможливлюється технічне фіксування проваджень, немає можливості передати матеріали в працюючі суди тощо, судді та працівники терміново евакуюються через небезпеку для життя. Відповідальність за правильну ідентифікацію ситуації покладається саме на керівника органу прокуратури. Проте, треба звернути увагу і на те, що надалі, коли вже у судовому провадженні виникне питання про допустимість доказів, тягар доказування допустимості зібраних доказів, за вимогами ст. 92 КПК України, покладається вже на прокурора, а не на керівника органу прокуратури. Отже, керівник органу прокуратури має під час вирішення питання про виконання «делегованих» повноважень бути готовим до того, щоб його обґрунтування у процесуальному рішенні неможливості виконання повноважень слідчим суддею «витримала» перевірку щодо оцінки відповідних обставин у майбутньому.

Якщо ж є можливість виконання повноважень слідчими суддями, вони їх виконують у встановленому законом порядку, у тому числі в умовах воєнного стану. Зазначимо, що в умовах воєнного стану запроваджено нормативний механізм передання справ до інших судів. У разі неможливості здійснення правосуддя судом з об'єктивних причин під час воєнного або надзвичайного стану, у зв'язку зі стихійним лихом, військовими діями, заходами щодо боротьби з тероризмом або іншими надзвичайними обставинами може бути змінено територіальну підсудність судових справ, що розглядаються в такому суді, за рішенням Вищої ради правосуддя. Таке рішення ухвалюється за поданням Голови Верховного Суду, передаючи справу до суду, що розташований найближче до суду, який не може здійснювати правосуддя, або іншого визначеного суду. У разі неможливості здійснення Вищою радою правосуддя такого повноваження воно здійснюється за розпорядженням Голови Верховного Суду. Відповідне рішення є також підставою для передачі всіх справ, які перебували на розгляді суду, територіальна підсудність якого змінюється (ч. 7 ст. 147 Закону України «Про судоустрій і статус суддів» (Закон України «Про судоустрій і статус суддів» від 2 червня 2016 року № 1402-VIII)). Голова Верховного Суду неодноразово виносив розпорядження і про зміну, і про відновлення підсудності з 24 лютого 2022 року (Розпорядження про визначення територіальної підсудності справ).

Дещо неоднозначним є і питання судового контролю в розумінні розгляду та вирішення скарг у досудовому розслідуванні в умовах воєнного стану.

Загалом, така можливість передбачена ч. 4 ст. 615 КПК України: скарги на рішення, дії чи бездіяльність керівника органу прокуратури, прийняті або вчинені на виконання повноважень, визначених частиною першою цієї статті, розглядаються слідчим суддею того суду, в межах територіальної юрисдикції якого закінчено досудове розслідування, а в разі неможливості з об'єктивних причин здійснювати відповідним судом правосуддя – найбільш територіально наближеного до нього суду, що може здійснювати правосуддя, або іншого суду, визначеного в порядку, передбаченому законодавством. Проте, тут є істотна колізія: адже, якщо скарги розглядатиме слідчий суддя, то не може йтися про суд, у межах територіальної юрисдикції якого закінчено досудове розслідування, бо слідчий суддя після закінчення досудового розслідування за КПК України не уповноважений розглядати скарги, вони розглядаються судом у судовому провадженні. Є різні розуміння цієї норми, одне з яких пов'язане із неможливістю розгляду скарг у досудовому розслідуванні, що не можна визнати вірним, проте, треба визнати очікуваним через такі суперечливі положення КПК України. Зауважимо, що деякі ухвали слідчих суддів, на жаль, демонструють, на жаль, такий формальний підхід щодо неможливості вирішення скарг до закінчення досудового розслідування (Ухвала слідчого судді Подільського районного суду м. Києва від 25 травня 2022 року (справа № 758/3649/22); Ухвала слідчого судді Київського районного суду м. Полтави від 07 червня 2022 року (справа № 552/2322/22); Ухвала Ірпінського міського суду Київської області від 26 травня 2022 року (справа № 367/1349/22); Ухвала слідчого судді Київського районного суду м. Харкова від 13 травня 2022 року (справа № 953/3147/22)), наводячи, наприклад, таке обґрунтування: «за змістом цієї норми можливість оскарження рішення прийнятого керівником органу прокуратури прийнятих на виконання повноважень, визначених частиною першою цієї статті, пов`язано із закінченням досудового розслідування» (Ухвала слідчого судді Подільського районного суду м. Києва від 25 травня 2022 року (справа № 758/3649/22)).

Крім того, варто звернути увагу й на те, що у разі такого оскарження слідчий суддя місцевого суду стає «судом апеляційної інстанції» для керівника органу прокуратури, що незвично для правової системи України. Є питання і в тому, чи є обмеженим перелік повноважень керівника органу прокуратури, рішення за якими підлягають оскарженню, оскільки не всі ухвали слідчого судді за цими повноваженнями оскаржують у апеляційному порядку за ст. 309 КПК України. Зауважимо, що КПК України не містить обмежень щодо оскарження постанов за «делегованими» повноваженнями керівника органу прокуратури, а отже, слідчі судді зобов'язані приймати, відкривати провадження та розглядати такі скарги. Водночас, ефективність такого оскарження

обмежується ще деякими положеннями КПК України. Зокрема, йдеться про п. 5 ч. 1 ст. 615 КПК України, якщо відсутня об'єктивна можливість виконання процесуальних дій у строки, визначені статтями 304, 306 КПК України, – такі процесуальні дії мають бути проведені невідкладно за наявності можливості, але не пізніше ніж через 15 днів після припинення чи скасування воєнного стану. Відповідні статті регламентують строк подання скарги на рішення, дії чи бездіяльність слідчого, дізнавача чи прокурора, її повернення або відмова відкриття провадження (ст. 304 КПК України) та порядок розгляду скарг на рішення, дії чи бездіяльність слідчого, дізнавача чи прокурора під час досудового розслідування (ст. 306 КПК України), що свідчить про те, що слідчі судді, самі оцінюючи можливість реалізації своїх повноважень, можуть відстрочувати розгляд скарг на невизначений час, оскільки наразі невідомо, коли буде припинено або скасовано воєнний стан. З іншого боку, цими нормами можуть скористатися скаржники, проте, довівши, що об'єктивної можливості виконання процесуальних дій не було.

Проблемою є і те, що автоматичного судового контролю здійснення «делегованиих» повноважень – немає, навіть коли така можливість з'являється в слідчого судді; тобто норма ч. 3 ст. 615 КПК України, що про рішення, прийняті прокурором у випадках та порядку, передбачених цією статтею, невідкладно за першої можливості повідомляється прокурор вищого рівня, а також суд, визначений у порядку, передбаченому законодавством, з наданням копій відповідних документів не пізніше 10 днів із дня повідомлення, є декларативною. Тому доречною є пропозиція Т.О. Лоскутова, що у змісті ст. 615 КПК України доцільно унормувати положення відносно обов'язкового подальшого та максимально оперативного контролю слідчого судді за перевіркою законності затримання підозрюваної особи під час правового режиму воєнного стану; суть цієї законодавчої пропозиції має стосуватися не лише затримання, а й інших заходів забезпечення кримінального провадження, слідчих (розшукових) дій, кримінальних процесуальних дій, щодо яких судовий контроль в умовах воєнного стану у виняткових випадках замінюється на прокурорський нагляд відповідно до п. 2 ч. 1 ст. 615 КПК України (Loskutov, 2022a, с. 420).

Отже, як видно, реалізація судового контролю є ускладненою, а це не сумісне із ст. 13 Конвенції про захист прав людини і основоположних свобод.

Істотно змінилася процедура ***застосування заходів забезпечення кримінального провадження***, у тому числі й запобіжних заходів, які є їх різновидом. Найбільше це торкнулося тимчасового доступу до речей і документів, який являє собою захід забезпечення кримінального провадження із доказо-

вою спрямованістю та полягає у наданні стороні кримінального провадження особою, у володінні якої є такі речі й документи, можливості ознайомитися з ними, зробити їх копії та вилучити їх (здійснити їх виїмку) (ч. 1 ст. 159 КПК України).

Якщо в межах загальної процедури привід; тимчасовий доступ до речей і документів; арешт майна – застосовуються за ухвалою слідчого судді, то в період воєнного стану – за постановою керівника органу прокуратури.

Проте, щодо тимчасового доступу до речей і документів, є ще більш «спеціальні» норми. Вони є спеціальними за такими аспектами: предметним (тимчасовий доступ до речей і документів, визначених у пунктах 2 (відомості, які можуть становити лікарську таємницю); 5 (відомості, які можуть становити банківську таємницю); 7 (інформація, яка є в операторів та провайдерів телекомунікацій, про зв'язок, абонента, надання телекомунікаційних послуг, у тому числі отримання послуг, їх тривалості, змісту, маршрутів передавання тощо); 8 (персональні дані особи, що є у її особистому володінні або в базі персональних даних, яка знаходиться у володільця персональних даних), частини першої статті 162 КПК України) та темпоральним (під час дії надзвичайного або воєнного стану на території України). Тому, відповідно, є колізія і виникає питання, яка норма щодо саме воєнного стану має пріоритет. Вирішення цієї колізії запропоновано О. Кравчуком, який пише: під час воєнного або надзвичайного стану: (1) ТДРД до лікарської, банківської таємниці, даних провайдерів телекомунікацій та інших персональних даних – здійснюється за постановою прокурора, погодженою керівником органу прокуратури. Для винесення такої постанови клопотання слідчого необов'язкове. (2) ТДРД до інших видів речей і документів – здійснюється за ухвалою слідчого судді, суду або постановою керівника органу прокуратури. Ця постанова виноситься за клопотанням прокурора або слідчого, погодженим із прокурором, та лише за умови, якщо неможлива реалізація слідчим суддею відповідних повноважень (Kravchuk, 2022b). Таке тлумачення є логічним і саме так має вирішуватися ця колізія, хоча емпірика показує, що в професійної спільноти є протилежне тлумачення можливості вирішення цієї колізії. Зокрема, в ухвалі слідчого судді указується, що «незважаючи на введення воєнного стану, судова система України та, зокрема, міста Кривого Рогу, постійно функціонує в повному обсязі. … А отже, підстав для зміни порядку проведення слідчих дій та інших заходів забезпечення кримінального провадження немає. … Тобто, так згідно з Перехідними положеннями прокурору передано повноваження "під час дії надзвичайного або воєнного стану на території України тимчасовий доступ до речей і документів, визначених у пунктах 2, 5, 7, 8 частини першої статті 162 цього Кодексу, здійснюється на підставі постанови прокурора, погодженої

з керівником прокуратури", але водночас відповідно до п. 2 ч. 2 ст. 615 КПК України єдиною підставою для самостійного прийняття рішення органом прокуратури про здійснення тимчасового доступу до речей та документів під час воєнного стану є не тільки введення надзвичайного або воєнного стану, а й об`єктивна неможливість виконання слідчим суддею своїх повноважень через введення такого стану. У даному випадку слідчі судді Довгинцівського районного суду м. Кривого Рогу Дніпропетровської області, за місцем здійснення досудового розслідування, повною мірою здійснюють судочинство, тож постанова прокурора від 01.06.2022 року підлягає скасуванню» (Ухвала слідчого судді Довгинцівського районного суду міста Кривого Рогу Дніпропетровської області від 15 червня 2022 року (справа № 211/435/22)).

Водночас, з урахуванням того, що прокурор належить до сторони обвинувачення, є питання, наскільки буде дотримуватися пропорційність втручання в права людини в аспекті тимчасового доступу, зважаючи на чутливість відомостей, тимчасовий доступ до яких можливий за постановою прокурора (зокрема, щодо персональних даних та даних у операторів зв'язку). Аналогічні побоювання є і стосовно керівника органу прокуратури, зважаючи на те, що в умовах воєнного часу саме на них покладається встановлення обставин локального предмету доказування по тимчасовому доступу до речей і документів, який включає в себе і пропорційність втручання, тобто визначення, за який період потрібні відомості, їх коло, як тлумачити поняття персональні дані особи. Із цього питання є широка практика ЄСПЛ (case of Rotaru v. Romania (Application no. 28341/95) (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Rotaru%20v.%20Romania%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58586%22]}), case of Leander v. Sweden (Application no. 9248/81) (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Leander%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57519%22]}), case of S. and Marper v. the United Kingdom (Applications nos. 30562/04 and 30566/04) (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20S.%20AND%20MARPER%20v.%20THE%20UNITED%20KINGDOM\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-90051%22]}), і хоча була дерогація по ст. 8 Конвенції про захист прав людини й основоположних свобод, Конституція України (Конституція України від 28 червня 1996 року) у ст. 32, сам текст КПК викладено з урахуванням цих положень, релевантні гарантії містяться в Конвенції про захист осіб у зв›язку з автоматизованою обробкою персональних даних, яка набула чинності для України 01 січня 2011 (Закон України «Про ратифікацію Конвенції про захист осіб у зв›язку з автоматизованою обробкою персональних даних та

Додаткового протоколу до Конвенції про захист осіб у зв›язку з автоматизованою обробкою персональних даних стосовно органів нагляду та транскордонних потоків даних» від 6 липня 2010 року N 2438-VI), а отже, вони мають бути враховані під час прийняття відповідної постанови прокурора. Зокрема, йдеться про такі таке: зберігання інформації, яка стосується приватного життя особи, є втручанням держави в реалізацію її прав за ст. 8 Конвенції про захист прав людини і основоположних свобод; мета збирання та використання, правила використання, тривалість зберігання, доступ інших осіб, збереження даних, підстави та термін знищення тощо. Відповідно, приймають постанову, вони мають чітко ідентифікувати необхідність у демократичному суспільстві в умовах воєнного стану, тобто отримувати та використовувати виключно той обсяг інформації, який є необхідним виключно для розкриття кримінального правопорушення (з урахуванням часових меж його вчинення), без надмірного обмеження права на приватність, зважаючи ще й на те, що за ст. 221 та 290 КПК України учасники кримінального правопорушення матимуть право на ознайомлення з цією чутливою для особи інформацією.

Щодо запобіжних заходів, зміни очікувано торкнулися найбільш судових запобіжних заходів – тримання під вартою та затримання.

Загальна процедура застосування тримання під вартою передбачає судових порядок (за ухвалою слідчого судді, суду), наявність загальних підстав: обґрунтованості підозри та ризиків, а також додаткових умов, передбачених ст. 183 КПК України, що відображають виключність характеру застосування цього заходу в разі, якщо інші запобіжні заходи не здатні забезпечити дієвість кримінального провадження в аспекті виключення ризиків переховуватися від органів досудового розслідування та/або суду; знищити, сховати або спотворити будь-яку із речей чи документів, які мають істотне значення для встановлення обставин кримінального правопорушення; незаконно впливати на потерпілого, свідка, іншого підозрюваного, обвинуваченого, експерта, спеціаліста в цьому ж кримінальному провадженні; перешкоджати кримінальному провадженню іншим чином; вчинити інше кримінальне правопорушення чи продовжити кримінальне правопорушення, у якому підозрюється, обвинувачується.

У період воєнного стану за браком об'єктивної можливості виконання слідчим суддею повноважень, ці повноваження передані керівнику органу прокуратури, але з такими обумовленнями: (1) до 30 діб; (2) до осіб, які підозрюються у вчиненні злочинів, передбачених статтями 109-115, 121, 127, 146, 146-1, 147, 152-156-1, 185, 186, 187, 189-191, 201, 255-255-2, 258-258-5, 260-263-1, 294, 348, 349, 365, 377-379, 402-444 Кримінального кодексу України; (3) додатково, у виняткових випадках також у вчиненні інших тяжких чи особливо

тяжких злочинів, якщо затримка в обранні запобіжного заходу може призвести до втрати слідів кримінального правопорушення чи втечі особи, яка підозрюється у вчиненні такого злочину. Цей додатковий випадок указує на такі ризики, як переховуватися від органів досудового розслідування та/або суду та знищити, сховати або спотворити будь-яку із речей чи документів, які мають істотне значення для встановлення обставин кримінального правопорушення (хоча й дещо в іншій інтерпретації), і загалом сутнісно додатково дублює деякі ризики зі ст. 177 КПК України.

Щодо строку, то він зменшений порівнюючи повноваженнями слідчого судді, адже за одною ухвалою слідчого судді, суду строк тримання під вартою не може перевищувати шістдесяти днів. Проте, це «скорочення» нівелюється положеннями щодо продовження строку дії цього запобіжного заходу. Продовжувати строк дії у досудовому розслідуванні у період воєнного стану також уповноважений керівник органу прокуратури, при чому і у випадках, коли цей захід обирався слідчим суддею, і у випадках, коли саме керівник органу прокуратури виносив про це постанову. При чому строк може бути продовжений до одного місяця та неодноразово в межах строку досудового розслідування. Отже, мають бути дотримані лише граничні строки тримання під вартою у досудовому розслідуванні: 6 місяців – у кримінальному провадженні щодо нетяжкого злочину; 12 місяців – у кримінальному провадженні щодо тяжких або особливо тяжких злочинів.

Й обрання, і продовження строку цього запобіжного заходу здійснюються за клопотанням прокурора або за клопотанням слідчого, погодженим із прокурором.

Деякі норми передбачено для судового провадження. Зокрема, питання щодо запобіжного заходу має бути вирішене у підготовчому судовому провадженні. Проте, у разі, якщо це засідання неможливо провести, то запобіжний захід у вигляді тримання під вартою вважається продовженим до вирішення відповідного питання в підготовчому судовому засіданні, але не більше ніж на два місяці (ч. 5 ст. 615 КПК України). Аналогічно в разі закінчення строку дії ухвали суду про тримання під вартою та неможливості розгляду судом питання про продовження строку тримання під вартою обраний запобіжний захід у вигляді тримання під вартою вважається продовженим до вирішення відповідного питання судом, але не більше ніж на два місяці (ч. 6 ст. 615 КПК України).

Водночас локальний предмет доказування щодо встановлення обґрунтованої підозри, ризиків, обставин, що враховуються у разі застосування запобіжного заходу, пропорційності застосування залишається і в період воєнного стану. Тягар доказування покладається на слідчого, прокурора, а оцінка до-

казів для прийняття рішення з урахуванням засади пропорційності – покладаються на керівника органу прокуратури. Зазначимо, що має враховуватися практика ЄСПЛ із цих питань за ст. 5 Конвенції про захист прав людини й основоположних свобод, незважаючи на дерогацію, адже відповідні гарантії зазначені у вимогах КПК України щодо доказування. Отже, релевантною є позиція ЄСПЛ, що відповідно до його усталеної практики за пунктом 3 статті 5 Конвенції існування обґрунтованої підозри, що ув'язнений вчинив злочин, є умовою sine qua non для законності тривалого тримання під вартою, але зі спливом деякого часу цього вже недостатньо. У таких випадках Суд повинен встановити, чи продовжували інші підстави, наведені органами судової влади, виправдовувати позбавлення свободи. Якщо такі підстави були «відповідними» та «достатніми», Суд також повинен з'ясувати, чи продемонстрували компетентні національні органи влади «особливу ретельність» під час здійснення провадження. Суд також встановив, що органами державної влади має бути переконливо обґрунтовано будь-який період тримання під вартою, яким би коротким він не був. Вирішуючи питання про звільнення або подальше тримання особи під вартою, органи державної влади зобов'язані розглянути альтернативні засоби забезпечення її явки до суду. Вимога до суду надати «обґрунтовані» та «достатні» підстави тримання під вартою – додатково до обґрунтованої підозри – застосовується вже під час ухвалення першого рішення щодо тримання під вартою під час досудового розслідування, тобто «негайно» після арешту (case of Dobryn v. Ukraine (Application no. 27916/12) (https://hudoc.echr.coe.int/ukr#{%22fulltext%22:[%22Dobryn%22],%22itemid%22:[%22001-209452%22]})).

Водночас, звернемо увагу на вразливість цих положень у аспекті практики ЄСПЛ та практики Конституційного Суду України. Свого часу у КПК України була норма, що «За відсутності зазначених клопотань сторін кримінального провадження застосування заходів забезпечення кримінального провадження, обраних під час досудового розслідування, вважається продовженим» (ст. 315 КПК України), що застосовувалася в підготовчому судовому провадженні. ЄСПЛ (case of Chanyev v. Ukraine (Application no. 46193/13) (https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2246193/13%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-146778%22]})) у 2014 році визнав, що українське кримінальне процесуальне чинне законодавство дозволяє продовження тримання підозрюваного під вартою без судового рішення упродовж періоду тривалістю до двох місяців та що ці положення застосовувалися в справі заявника, який перебував під вартою без ухвали суду про обрання запобіжного заходу у вигляді тримання під вартою в період із 28 лютого до 15 квітня 2013 року включно.

Відповідно було порушення пункту 1 статті 5 Конвенції. У 2017 році Конституційний Суд України визнав це положення КПК України неконституційним, указавши такі аргументи: продовження судом під час підготовчого судового засідання застосування заходів забезпечення кримінального провадження щодо запобіжних заходів у виді домашнього арешту та тримання під вартою за браком клопотань прокурора порушує принцип рівності всіх учасників судового процесу, а також принцип незалежності та безсторонності суду, оскільки суд стає на сторону обвинувачення у визначенні наявності ризиків за статтею 177 КПК України, які впливають на необхідність продовження домашнього арешту або тримання під вартою на стадії судового провадження у суді першої інстанції. Коли суддя за браком клопотань сторін (прокурора) ініціює питання продовження тримання обвинуваченого під вартою або домашнім арештом, він виходить за межі судової функції і фактично стає на сторону обвинувачення, що є порушенням принципів незалежності й безсторонності судової влади (Рішення Конституційного Суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положення третього речення частини третьої статті 315 Кримінального процесуального кодексу України 23 листопада 2017 року № 1-р/2017). Отже, й автоматичне продовження строку тримання під вартою в умовах воєнного стану має ризик бути визнаним неконституційним.

Відповідно, виникла низка практичних проблем щодо обрання та продовження строку тримання під вартою, зокрема: дії слідчого судді, суду за браком матеріалів кримінального провадження; неможливість доставлення підозрюваного, обвинуваченого, якого позбавлено свободи, та дистанційне провадження; автоматичне продовження тримання під вартою в досудовому розслідуванні; неодноразове автоматичне продовження в судовому провадженні; питання щодо постановлення у разі «автоматичного продовження» строку тримання під вартою ухвали; оскарження «автоматичного продовження» строку тримання під вартою.

Через бойові дії, руйнування приміщень судів, захоплення органів влади на тимчасово окупованих територіях нерідкою є ситуація, коли неможливо надати до суду матеріали кримінальних проваджень. Верховний Суд роз'яснив, що в таких випадках слідчий суддя (суд) має керуватися всіма наявними матеріалами клопотання про застосування (продовження) запобіжного заходу. Під час розгляду клопотань органів досудового розслідування суд використовує всі наявні документи й матеріали, зокрема, й судові рішення у формі, у якій їх внесено до Єдиного державного реєстру судових рішень (роздруківки з Реєстру). Вирішуючи питання про продовження запобіжного

заходу, суд може зважати на попередню оцінку деяких фактичних обставин, здійснену ним при вирішенні попередніх клопотань у цьому кримінальному провадженні на підставі відповідних матеріалів, і не здійснювати надмірного витребування матеріалів у сторін кримінального провадження (Лист Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» № 2/0/2-22 від 03 березня 2022 року). Водночас, на практиці неможливість надання матеріалів розглядається і як ситуація, коли неможливий розгляд відповідного питання слідчим суддею, судом та тягне наслідки, відповідно, реалізації цих повноважень керівником органу прокуратури (у досудовому розслідуванні) та автоматичне продовження строку тримання під вартою (у стадії судового розгляду).

За загальним правилом, участь підозрюваного, обвинуваченого в розгляді клопотання про обрання запобіжного заходу у вигляді тримання під вартою, продовження строк тримання під вартою є обов'язковим. Проте, в умовах бойових дій, може бути ризикованим для життя або взагалі унеможливленим доставляння підозрюваних, обвинувачених, які затримані або тримаються під вартою, до слідчого судді, суду. Наслідком такої можливості може бути дистанційна участь у розгляді клопотання, якщо є зв›язок з установою, де тримається підозрюваний, обвинувачений. Верховний Суд роз'яснив: якщо через об'єктивні обставини учасник кримінального провадження не може брати участь у засіданні в режимі відеоконференцзв'язку за допомогою технічних засобів, визначених КПК України, як виняток можна допускати участь такого учасника в режимі відеоконференцзв'язку за допомогою інших засобів. За цих обставин треба звернути увагу на роз'яснення такому учаснику його процесуальних прав та обов'язків. Також, З огляду на об'єктивні обставини, як виняток, можна допускати розгляд клопотань щодо запобіжних заходів без участі підозрюваного, з належною мотивацією такої процедури розгляду (Ibid.). Тим не менш, у КПК України норм щодо розгляду клопотання без участі підозрюваного немає, крім випадків, коли йдеться про ситуації, що підозрюваний, обвинувачений виїхав та/або перебуває на тимчасово окупованій території України, території держави, визнаної Верховною Радою України державою-агресором, та/або оголошений у міжнародний розшук. Тому, з урахуванням того, що відступу від зобов'язань за ст. 6 Конвенції про захист прав людини й основоположних свобод немає, то більш правильним є шлях забезпечення дистанційної присутності підозрюваного, обвинуваченого. Водночас, законодавство не є чітким у цьому сенсі, бо зараз ст. 336 КПК України дозволяє дистанційне судове провадження, коли в режимі віддаленої присутності знаходиться обвинувачений, без його згоди в умовах воєнного стану, проте, ця стаття не вирішує питання провадження щодо розгляду клопотання слідчим суддею стосовно

підозрюваного, хоча лист Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» це дозволяє.

Питання, чи допустиме автоматичне продовження тримання під вартою в досудовому розслідуванні, викликає різні тлумачення в доктрині (Glovyiuk, 2022, с. 61-64) та на практиці.

Можна навести приклади судових рішень, де цей механізм ч. 6 ст. 615 КПК України застосовується, із посиланням на неможливість забезпечити участь підозрюваного у розгляді питання про продовження дії запобіжного заходу, відсутність матеріалів, які би обґрунтовували необхідність продовження останньому строк дії раніше обраного запобіжного заходу (Ухвала Жовтневого районного суду Дніпропетровська від 25 березня 2022 року (справа № 201/2132/22); Ухвала слідчого судді Жовтневого районного суду Дніпропетровська від 23 березня 2022 року (справа № 201/2076/22)).Водночас, з таким тлумачення погодитися неможливо, що вже детально обґрунтовувалося раніше, оскільки: по-перше, структурно-логічно відповідні норми у КПК України розташовані у такий спосіб, що спочатку регламентовано питання щодо обрання запобіжного заходу у досудовому розслідуванні (ч. 1); його продовження в досудовому розслідуванні (ч. 2); продовження строку тримання під вартою в разі неможливості проведення підготовчого судового засідання (ч. 5); та насамкінець правило «у разі закінчення строку дії ухвали суду про тримання під вартою та неможливості розгляду судом питання про продовження строку тримання під вартою в установленому цим Кодексом порядку обраний запобіжний захід у вигляді тримання під вартою вважається продовженим до вирішення відповідного питання судом, але не більше ніж на два місяці». За логікою стадійності кримінального провадження, ці норми стосуються судового розгляду. По-друге, якщо припустити, що це правило стосується досудового розслідування, то виходить, що у досудовому розслідуванні є три (!!!) альтернативні процедури продовження строку тримання під вартою: 1) слідчим суддею – якщо є можливість здійснення повноважень; 2) керівником органу прокуратури – якщо в слідчого судді немає можливості здійснювати повноваження; 3) автоматично – якщо в слідчого судді немає можливості здійснювати повноваження. Тобто останні дві процедури є за змістом дублюючими одна одну. Отже, виникає питання потреби такого дублювання зважаючи на те, що, продовжуючи строк тримання під вартою в ситуації, де цей запобіжний захід обирався слідчим суддею, керівник органу прокуратури не обмежений за колом злочинів ч. 1 ст. 615 КПК України. По-третє, якщо рішенні про продовження строку тримання під вартою приймається прокурором, воно може бути оскаржене згідно із ч. 4 ст. 615 КПК України. Попри недоліки формулювання такої норми, однаково ця гарантія наявна, по-

при ситуацію із автоматичним продовженням строку тримання під вартою (Glovyiuk, 2022, с. 63).

Виникає питання на практиці і про те, чи можливе неодноразове автоматичне продовження строку тримання під вартою в судовому провадженні, керуючись ч. 6 ст. 615 КПК України. Як видається, таке неодноразове продовження недопустиме, адже ця є частина статті передбачає продовження до вирішення відповідного питання судом, але не більше ніж на два місяці, і не йдеться про неодноразове продовження (на відміну, зокрема, від ч. 2 ст. 615 КПК України щодо стадії досудового розслідування, де вказано, що строк тримання під вартою може продовжуватися неодноразово в межах строку досудового розслідування).

Питання щодо постановлення у разі «автоматичного продовження» строку тримання під вартою ухвали є таким, що протилежно тлумачиться в судовій практиці, є випадки й постановлення ухвал, і скерування на адресу начальника слідчого ізолятора повідомлення, у якому констатується неможливість розгляду судом питання про продовження обраного запобіжного заходу у вигляді тримання під вартою і що установою повинна бути виконана вимога ч. 6 ст. 615 КПК про продовження обраного запобіжного заходу у вигляді тримання під вартою до вирішення відповідного питання судом, але не більше ніж на два місяці (Gubnitskyi, 2022). КПК України обходить це питання замовчуванням, однозначно безспірної відповіді натепер дати неможливо, проте, при його вирішенні треба врахувати такі аспекти. З одного боку, особа може триматися під вартою, крім короткострокового затримання, за судовим рішенням, що є міжнародною, конституційною та кримінально-процесуальною гарантією. З іншого боку, якщо немає можливості проведення засідання, очевидно, що ніякого рішення суд прийняти не може, лише констатувати таку неможливість. По-третє, брак ухвали нівелює можливість оскарження незаконного тримання під вартою, що несумісне із ст. 13 Конвенції про захист прав людини і основоположних свобод. По-четверте, за браком ухвали сторона захисту для звільнення особи з-під варти застосовує механізм ст. 206 КПК України, проте, зважаючи на те, що ці повноваження теж є «делегованими», це також несумісне із ст. 13 Конвенції про захист прав людини й основоположних свобод.

Оскарження «автоматичного продовження» строку тримання під вартою є ускладненим. Беручи під увагу брак доступу до Єдиного державного реєстру судових рішень, наразі складно дати емпіричну картину ефективності використовуваних стороною захисту механізмів. Проте, застосовним є механізм ст. 206 КПК України, тобто перевірки слідчим суддею підстав позбавлення свободи. Водночас, ці повноваження теж є «делегованими», тому за браком

можливості реалізації цих повноважень слідчим суддею їх ефективність є сумнівною. Крім того, є проблема оскарження, коли констатується відмітність можливості проведення судового засідання, проте, вона в реальності була, проте, суд ухвали не постановив. У такому випадку є доречним апеляційне оскарження за браком ухвали суду, зважаючи на те, що судове рішення все же, хоча і не викладене в окремому процесуальному документі – ухвалі. Хоча, без сумніву, реалізація цього способу є, як мінімум, ускладненою.

Істотні зміни внесено до законодавства щодо затримання особи. Це стосується підстав та строків затримання. За ст. 208 КПК України, уповноважена службова особа має право без ухвали слідчого судді, суду затримати особу, підозрювану у вчиненні злочину, за який передбачене покарання у виді позбавлення волі, лише у випадках: 1) якщо цю особу застали під час вчинення злочину або замаху на його вчинення; 2) якщо безпосередньо після вчинення злочину очевидець, у тому числі потерпілий, або сукупність очевидних ознак на тілі, одязі чи місці події вказують на те, що саме ця особа щойно вчинила злочин; 3) якщо є обґрунтовані підстави вважати, що можлива втеча з метою ухилення від кримінальної відповідальності особи, підозрюваної у вчиненні тяжкого або особливо тяжкого корупційного злочину, віднесеного законом до підслідності Національного антикорупційного бюро України; 4) якщо є обґрунтовані підстави вважати, що можлива втеча з метою ухилення від кримінальної відповідальності особи, підозрюваної у вчиненні злочину, передбаченого статтями 255, 255-1, 255-2 Кримінального кодексу України. До цих підстав відсилає і ст. 615 КПК України, проте, передбачає і додаткову підставу затримання: виникли обґрунтовані обставини, які дають підстави вважати, що можлива втеча з метою ухилення від кримінальної відповідальності особи, підозрюваної у вчиненні злочину, хоча в загальній процедурі така підстава є лише у провадженні щодо корупційного злочину, підслідного Національному антикорупційному бюро України, та злочинів: створення, керівництво злочинною спільнотою або злочинною організацією, а також участь у ній; встановлення або поширення злочинного впливу; організація, сприяння в проведенні або участь у злочинному зібранні (сходці). За такого формулювання, підстави затримання є невизначеними та уповноважені службові особи мають надто широку дискрецію.

Згідно з Конституцією України, строк затримання без судового рішення становить 72 години. Аналогічні положення містяться і у ч. 2 ст. 12 КПК України.

Проте, без будь-який обумовлень у цій статті, є спеціальна норма ст. 615 КПК України щодо можливості затримання без ухвали слідчого судді, суду та постанови керівника органу прокуратури до 216 годин (9 діб) з моменту затри-

мання, тобто з моменту, коли особа силою або через підкорення наказу змушена залишатися поряд з уповноваженою службовою особою чи в приміщенні, визначеному уповноваженою службовою особою (ст. 209 КПК України). Відповідно, затримана без ухвали слідчого судді, суду чи постанови керівника органу прокуратури особа під час дії воєнного стану не пізніше двохсот шістнадцяти годин із моменту затримання повинна бути звільнена або доставлена до слідчого судді, суду чи керівника органу прокуратури для розгляду клопотання про обрання стосовно неї запобіжного заходу (п. 6 ч. 1 ст. 615 КПК України). У такому формулюванні, крім того, що строк затримання є надто довгим, є і ніші вади. Зокрема, строк затримання, по суті, ототожнено із строком доставлення до слідчого судді, суду, керівника органу прокуратури.

Звісно, що такі формулювання не могли не викликати критичної оцінки у правничій спільноті (Pelikhos, 2022; Fomina, Rogalska, 2022). Зазначимо, що вже є пропозиції щодо зміни цих положень. Зокрема, пропонується передбачити зміни до п. 6 ч. 1 ст. 615 КПК України, а саме: «Строк затримання особи без ухвали слідчого судді, суду не може перевищувати строку, визначеного статтею 211 цього Кодексу. Якщо в умовах воєнного стану наявні об'єктивні обставини, що унеможливлюють доставити затриману особу до слідчого судді, суду у строк, передбачений статтею 211 цього Кодексу, розгляд клопотання про обрання стосовно неї запобіжного заходу здійснюється із застосуванням технічних засобів (відео-, аудіозв'язку) для забезпечення дистанційної участі затриманої особи. Якщо затриману особу неможливо доставити до слідчого судді, суду у строк, передбачений статтею 211 цього Кодексу, для розгляду клопотання про обрання стосовно неї запобіжного заходу або забезпечити її дистанційну участь під час розгляду відповідного клопотання, така особа негайно звільняється» (Проєкт Закону України про внесення змін до Кримінального процесуального кодексу України щодо удосконалення окремих положень досудового розслідування в умовах воєнного стану (№ 7370 від 11.05.2022)). Дослідники указують і на потребу регламентувати обов'язковий подальший та оперативний судовий контроль за процедурою застосування (продовження) прокурором тримання під вартою в умовах воєнного стану, та те, що «під час правового режиму воєнного стану можуть бути врегульовані тимчасові винятки щодо вирішення питання про застосування (продовження) тримання під вартою без участі підозрюваного / обвинуваченого (взагалі сторони захисту), незалежно від його бажання бути присутнім на такому розгляді. У даному випадку «повноцінні» судові засідання щодо перевірки підстав та умов застосування (продовження) тримання під вартою за участю обох сторін кримінального провадження мають відбутися найближчим часом, з урахуванням обставин проведення бойових дій» (Loskutov, 2009, c. 132).

В умовах воєнної агресії проти України бажання захищати Батьківщину проявили в тому числі підозрювані, обвинувачені, які перебувають під вартою. Зважаючи на те, що КПК України раніше не враховував можливість залучення таких підозрюваних, обвинувачених до захисту Батьківщини, виникла потреба в процесуальному механізмі зміни та скасування запобіжного заходу, оскільки загальний механізм – за клопотанням сторони захисту – був недостатній, оскільки не враховував цільове призначення звільнення особи з-під варти. Відповідно, було додано до «воєнного» розділу ст. 616 КПК України, яка регламентує механізм скасування запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період та зміну запобіжного заходу з інших підстав. Основні складники механізму скасування запобіжного заходу для проходження військової служби за призовом під час мобілізації, на особливий період такі:

– застосовний лише в умовах воєнного стану;
– стосується осіб, які перебувають під вартою;
– обмеження за колом кримінальних правопорушень (не застосовний до осіб, які підозрюються у вчиненні злочинів проти основ національної безпеки України, а також злочинів, передбачених статтями 115, 146-147, 152-156, 186, 187, 189, 255, 255-1, 257, 258-262, 305-321, 330, 335-337, 401-414, 426-433, 436, 437-442 Кримінального кодексу України);
– мета: проходження військової служби за призовом під час мобілізації, на особливий період;
– порядок: звернення з клопотанням до прокурора, звернення прокурора з клопотанням до слідчого судді, суду; розгляд клопотання слідчим суддею, судом;
– якщо скасовано запобіжний захід у вигляді тримання під вартою, підозрюваний, обвинувачений має невідкладно, не пізніше 24 годин, з›явитися до відповідного територіального центру комплектування та соціальної підтримки за місцем реєстрації; у разі невиконання цього обов'язку, прокурор подає клопотання про обрання стосовно неї запобіжного заходу у вигляді тримання під вартою.

На практиці виникли проблемні питання застосування цього механізму: отримання висновку про придатність особи до несення військової служби в умовах воєнного стану; право (а не обов'язок) прокурора звернутися з клопотанням до слідчого судді; звернення сторони захисту з клопотаннями не до прокурора, а безпосередньо до слідчого судді.

Щодо того, як здійснюється оцінка придатності особи до несення військової служби в умовах воєнного стану, з ухвал єдину позицію виокремити неможливо, оскільки практично немає покликань на висновок як на окремий

документ. Наведемо приклад мотивування про придатність: «У минулому ОСОБА_1 працював на посаді інспектора ВРІО 2 категорії в Державній установі «Сумський слідчий ізолятор», що прирівнюється до військової служби» (Ухвала Подільського районного суд м. Києва від 18 квітня 2022 року (справа № 758/4796/21)).

Можливо припустити, що право (а не обов'язок) прокурора звернутися з клопотання до слідчого судді зумовлено тим, що в разі звільнення з-під варти саме прокурор здійснює контроль за виконанням ухвали слідчого судді або суду про скасування запобіжного заходу у вигляді тримання під вартою для проходження військової служби за призовом під час мобілізації.

У ситуації звернення сторони захисту з клопотаннями не до прокурора, а безпосередньо до слідчого судді, судова практика є різною, що зумовлено новизною цієї процедури та незвичністю такого механізму для сторони захисту, яка, за загальним правилом, з клопотанням про зміну запобіжного заходу сторона захисту звертається безпосередньо до слідчого судді, суду. Деякі клопотання розглядаються і вирішуються, а інші повертаються заявнику чи направляються для вирішення прокурору (Mikhailenko, 2022), або навіть у їх задоволенні відмовляють (Ухвала Бродівський районний Львівської області від 14 квітня 2022 року (справа № 439/2019/21)) (що доволі спірно через неналежного суб'єкта звернення). КПК України не регламентує, що роботи у такому випадку, але логічним є скерування клопотання прокурору, щоб не ускладнювати дії для сторони захисту щодо подання клопотання в умовах воєнного часу.

Крім того, слушно пишуть Т. Фоміна та В. Рогальська, що «системний аналіз ст.616 КПК дозволяє зрозуміти, що законодавець оминув визначення окремих аспектів, зокрема щодо: а) змісту клопотання підозрюваного, обвинуваченого до прокурора; б) підстав, за наявності яких прокурор визначає за доцільне звернутися до слідчого судді, суду; в) порядку розгляду слідчим суддею, судом клопотання прокурора; г) підстав, за наявності яких слідчий суддя або суд має право скасувати запобіжний захід (у ч. 2 ст. 616 КПК з цього приводу вжито оціночне поняття «за наявності достатніх підстав») (Fomina, Rogalska, 2022).

Зауважимо, що є спроби оскаржити незвернення прокурора з клопотанням в порядку ст. 616 КПК України як бездіяльність у порядку ст. 303 КПК України.

Ще одним цікавим питанням, яке виникло на практиці, стало те, підозрювані почали заявляти клопотання про зменшення сум застав із тим, що суму, на яку зменшено заставу, було передано на потреби оборони України, або взагалі із цією з метою зміну застави на особисте зобов'язання. Зазначимо, що це

питання первинно почалося вирішуватися на практиці без будь-яких спеціальний норм КПК України, проте, пізніше було роз'яснення Верховного Суду, що слідчим суддям (суду) необхідно зважати на обставини воєнного стану та, за наявності необхідних для цього підстав, за клопотанням підозрюваного доречно ухвалювати рішення про зміну запобіжного заходу у вигляді застави на особисте зобов'язання, якщо відповідне клопотання обгрунтовується бажанням використати кошти, передані в заставу, для їх подальшого внесення на спеціальні рахунки Національного банку України для цілей оборони України (Лист Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» № 2/0/2-22 від 03 березня 2022 року), і лише 15 березня було внесено зміни до КПК України, доповнено статтею 616, у якій передбачено, що за клопотанням підозрюваного, обвинуваченого слідчий суддя, суд має право ухвалити рішення про зміну запобіжного заходу у вигляді застави на особисте зобов'язання, якщо відповідне клопотання обґрунтовується бажанням використати кошти, передані в заставу (в повному обсязі або частково), для внесення на спеціальні рахунки Національного банку України для цілей оборони України.

Строки в досудовому розслідуванні та судовому провадженні були істотно трансформовані у спеціальних нормах, зважаючи на очікувані проблеми з їх дотриманням в умовах бойових дій. Водночас ці зміни торкнулися не лише строків запобіжного заходу, про що вже зазначено вище, а і строків повідомлення про підозру, строків досудового розслідування, строків здійснення процесуальних дій.

КПК України в межах загальної процедури передбачає, що особа, яка затримання за підозрою у вчиненні кримінального правопорушення, має бути повідомлена про підозру не пізніше двадцяти чотирьох годин із моменту затримання, і якщо таке повідомлення не здійснено, то особа з-під варти звільняється. Проте, у період воєнного стану можливі ситуації, коли вчасно неможливо повідомити про підозру, зважаючи на те, що, наприклад, складене слідчим повідомлення про підозру має бути погоджене з прокурором, а комунікація може бути унеможливленою або утрудненою в умовах бойових дій. Отже, у разі наявності об'єктивних обставин, що унеможливлюють вручення затриманій особі письмового повідомлення про підозру не пізніше двадцяти чотирьох годин із моменту затримання, якщо такі процесуальні дії здійснюються в умовах воєнного стану, строк для вручення письмового повідомлення про підозру затриманій особі може бути продовжено до сімдесяти двох годин. У разі якщо особі не вручено повідомлення про підозру впродовж сімдесяти двох годин з моменту її затримання, така особа підлягає негайному звільненню (ч. 7 ст. 615 КПК України). Зауважимо, що в цьому формуванні закладено

оцінне поняття щодо унеможливлюють вручення письмового повідомлення про підозру, і така можливість / неможливість, звісно, може по-різному тлумачитися сторонами кримінального провадження і може бути одним з аргументів оскарження повідомлення про підозру. Також треба звернути увагу та те, що таке «продовження» строку для повідомлення про підозру є невизначеним у тому аспекті, що КПК України прямо не передбачає необхідності винесення слідчим / дізнавачем / прокурором постанови (і з відомої практики є дані, що така постанова не виноситься), хоча, як видається, норма про винесення постанови є необхідною для відображення саме в процесуальному рішенні підстав такого «продовження», що було б гарантією від зловживань.

Чинне кримінальне процесуальне законодавство передбачає в межах загальної процедури два режими строків досудового розслідування: до повідомлення про підозру та після повідомлення про підозру, відповідно, ці строки є диференційованими та мають різні правила продовження. Загалом, до дня повідомлення про підозру строк становить: 1) дванадцять місяців – у кримінальному провадженні щодо нетяжкого злочину; 2) вісімнадцять місяців – у кримінальному провадженні щодо тяжкого або особливо тяжкого злочину. З дня повідомлення особі про підозру досудове розслідування повинно бути закінчене: 1) протягом сімдесяти двох годин – у разі повідомлення особі про підозру у вчиненні кримінального проступку або затримання особи; 2) протягом двадцяти діб – у разі повідомлення особі про підозру у вчиненні кримінального проступку у випадках, якщо підозрюваний не визнає вину або необхідності проведення додаткових слідчих (розшукових) дій, або вчинення кримінального проступку неповнолітнім; 3) протягом одного місяця – у разі повідомлення особі про підозру у вчиненні кримінального проступку, якщо особою заявлено клопотання про проведення експертизи; 4) протягом двох місяців з дня повідомлення особі про підозру у вчиненні злочину (ст. 219 КПК України). Зазначимо, що в умовах воєнного стану делегованими є і повноваження слідчого судді щодо продовження строку досудового розслідування, хоча за загальною процедурою до повідомлення особі про підозру строк досудового розслідування продовжується слідчим суддею, а після повідомлення про підозру до трьох місяців – керівником окружної прокуратури, керівником обласної прокуратури або його першим заступником чи заступником, заступником Генерального прокурора; до шести місяців – слідчим суддею за клопотанням слідчого, погодженим з керівником обласної прокуратури або його першим заступником чи заступником, заступниками Генерального прокурора; до дванадцяти місяців – слідчим суддею за клопотанням слідчого, погодженим із Генеральним прокурором чи його заступниками (ст. 294 КПК України). У період воєнного стану за браком об'єктивної можливості

виконання слідчим суддею цих повноважень, їх виконує керівник органу прокуратури.

Якщо ці строки не дотримані, то кримінальне провадження підлягає закриттю із уточненням, що коли йдеться про строк після повідомлення про підозру, то крім випадку повідомлення особі про підозру у вчиненні тяжкого чи особливо тяжкого злочину проти життя та здоров'я особи. Якщо ж жодній особі не було повідомлено про підозру, то строкових обмежень для закриття кримінального провадження немає. Відповідно, виникає питання досягнення публічного інтересу щодо захисту особи, суспільства, держави, від кримінальних правопорушень, а у ширшому контексті – публічного інтересу в безпеці. Тому законодавець і уточнив правила щодо строків саме для періоду воєнного стану. Йдеться про два механізми для цього: обрахування строків та зупинення досудового розслідування.

У частині обрахування строків, позиція ст. 615 КПК України така, що в кримінальних провадженнях, у яких жодній особі не було повідомлено про підозру на дату введення воєнного стану, строк від зазначеної дати до дати припинення чи скасування воєнного стану не зараховується до загальних строків досудового розслідування, тобто до строків до повідомлення особі про підозру. Про строк після повідомлення особі про підозру не йдеться, отже, обрахування здійснюється в межах загальної процедури. Тобто фактично на період воєнного стану строк досудового розслідування не спливає та не рахується. Зазначимо, що ця позиція вже зазнала критики у доктрині з урахуванням критеріїв ефективності досудового розслідування, і запропоновано регламентувати винятково розумний строк для проведення досудового розслідування, оскільки це дасть змогу визначати ефективність досудового розслідування в умовах бойових дій через урахування конкретних обставин здійснення кримінального провадження (Loskutov, 2022b, с. 16). Водночас, і ця пропозиція викликає питання в аспекті балансу інтересів, зважаючи на те, що навіть в умовах воєнного стану вчиняються різні діяння, не усі з них безпосередньо пов'язані з війною, і не всі мають або можуть мати такі складнощі в розслідуванні, як, наприклад, воєнні злочини.

Другий механізм пов›язаний із тим, що в разі браку об'єктивної можливості подальшого проведення, закінчення досудового розслідування та звернення до суду з обвинувальним актом, клопотанням про застосування примусових заходів медичного або виховного характеру, клопотанням про звільнення особи від кримінальної відповідальності – строк досудового розслідування в кримінальному провадженні зупиняється на підставі вмотивованої постанови прокурора з викладом відповідних обставин та підлягає поновленню, якщо підстави для зупинення перестали існувати (п. 3 ч. 1 ст. 615 КПК Укра-

їни). Ці формулювання із цілком зрозумілою ідеєю, проте, дещо юридично ускладненими способами її реалізації. Проблема в тому, у разі неможливості подальшого проведення досудового розслідування можна зупинити провадження за п. 4 ч. 1 ст. 280 КПК України за підставою наявні об'єктивні обставини, що унеможливлюють подальше проведення досудового розслідування в умовах воєнного стану. Проте, є складнощі, якщо, наприклад, уже іде етап ознайомлення з матеріалами досудового розслідування за ст. 290 КПКК України, бо вже йдеться про неможливість закінчення досудового розслідування та звернення до суду, а такої підстави зупинення у ч. 1 ст. 280 КПК України немає. Хоча, як ставить питання О. Кравчук, чи можна зупинити досудове розслідування, що є на стадії виконання вимог ст. 290 КПК. Так, на практиці в мирний час такі ситуації траплялися в разі оголошення в розшук підозрюваного на цій стадії (стадії ст. 290 КПК). Сама процедура зупинення досудового розслідування передбачена ст. 280 КПК, і винесення постанови слідчого або прокурора про зупинення досудового розслідування в такому випадку з покликанням на п. 3 ч. 1 ст. 615 КПК – один із варіантів зупинення строку, якщо сторона захисту завершила ознайомлення за ст. 290 КПК, але прокурор не може об'єктивно звернутися до суду з обвинувальним актом до завершення строків досудового розслідування. В разі винесення такої постанови, після зникнення обставин, що перешкоджали зверненню до суду з обвинувальним актом, вочевидь має бути прийнято постанову про відновлення такого строку (Kravchuk, 2022a). Це питання, як видається, потребує нормативного вирішення.

Цікавим із позицій строків є і механізм, закладений у п. 5 ч. 1 ст. 615 КПК України: якщо немає об'єктивної можливості виконання процесуальних дій у строки, визначені статтями 220 (розгляд клопотань під час досудового розслідування), 221 (ознайомлення з матеріалами досудового розслідування до його завершення), 304 (строк подання скарги на рішення, дії чи бездіяльність слідчого, дізнавача чи прокурора, її повернення або відмова відкриття провадження), 306 (порядок розгляду скарг на рішення, дії чи бездіяльність слідчого, дізнавача чи прокурора під час досудового розслідування), 308 (оскарження недотримання розумних строків), 376 (проголошення судового рішення), 395 (порядок і строки апеляційного оскарження), 426 (порядок і строки касаційного оскарження) КПК України, – такі процесуальні дії мають бути проведені невідкладно за наявності можливості, але не пізніше ніж через 15 днів після припинення чи скасування воєнного стану.Зазначимо, що в цих формулюваннях, по суті, поєднано два аспекти: (1) неможливість здійснення владних повноважень та (2) неможливість реалізації свої процесуальних прав учасниками кримінального провадження. Стандарт доказування за цих обставин

обрано однаковий – брак об'єктивної можливості виконання процесуальних дій. Зауважимо, що така уніфікація породжує багато питань. По-перше, сам перелік процесуальних дій, які неможливо виконати: зокрема, якщо є можливість постановлення судового рішення, то є можливість і його проголошення, тому сумнівним є згадка про ст. 376 КПК України в цьому переліку. По-друге, низка вищеперелічених статей містить у одній статті і правила для невладних, і правила для владних суб'єктів кримінального провадження (ст.ст. 220, 221, 304), і як це застосовуватиметься і разі, якщо, наприклад, невладні учасники мають можливість провести процесуальну дію, а невладні – ні – неясно. По-третє, для невладних учасників кримінального провадження надалі доказування браку об'єктивної можливості є ускладненим, що може вплинути на розгляд та вирішення відповідних скарг та клопотань. Наприклад, якщо особа перебуває в евакуації на території, де немає активних бойових дій, проте, матеріали, щоб подати скарги / клопотання, залишилися в іншому місці і до них нема доступу тощо. У підсумку, це впливає і на оперативність судового контролю у досудовому розслідуванні, про що вже згадувалося вище.

Здійснення правосуддя в умовах воєнного стану є необхідним, і відступу від зобов'язань за ст. 6 Конвенції про захист прав людини й основоположних свобод немає. За Конституцією України, право на судових захист не може бути обмежено в умовах воєнного стану. Відповідно, і у Законі України «Про правовий режим воєнного стану» (Закон України «Про правовий режим воєнного стану» від 12 травня 2015 року № 389-VIII) зазначено, що правосуддя на території, на якій введено воєнний стан, здійснюється лише судами. На цій території діють суди, створені відповідно до Конституції України. Скорочення чи прискорення будь-яких форм судочинства забороняється. У разі неможливості здійснювати правосуддя судами, які діють на території, на якій введено воєнний стан, законами України може бути змінена територіальна підсудність судових справ, що розглядаються в цих судах, або в установленому законом порядку змінено місцезнаходження судів. Створення надзвичайних та особливих судів не допускається (ст. 26). Зазначимо, що ці гарантії в чинному законодавстві загалом дотримано, правосуддя здійснюється лише судами, які й діяли до 24 лютого 2022, нові суди не створювалися (хоча періодично лунають пропозиції про військові суди). Що стосується зміни територіальної підсудності, то вона здійснюється згідно із ч. 7 ст. 147 Закону України «Про судоустрій і статус суддів» (Закон України «Про судоустрій і статус суддів» від 2 червня 2016 року № 1402-VIII), за якою в разі неможливості здійснення правосуддя судом з об'єктивних причин під час воєнного або надзвичайного стану, у зв'язку зі стихійним лихом, військовими діями, заходами щодо боротьби з тероризмом або іншими надзвичайними обставинами може бути

змінено територіальну підсудність судових справ, що розглядаються в такому суді, за рішенням Вищої ради правосуддя, що ухвалюється за поданням Голови Верховного Суду, за допомогою передачі її до суду, який найбільш територіально наближений до суду, який не може здійснювати правосуддя, або іншого визначеного суду. У разі неможливості здійснення Вищою радою правосуддя такого повноваження воно здійснюється за розпорядженням Голови Верховного Суду. Відповідне рішення є також підставою для передачі усіх справ, які перебували на розгляді суду, територіальна підсудність якого змінюється. На практиці через те, що не функціонує Вища рада правосуддя, відповідні повноваження реалізує Голова Верховного Суду.

Водночас, є ще один випадок «прихованої» зміни територіальної підсудності. Зокрема, під час дії воєнного стану обвинувальні акти, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності скеровуються та розглядаються судами, у межах територіальної юрисдикції яких закінчено досудове розслідування, а в разі неможливості з об'єктивних причин здійснювати відповідним судом правосуддя – найбільш територіально наближеним до нього судом, що може здійснювати правосуддя, або іншим судом, визначеним у порядку, передбаченому законодавством. Положення цієї частини не поширюються на кримінальні провадження, обвинувальні акти, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності в яких скеровано до суду до моменту введення воєнного стану та набрання чинності цією частиною (ч. 9 ст. 615 КПК України). Слушно зазначається щодо цього правила, що в ситуації, яка склалася у зв'язку із вторгненням рф на територію України, зазначене правоположення має колізійний характер, адже ці два моменти не збігаються: воєнний стан на всій території України був оголошений 24 лютого 2022 року, в той час як норми ч. 9 коментованої статті набрали чинності 01 травня 2022 року. Кримінальний процесуальний закон не має зворотної сили в часі, тому відповідна норма поширюється тільки на ті кримінальні провадження, обвинувальні акти, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності за якими скеровані до суду починаючи з 01 травня 2022 року (Glovyiuk and others, 2022, c. 52). Натомість, з огляду на те, що підсудність Вищому антикорупційному суду має родовий та персональний характер, для таких проваджень обвинувальні акти, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності скеровуються до Вищого антикорупційного суду за його місцезнаходженням в умовах воєн-

ного стану. Станом на день закінчення підготовки дослідження місцезнаходження цього суду не змінювалося.

Питання є лише щодо скорочення чи прискорення будь-яких форм судочинства. Відразу зазначимо, що йдеться не про фактичне, всупереч чинним нормам КПК України, скорочення чи прискорення, а про уточнення у ст. 615 КПК України деяких процедур, зокрема, щодо складу суду. Йдеться про те, що за загальною процедурою, є варіації складу суду в суді першої інстанції щодо злочинів, за вчинення яких передбачено довічне позбавлення волі: колегіально судом у складі трьох суддів, а за клопотанням обвинуваченого – судом присяжних у складі двох суддів та трьох присяжних. Проте, у період воєнного стану «нових» розглядів за участю суду присяжних не буде, оскільки є уточнення, що такий розгляд здійснюється колегіально судом у складі трьох суддів, крім здійснення кримінального провадження в суді, в якому до моменту введення воєнного стану та набрання чинності цією частиною ст. 615 КПК України було визначено склад суду за участю присяжних. У частині темпоральних меж ця стаття має вади, бо не збігаються моменти, які було процитовано вище.

Крім того, особливості встановлено щодо участі «ювенальних суддів», адже за загальним правилом, кримінальне провадження щодо неповнолітньої особи (підозрюваного, обвинуваченого), а також кримінальне провадження в апеляційному чи касаційному порядку здійснюються «ювенальним» суддею, тобто суддею, уповноваженим згідно із Законом України "Про судоустрій і статус суддів" на здійснення кримінального провадження стосовно неповнолітніх, а в колегіальному розгляді цим вимогам має відповідати головуючий. Натомість, це правило може не застосовуватися в умовах воєнного стану, якщо є обставини, що унеможливлюють участь судді, спеціально уповноваженого на здійснення кримінального провадження щодо неповнолітніх. Тобто ця норма не ліквідує потребу ювенальної спеціалізації в судах, проте, у ситуаціях, коли неможливо забезпечити розгляд провадження саме «ювенальним» суддею, цей розгляд здійснюються іншим суддею.

Доказування в кримінальному проваженні, за загальним правилом, здійснюється в межах загальної процедури, проте, є спеціальні норми, які обмежують сферу дії засади безпосередності дослідження показань.

За ст. 23 КПК України, суд досліджує докази безпосередньо. Показання учасників кримінального провадження суд отримує усно. Не можуть бути визнані доказами відомості, що містяться в показаннях, речах і документах, які не були предметом безпосереднього дослідження суду, крім випадків, передбачених КПК України. Суд може прийняти як доказ показання осіб, які не дають їх безпосередньо в судовому засіданні, лише у випадках, передбачених

КПК України. Верховний Суд неодноразово підкреслював важливість цієї засади для формування внутрішнього переконання суду. Наприклад, Касаційний кримінальний суд у складі Верховного Суду зазначає, що безпосередність дослідження доказів означає звернену до суду вимогу закону про дослідження ним усіх зібраних у конкретному кримінальному провадженні доказів за допомогою допиту обвинувачених, потерпілих, свідків, експерта, огляду речових доказів, оголошення документів, відтворення звукозапису і відеозапису тощо. Ця засада кримінального судочинства має значення для повного з`ясування обставин кримінального провадження та його об`єктивного вирішення. Безпосередність сприйняття доказів дає змогу суду належним чином дослідити і перевірити їх як кожний доказ окремо, так і у взаємозв`язку з іншими доказами, здійснити їх оцінку за критеріями, визначеними в частині 1 статті 94 КПК України, і сформувати повне та об`єктивне уявлення про фактичні обставини конкретного кримінального провадження. Недотримання засади безпосередності призводить до порушення інших засад кримінального провадження: презумпція невинуватості та забезпечення доведеності вини, забезпечення права на захист, змагальність сторін та свобода в поданні ними своїх доказів і в доведенні перед судом їх переконливості (пункти 10, 13, 15 статті 7 КПК України). Тому засада безпосередності є необхідним елементом процесуальної форми судового розгляду, недотримання її судом, з огляду на зміст частини другої статті 23 та статті 86 цього Кодексу, означає, що докази, які не були предметом безпосереднього дослідження суду, не можуть бути визнані допустимими і враховані під час постановлення судового рішення судом, крім випадків, передбачених зазначеним Кодексом, а отже, судове рішення, відповідно до статті 370 цього Кодексу, не може бути визнано законним і обґрунтованим і, згідно з частиною першою статті 412 КПК України, підлягає скасуванню (Постанова Касаційного кримінального суду у складі Верховного Суду від 11 липня 2019 року, справа № 263/206/14-к).

У ст. 23 КПК України зміни не вносились, проте, через правки у ст. 95 КПК України, яка у редакції до 14 квітня 2022 року, її зміст фактично уточнено, оскільки натепер суд може обґрунтовувати свої висновки лише на показаннях, які він безпосередньо сприймав під час судового засідання, або отриманих у порядку, передбаченому статтею 225 КПК України. Суд не має права обґрунтовувати судові рішення показаннями, наданими слідчому, прокурору, або посилатися на них, крім порядку отримання показань, визначеного статтею 615 КПК України.

Стаття 615 КПК України в чинній редакції встановлює спеціальний режим використання в доказуванні показань, отриманих у умовах воєнного стану незалежно від того, коли матиме місце саме судовий розгляд. У разі, якщо по-

казання свідка, потерпілого отримано в результаті допиту, якщо хід і результати такого допиту фіксувалися за допомогою доступних технічних засобів відеофіксації, вони можуть бути використані у суді, попри положення ст. 23 КПК України. Що ж стосується показань підозрюваного, то вони можуть бути використані як докази в суді, якщо в такому допиті брав участь захисник, а хід і результати проведення допиту фіксувалися за допомогою доступних технічних засобів відеофіксації.

Розуміючи причини появи таких норм (бо зауваження щодо ризиків браку виключень із загального правила стосовно того, що показання суд отримує усно, лунали і раніше), оскільки з урахуванням переміщення потерпілих по території України, за кордон, ризики перебування на території України під час війни, відмітимо, що такими нормами не повністю враховано баланс приватних та публічних інтересів у цьому питанні. Адже питання не в тому, як отримати ці показання, а в тому, що обвинувачений має право на перехресний допит, і це є одним з основних стандартів справедливого судочинства. І хоча навіть практика ЄСПЛ цього права не абсолютизує, важливо забезпечити баланс справедливості судового розгляду в таких умовах.

Позиції ЄСПЛ з питання реалізації права конфронтації є такими, що відповідно до статті 6 § 3 (d), перш ніж обвинуваченого можна буде визнати винним, йому, загалом, потрібно пред'явити всі докази обвинувачення у відкритому судовому засіданні, аби уможливити змагальні судові дебати. Цей принцип має певні винятки, з якими, однак, можна погодитися за умови забезпечення прав сторони захисту; за загальним правилом, ці права вимагають надати обвинуваченому належну і достатню можливість опротестувати свідчення проти нього й допитати осіб, які їх зробили, або під час дачі таких показань, або на пізнішій стадії (Al-Khawaja and Tahery v. the United Kingdom) [ВП], § 118; Hümmer v. Germany, § 38; Lucà v. Italy, § 39; Solakov v. the former Yugoslav Republic of Macedonia, § 57). Ці принципи особливо справедливі у випадку використання заяв свідків, отриманих під час розслідування поліції та судового слідства на слуханні (Schatschaschwili v. Germany [ВП], §§ 104-105). У справі Al-Khawaja and Tahery v. the United Kingdom [ВП], §§ 119-147 Суд роз›яснив принципи, які треба застосовувати, коли свідок не відвідує публічне судове слухання. Ці принципи можуть бути узагальнені такимчином (Seton v. the United Kingdom, §§ 58-59; Dimović v. Serbia, §§ 36-40; T.K. v. Lithuania, §§ 95-96): (i) Суд спочатку повинен вивчити попереднє питання про те, чи існувала вагома причина для допустимості доказів відсутнього свідка, приймаючи до уваги, що свідки повинні, як правило, давати свідчення під час судового розгляду, і що треба докладати всіх розумних зусиль, аби забезпечити їх присутність; (ii) Коли свідок не був допитаний на жодній попередній стадії

провадження, допустимість прийняття заяв свідка замість надання свідчень під час судового засідання має бути крайнім заходом; (iii) Прийняття в якості доказів заяви відсутніх свідків призводить до потенційного негативного наслідку для підсудного, який, загалом, повинен мати ефективну можливість оскаржити докази проти нього. Зокрема, він повинен мати можливість перевірити правдивість та достовірність свідчень, наданих свідками, за допомогою їх усного допиту у його присутності, або в той час, коли свідок надавав заяву, або на більш пізньому етапі провадження; (iv) Згідно з «виключним чи вирішальним правилом», якщо засудження обвинуваченого ґрунтується виключно або головним чином на доказах, наданих свідками, яких обвинувачений не може допитати на будь-якій стадії провадження, його права на захист необґрунтовано обмежуються; (v) Однак, оскільки стаття 6 § 3 Конвенції повинна тлумачитися за вивченням справедливості судового провадження загалом, виключне чи вирішальне правило не треба застосовувати у негнучкий спосіб; (vi) Зокрема, якщо заява із чужих слів є виключним або вирішальним доказом проти відповідача, її прийняття як доказу автоматично не призведе до порушення статті 6 § 1. Водночас, коли виправдання засноване виключно або вирішально на свідченнях відсутніх свідків, Суд повинен вивчити провадження у найретельніший спосіб. Через небезпеку прийняття таких доказів це було б дуже важливим чинником для зважения обставин справи та чинником, який вимагав би достатніх урівноважуючих чинників, включаючи наявність сильних процесуальних гарантій. Питання в кожному конкретному випадку полягає в тому, чи існують достатні урівноважуючі чинники, включно із заходами, що дозволяють здійснити справедливу та належну оцінку достовірності цих доказів. Це дало б змогу ґрунтувати вирок на таких доказах, лише якщо вони є достатньо надійними, з огляду їхню важливість у справі (Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb). Updated on 30 April 2022, c. 91-92).

Отже, обмеження права конфронтації можливе, проте, якщо є вагома причина неявки свідка (в розумінні автономного тлумачення, для України це й потерпілий); засудження не може ґрунтуватися виключно на таких показаннях, хоча це правило має застосовуватися у гнучкий спосіб; урівноважуючі чинники для належної оцінки цих доказів. Звісно, що конкретна оцінка може бути надана в конкретному кримінальному провадженні, проте, більш чіткі формулювання в національному законодавстві знатні мінімізувати ризики недотримання зобов'язань за Конвенцією про захист прав людини й основоположних свобод.

І в цьому контексті найперше, на що треба звернути увагу, це те, що правило щодо використання показань у доказуванні, є загальним, тобто немає ні-

якої оцінки достатності причин неявки, і ба більше, не йдеться про те, що має бути констатована неможливість явки (наприклад, через смерть або психічну хворобу особи, її зникнення, неможливість отримання міжнародної правової допомоги тощо). У справі Schatschaschwili v. Germany [ВП], §§ 111-131, ЄСПЛ підтвердив, що сам тільки брак достатніх причин для неявки свідка не може бути вирішальною щодо браку справедливості судового розгляду, хоча вона залишається дуже важливим чинником, який повинен бути врахований під час оцінки загальної справедливості, а також чинником, який може переважити чашу терезів на користь висновку про порушення статті 6 §§ 1 і 3(d) (Ibid., с. 92). Тому таке формальне указання в КПК України без «резервів» оцінки причин неявки може спричинити питання стосовно справедливості судового розгляду загалом та правильного з'ясування обставин кримінального провадження, що вказує на потребу уточнення нормативних формулювань.

Що стосується показань підозрюваного, то таке їх «механічне» використання ставить під сумнів ефективність участі обвинуваченого в кримінальному провадженні, яке теж є стандартом справедливості судового розгляду. Адже за такого формулювання у сторін в судах будуть різні роз уміння можливості та меж використання показань у випадках, коли: (1) обвинувачений з'явився, і дає інші показання, ніж у досудовому розслідуванні; (2) обвинувачений з'явився, відмовився давати показання, і вказує, що до нього під час допиту у досудовому розслідуванні застосоване жорстоке поводження. Як видається, такий механізм для показань підозрюваного має бути переглянутий та збалансований «права обвинуваченого – права та інтереси потерпілого – інтереси правосуддя».

Участь захисника у кримінальному провадженні в умовах воєнного стану здійснюється на загальними правилами щодо залучення захисника (за договором або із системи безоплатної правової допомоги), обов'язкової участі захисника (ст. 52 КПК України), підтвердження повноважень захисника. Зазначимо, що в Україні участь адвоката як захисника у конкретному кримінальному провадженні підтверджується такими документами: 1) свідоцтвом про право на зайняття адвокатською діяльністю; 2) ордером, договором із захисником або дорученням органу (установи), уповноваженого законом на надання безоплатної правової допомоги. Встановлення будь-яких додаткових вимог, крім пред'явлення захисником документа, що посвідчує його особу, або умов для підтвердження повноважень захисника чи для його залучення до участі в кримінальному провадженні не допускається (ст. 50 КПК України). Зауважимо, що на практиці були й ще періодично трапляються різні тлумачення цієї норми в аспекті, чи має обов'язково надаватися саме договір за наявності ордеру адвоката. Касаційний кримінальний суд у складі Верховного Суду висловлювався із цього питання. Зокрема, у постанові Об'єдна-

ної палати Касаційного кримінального суду в складі Верховного Суду було сформульовано висновок щодо застосування норми права: відповідно до чинного національного законодавства повноваження адвоката в кримінальному провадженні треба вважати належним чином підтвердженими, якщо захисник до свідоцтва про право на зайняття адвокатською діяльністю надав хоча б один із документів, передбачених п. 2 ч. 1 ст. 50 КПК, а саме: або ордер, виданий відповідно до Закону України «Про адвокатуру та адвокатську діяльність», або договір із захисником, або доручення органу (установи), уповноваженого законом на надання безоплатної правової допомоги)(Постанова Об'єднаної палати Касаційного кримінального суду у складі Верховного Суду від 18 листопада 2019 року, справа № 648/3629/17). Ще один цікавий аспект полягає в тому, що за КПК України договір в інтересах підозрюваного, обвинуваченого із захисником можуть укласти будь-які особи, які діють в їх інтересах, за їх клопотанням або наступною згодою. Водночас, як розтлумачив Касаційний кримінальний суд у складі Верховного Суду, положеннями ст. 51 КПК чітко не визначено ні строку надання такої «наступної згоди», ні порядку підтвердження її наявності, у зв›язку з чим зазначена норма має застосовуватися з урахуванням обставин конкретної справи у спосіб, який не становитиме невиправдане обмеження права особи на захист (Постанова Касаційного кримінального суду у складі Верховного Суду від 28 листопада 2018 року, справа № 569/16759/16-к).

Нових форм залучення захисника у воєнний час КПК України не встановив, проте, оновив правила щодо залучення захисника до участі в окремій процесуальній дії. Якщо за ст. 53 КПК України, у межах загальної процедури таке залучення можливе в невідкладних випадках, коли є потреба в проведенні невідкладної процесуальної дії за участю захисника, а завчасно повідомлений захисник не може прибути для участі в проведенні процесуальної дії чи забезпечити участь іншого захисника або якщо підозрюваний, обвинувачений виявив бажання, але ще не встиг залучити захисника або прибуття обраного захисника неможливе, як через систему центрів з надання безоплатної вторинної правової допомоги, так і самостійно підозрюваним, обвинуваченим. Якщо потреби у проведенні невідкладних процесуальних дій за участю захисника немає і коли неможливе прибуття захисника, обраного підозрюваним, обвинуваченим, протягом двадцяти чотирьох годин, слідчий, прокурор, слідчий суддя, суд мають право запропонувати підозрюваному, обвинуваченому залучити іншого захисника. Такий залучений захисник, крім загальних прав захисника, має право як до процесуальної дії, так і після неї зустрічатися з підозрюваним, обвинуваченим для підготовки до проведення процесуальної дії або обговорення її результатів.

У період воєнного стану трансформовано спосіб залучення захисника до участі в окремій процесуальній дії: дізнавач, слідчий, прокурор забезпечує участь захисника в проведенні окремої процесуальної дії, у тому числі у разі неможливості явки захисника – із застосуванням технічних засобів (відео-, аудіозв'язку) для забезпечення дистанційної участі захисника (ч. 12 КПК України). Ця норма є проблемною для сторони захисту. Адже, по-перше, не визначено умов залучення (як мінімум наявності стабільного зв'язку). По-друге, не враховано ніяк позицію захисника щодо можливості надавати ефективний захист у таких умовах (адже є проблема із забезпечення конфіденційності спілкування, часом спілкування, погодженням позиції, короткочасними оперативними консультаціями, участю іншого адвоката-захисника у кримінальному провадженні тощо). Відмітимо, що для усунення цих прогнозованих проблем пропонувалося інше формулювання цієї частини ст. 615 КПК України: «12. Слідчий, прокурор забезпечує участь захисника у проведенні окремої процесуальної дії за першої можливості, у тому числі в разі неможливості явки захисника – із застосуванням технічних засобів (відео, аудіозв'язку) для забезпечення дистанційної участі захисника, у разі, якщо захисник на це погоджується» (Зауваження та пропозиції Національної асоціації адвокатів України до проекту Закону «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення порядку здійснення кримінального провадження в умовах воєнного, надзвичайного стану» (реєстр. № 7183 від 20.03.2022 р.)). По-третє, використання аудіозв'язку може унеможливити належну ідентифікацію учасників процесуальної дії. Крім того, виваженою є позиція, що використання словосполучення «у тому числі у разі неможливості явки захисника» не сприяє дотриманню вимоги правової визначеності та забезпеченню права на захист, оскільки буквальне тлумачення даж змогу припустити, що на розсуд вище перелічених учасників кримінального провадження з боку сторони обвинувачення залишається їх право застосовувати дистанційну участь захисника не тільки у разі неможливості його явки (Glovyiuk and others, 2022, c. 59).

Відновлення втрачених матеріалів кримінального провадження. Наразі у кримінальному провадженні України є два різновиди відновлення матеріалів кримінального провадження: перший (загальний) стосується відновлення матеріалів кримінального провадження, яке закінчилося ухваленням вироку суду (хоча у доктрині справедливо зверталася увага на обмеженість цієї умови (Romanyuk, 2012, t. 11, c. 440-443)), і він є застосовний і у період воєнного стану, та порядок, передбачений ст. 615-1 КПК України щодо відновлення втрачених матеріалів кримінального провадження в умовах воєнного стану, який стосується матеріалів кримінального провадження, яке не завершилося

направленням обвинувального акта, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності до суду.

Перший (загальний) передбачає звернення учасників судового провадження або близьких родичів обвинуваченого, який помер, до суду який ухвалив вирок, із заявою про відновлення втрачених матеріалів кримінального провадження. За результатами розгляду суд постановляє ухвалу про відновлення матеріалів втраченого кримінального провадження повністю або в частині, яку, на його думку, необхідно відновити (ч. 1 ст. 531 КПК України), якщо достатньо даних для відновлення, або, якщо даних недостатньо – закриває розгляд заяви про відновлення матеріалів втраченого кримінального провадження, проте, учасники судового провадження мають право на повторне звернення з такою заявою за наявності необхідних документів, достатніх для відновлення провадження.

Порядок відновлення втрачених матеріалів кримінального провадження в умовах воєнного стану стосується матеріалів кримінального провадження, яке не завершилося направленням обвинувального акта, клопотання про застосування примусових заходів медичного або виховного характеру, клопотання про звільнення особи від кримінальної відповідальності до суду, тобто, фактично, лише матеріалів досудового розслідування. Зазначимо, що ЄСПЛ уже визнавав порушення з боку України в аспекті неможливості відновлення матеріалів. Зокрема, у рішенні в справі «Kurochenko and Zolotukhin v. Ukraine» (Applications nos. 20936/16 and 53257/16), ЄСПЛ зауважив специфіку статусу другого заявника через те, що він не був визнаний винуватим, тобто не була перевірена обґрунтованість обвинувачення. Національне законодавство не передбачає жодної процедури звернення із заявою про відновлення втрачених матеріалів справи в ситуаціях, коли не було ухвалено вироку суду, як у справі другого заявника. Із цієї причини національні суди ніколи не розглядали суть справи заявника та не досліджували можливість відновлення матеріалів справи. Суд також вважає переконливим аргумент заявника, що це виключило можливість зняти пред'явлені проти нього обвинувачення та закрити провадження. Так само, це перешкодило органам державної влади перевірити, чи відповідало суспільним інтересам продовження розгляду кримінальної справи щодо заявника за браком будь-яких перспектив прогресу в цьому провадженні й чи переважав такий інтерес шкоду, заподіяну заявнику продовженням провадження. Суд вважає, що національні органи влади мали провести таку перевірку, оскільки другий заявник не був визнаний винним судами будь-якої інстанції та обвинувачувався у вчиненні порівняно менш тяжкого злочину, який, як вбачається, безпосередньо не впливав на

права третіх сторін за статтями 2 та 3 Конвенції (Kurochenko and Zolotukhin v. Ukraine (Applications nos. 20936/16 and 53257/16)).

Порядок відновлення також є судовим, але клопотання подається до слідчого судді. Згідно ч. 4 ст. 615-1 КПК України, у клопотанні зазначаються: 1) обставини втрати матеріалів кримінального провадження; 2) місцезнаходження копій документів кримінального провадження або відомостей щодо них; 3) перелік документів та інших матеріалів, відновлення яких прокурор, слідчий, дізнавач, сторона захисту чи потерпілий вважає необхідним; 4) мета відновлення документів та інших матеріалів; 5) особи, яким повідомлено про підозру (за наявності); 6) особи, які брали участь у кримінальному провадженні, із зазначенням їхнього статусу в такому провадженні; 7) перелік слідчих (розшукових) дій та інших процесуальних дій, проведених у кримінальному провадженні. До клопотання про відновлення втрачених матеріалів кримінального провадження додаються документи або їх копії, у тому числі не посвідчені в установленому порядку, що збереглися у прокурора, слідчого, дізнавача, сторони захисту чи потерпілого, за умови їх засвідчення кваліфікованим електронним підписом. Водночас умовою відновлення є наявність витягу з Єдиного реєстру досудового розслідування або постанови про початок досудового розслідування матеріалів фотозйомки, звукозапису, відеозапису та інших носіїв інформації, а також копій документів, засвідчених із використанням кваліфікованого електронного підпису. Як слушно зазначає Г.К. Тетерятник, тлумачення дає підстави вважати, що в зазначений перелік входять також копії документів, посвідчені в установленому порядку (Glovyiuk and others, 2022, c. 70).

Така нормативна регламентація має вади, зокрема, щодо: суб'єкта, який розглядає клопотання (слідчий суддя, який отримує матеріали від сторін, а основна кількість матеріалів є в слідчого, дізнавача, прокурора); змісту клопотання (через обмеженість доступу до матеріалів сторона захисту та потерпілий належним чином його скласти не зможуть); браку строків та порядку розгляду клопотання. Зазначимо, що вже є ухвали слідчих суддів щодо відновлення матеріалів, отже, ця процедура є затребуваною.

Інші трансформації КПК України як реакція на збройний конфлікт

Фаза війни у вигляді широкомасштабного наступу на території України показала проблеми кримінального провадження, які були, але їх можна було подолати, коли вся кримінальна юстиція ще не функціонувала в умовах надзвичайного правового режиму й багатьох практичних проблем не виникало. Це стосується зміни місцезнаходження органу досудового розслідування та прокуратури через неможливість функціонування на певній території, неможливість забезпечити доставлення підозрюваних, обвинувачених, які тримаються під вартою, до суду, неможливість забезпечити зв›язок з установами, де тримаються ці особи, фізична втрата матеріалів кримінальних проваджень, потреба опрацювання великих масивів фактичних даних тощо. Якщо підсумувати, то йдеться фактично про забезпечення ефективного функціонування кримінальної юстиції в умовах воєнного часу. І хоча КПК України, вживаючи термін ефективність, не надає критеріїв її визначення, вони експлікуються із рішень ЄСПЛ (Guide on Article 2 of the European Convention on Human Rights. Right to life. Updated on 31 December 2021, c. 34-39) у тому числі проти України (Aleksakhin v. Ukraine (Application no. 31939/06) (https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-112277%22]}), Kaverzin v. Ukraine (Application no. 23893/03) (https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-110895%22]}), Pomilyayko v. Ukraine (Application no. 60426/11) (https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-160428%22]})), та являють собою ініціативність, незалежність, неупередженість, адекватність, оперативність, сумлінність (ретельність), залучення жертв (рідних жертв), відкритість результатів для громадськості.

Для цього були потрібні не тільки спеціальні норми, а й уточнення норм, які регламентують загальну процедуру кримінального провадження та її «пристосування» до складних умов воєнного стану.

Частина цих змін стосується органів досудового розслідування та прокуратури. Через те, що були і є проблеми із функціонуванням певних органів досудового розслідування через бойові дії, було істотно уточнено повноваження керівників органу прокуратури щодо доручення здійснення досудового розслідування іншому органу досудового розслідування, і натепер підставою є не тільки неефективність досудового розслідування, а й наявність об'єктивних обставин, що унеможливлюють функціонування відповідного органу досудового розслідування чи здійснення ним досудового розслідування в умовах воєнного стану. Відповідні повноваження мають Генеральний прокурор (особа, яка виконує його обов'язки), керівник обласної прокуратури, їх перші

заступники та заступники. Проте, є обмеження для органів у тому сенсі, що повноваження доручати здійснення досудового розслідування кримінальних правопорушень, віднесених до підслідності Бюро економічної безпеки України, а також доручати Бюро економічної безпеки України розслідування кримінальних правопорушень, віднесених до підслідності інших органів досудового розслідування, мають Генеральний прокурор (особа, яка виконує його обов'язки), його перший заступник, заступник. Крім того, є заборонні норми, що викликані виключною підслідністю Національного антикорупційного бюро та Державного бюро розслідувань: забороняється доручати здійснення досудового розслідування кримінального правопорушення, віднесеного до підслідності Національного антикорупційного бюро України, іншому органу досудового розслідування, крім випадків наявності об'єктивних обставин, що унеможливлюють функціонування Національного антикорупційного бюро України чи здійснення ним досудового розслідування в умовах воєнного стану. Право доручати здійснення досудового розслідування іншому органу за наявності об'єктивних обставин, що унеможливлюють функціонування Національного антикорупційного бюро України чи здійснення ним досудового розслідування в умовах воєнного стану, має заступник Генерального прокурора – керівник Спеціалізованої антикорупційної прокуратури або Генеральний прокурор (особа, яка виконує його обов'язки). Забороняється доручати здійснення досудового розслідування кримінального правопорушення, вчиненого народним депутатом України, іншим органам досудового розслідування, крім Національного антикорупційного бюро України та центрального апарату Державного бюро розслідувань відповідно до їх підслідності, визначеної КПК України (ч. 5 ст. 36 КПК України).

Певні питання виникли щодо функціонування слідчих груп. У КПК України передбачено, що керівник органу досудового розслідування уповноважений у випадках здійснення досудового розслідування слідчою групою – визначати старшого слідчої групи, який керуватиме діями інших слідчих (ч. 1 ст. 39). Керівник органу досудового розслідування під час дії воєнного стану має право своєю вмотивованою постановою, погодженою з керівниками відповідних органів досудового розслідування, утворювати міжвідомчі слідчі групи та визначати у їх складі старшого слідчого, який керуватиме діями інших слідчих (ч. 4 ст. 39). Більше норм про функціонування таких груп немає, проте, є норми щодо міжнародних слідчих груп.

В Інструкції з організації діяльності слідчих підрозділів Національної поліції України(затверджено Наказом Міністерства внутрішніх справ України 06.07.2017 № 570) передбачено, що організація взаємодії слідчих підрозділів з органами та підрозділами, що здійснюють оперативно-розшукову, судово-

-експертну діяльність, а також у межах компетенції з іншими правоохоронними органами, центральними органами виконавчої влади забезпечується шляхом : створення для всебічного, повного й неупередженого дослідження обставин кримінального провадження слідчо-оперативних груп із включенням до їх складу працівників оперативних та інших підрозділів органів Національної поліції, а в разі необхідності – міжвідомчих слідчо-оперативних груп, а для проведення досудового розслідування обставин кримінальних правопорушень, вчинених на територіях декількох держав або якщо порушуються інтереси цих держав, – спільних слідчих груп (п. 16 Розділу 2) (Інструкція з організації діяльності слідчих підрозділів Національної поліції України. Затверджено Наказом Міністерства внутрішніх справ України від 06.07.2017 № 570).

Водночас, зважаючи на масштаби воєнних злочинів, обсяги процесуальних дій, які необхідно провести, діяльність саме слідчих груп є надважливою. Проте, викликає зауваження те, що норма щодо міжвідомчих слідчих груп є темпоральною і поширюється лише на час дії воєнного стану. Крім того, не визначено, як у таких випадках визначатися із підсудністю питань слідчого судді в разі потреби звернення до нього.

Зазначимо, що натепер актуальним є питання роботи на території України міжнародних спільних слідчих груп. Такі групи створені (Eurojust supports joint investigation team into alleged core international crimes in Ukraine; Офіс прокурора МКС приєднався до спільної слідчої групи України, Литви та Польщі щодо розслідування злочинів РФ) Крім того, Європейський Парламент змінив мандат Євроюсту для збирання, збереження та обміну доказами воєнних злочинів (Russian war crimes in Ukraine: Commission proposes to reinforce the mandate of Eurojust to collect and preserve evidence of war crimes). Офіс Прокурора Міжнародного кримінального суду приєднався до спільної слідчої групи щодо міжнародних злочинів, вчинених в Україні (ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine; Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine) (the joint investigation team (JIT) on alleged core international crimes committed in Ukraine), під егідою Євроюсту, що трапилося вперше.

КПК України передбачає, що для проведення досудового розслідування обставин кримінальних правопорушень, вчинених на територіях декількох держав, або якщо порушуються інтереси цих держав, можуть створюватися спільні слідчі групи (ч. 1 ст. 571 КПК України). Зазначимо, що хоча воєнні злочини вчиняються на території України, заважаючи на те, що вони порушу-

ють норми міжнародного гуманітарного права, визнані у світі, та норми міжнародного кримінального права, у тому числі ті, які імплементовані в Римський Статут (Rome Statute of the International Criminal Court. Published by the International Criminal Court ISBN No. 92-9227-386-8), ратифікований багатьма державами світу, то реально злочини, вчинені на території України, зачіпають не тільки інтереси України. Рішення про створення приймає Офіс Генерального прокурора розглядає за запитом слідчого органу досудового розслідування України, прокурора України та компетентних органів іноземних держав. А. Лапкін слушно звертає увагу на проблему, що ініціаторами створення ССГ перед ОГП, згідно із ч. 2 ст. 571 КПК України, є слідчий органу досудового розслідування України, прокурор України та компетентні органи іноземних держав, за запитами яких ОГП розглядає і вирішує питання про створення ССГ. Водночас законодавець не конкретизує, чи є достатнім приводом до цього запит якогось одного із цих органів, чи всіх їх відразу. Використання сполучника «та» замість «або» вказує на те, що йдеться саме про запит від усіх цих суб›єктів одночасно. Такий підхід суттєво ускладнює процес ініціювання створення ССГ, адже передбачає певну взаємодію між вітчизняними органом досудового розслідування та прокурором – з одного боку, та компетентним органом іноземної держави – з іншого боку, що також має здійснюватися в порядку міжнародного співробітництва. А оскільки уповноваженим центральним органом влади в Україні із цих питань є саме ОГП, то комунікація цих суб›єктів також має опосередковуватися цим органом. Водночас, як випливає із ч. 2 ст. 571 КПК України, ОГП позбавлене самостійної ініціативи у вирішенні цього питання (Lapkin, 2022, с. 311).

Стосовно функціонування таких груп, КПК України ці питання не деталізує, а лише передбачає, що члени спільної слідчої групи безпосередньо взаємодіють між собою, узгоджують основні напрями досудового розслідування, проведення процесуальних дій, обмінюються отриманою інформацією. Координацію їх діяльності здійснює ініціатор створення спільної слідчої групи або один із її членів (ч. 3 ст. 571 КПК України). Доречно, щоб питання координації прописуватися в рішенні про створення групи.

З урахуванням викликів, які постали перед функціонуванням кримінальної юстиції, є пропозиції уточнення цих положень щодо міжнародних спільних слідчих груп, зокрема, проєкт Закону України про внесення зміни до Кримінального процесуального кодексу України щодо удосконалення діяльності спільних слідчих груп № 7330 від 29.04.2022 (Проєкт Закону України про внесення зміни до Кримінального процесуального кодексу України щодо удосконалення діяльності спільних слідчих груп № 7330 від 29.04.2022). До найважливіших пропонованих змін належать такі: група може бути створена,

якщо навіть кримінального провадження здійснюється на території однієї держави; запит про створення можуть подавати керівник органу досудового розслідування, керівник обласної прокуратури; Генеральний прокурор (особа, яка виконує його обов'язки) надає доручення керівнику органу досудового розслідування про створення спільної слідчої групи; уточнення порядку функціонування групи («члени спільної слідчої групи за письмовим погодженням зістаршим слідчим спільної слідчої групи мають право проводити слідчі (розшукові) та інші процесуальні дії на території держави, де здійснюється кримінальне провадження, або на території однієї з держав, компетентні органи якої є членами спільної слідчої групи, якщо цього вимагають потреби досудового розслідування та судового провадження» (Ibid.)); визнання допустимості зібраних доказів якщо вони отримані за законодавством України або за законодавством держави, компетентні органи якої є членами спільної слідчої групи, якщо під час отримання таких доказів на території відповідної держави не було порушено засади справедливого судочинства, права людини й основоположні свободи. Ці правки не вирішують питання щодо ініціативного створення групи Генеральним прокурором (особою, яка виконує його обов'язки), а також додає ще один етап – доручення про створення спільної слідчої групи керівнику органу досудового розслідування; щодо рівня керівників органу досудового розслідування, уповноважених на запит / виконання доручення. Зазначимо, що Рада Європи надала висновок щодо цього проєкту, де виділено та запропоновано усунути ще такі недоліки: зазначити, що рішення, яке Генеральний прокурор приймає щодо створення спільної слідчої групи, приймається тільки після укладення угоди з компетентними органами заінтересованих іноземних держав; що Генеральний прокурор може також делегувати виконання своїх функцій, пов'язаних зі спільними слідчими групами; що «старший слідчий», про якого йдеться, буде українським слідчим; змінити підпункт пункту 3 щодо обміну інформацією у такий спосіб, щоб він також охоплював її використання та будь-які обмеження щодо її розкриття, а також уточнити застосування статті 222 Кодексу до членів спільної слідчої групи, які не є українськими слідчими чи прокурорами; чітко вказати, що старший слідчий не обов'язково є особою, про яку йдеться в пункті 2, тобто вибраною керівником органу досудового розслідування; у пункті 4 додати фразу «та в порядку, встановленому цим Кодексом, або в порядку, встановленому законодавством компетентних органів заінтересованої держави» після «за письмовим погодженням із старшим слідчим спільної слідчої групи»; у пункті 5 зазначити, що у всіх випадках допустимість має відповідати вимогам Європейської конвенції, як це викладено в практиці Європейського суду (Експертний висновок експертно-консультативної групи Ради Європи з під-

тримки Офісу Генерального прокурора України щодо проєкту Закону України «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення діяльності спільних слідчих груп». 09 червня 2022, с. 17).

Інший блок змін зачепив доказування у різних проявах цього процесу. Очікувано, що з урахуванням «делегування» повноважень слідчого судді по повноваженням, пов'язаним зі збиранням доказів, можуть виникнути і виникнуть питання щодо допустимості доказів.

Стаття 87 КПК України визнання недопустимим доказів, отримані внаслідок істотного порушення прав та свобод людини, гарантованих Конституцією та законами України, міжнародними договорами, згода на обов'язковість яких надана Верховною Радою України, а також будь-які інші докази, здобуті завдяки інформації, отриманій унаслідок істотного порушення прав та свобод людини, і містить невичерпний перелік таких порушень (ч. 2), а також інші випадки, коли докази є недопустимими (ч. 3).

Стаття 87 КПК України донедавна ніяких особливостей щодо воєнного стану не містила, проте, Законом № 2201-IX від 14.04.2022 цю статтю доповнено нормою, що в умовах воєнного стану положення цієї статті застосовуються з урахуванням особливостей, визначених статтею 615 КПК України, що означає, що критерії допустимості доказів мають оцінюватися з урахуванням підстав «делегування» повноважень слідчого судді керівнику органу прокуратури. Як уже зверталася увага, це стосується збирання доказів за постановою керівника органу прокуратури без ухвали слідчого судді (обшук, «легалізація» проникнення за ч. 3 ст. 233 КПК України, отримання зразків для експертизи, негласні слідчі (розшукові) дії, «легалізація» початку негласної слідчої (розшукової) дії у порядку ст. 250 КПК України) – п. 1 ч. 2 (здійснення процесуальних дій, які потребують попереднього дозволу суду, без такого дозволу або з порушенням його суттєвих умов), п. 4 ч. 3 (під час виконання ухвали про дозвіл на обшук житла чи іншого володіння особи, якщо така ухвала винесена слідчим суддею без проведення повної технічної фіксації засідання) ст. 87 КПК України. Щодо інших частин ст. 87 КПК України немає обумовлень (Glovyiuk, Zavtur, 2022).

Зважаючи на те, що іде ще й інформаційна війна росії проти України, постави питання протидії кіберзагрозам та використання саме цифрової інформації у доказуванні. Звісно, що законодавство України мало і раніше відповідну базу, проте, її було уточнено та розширено, щоб спростити доказування у цій сфері. Це торкнулося слідчих (розшукових) та негласних слідчих (розшукових) дій.

Слідчі (розшукові) дії змінено в аспекті комп'ютерних даних. Зокрема, якщо під час обшуку слідчий, прокурор виявив доступ чи можливість

доступу до комп'ютерних систем або їх частин, мобільних терміналів систем зв'язку, для виявлення яких не надано дозвіл на проведення обшуку, але щодо яких є достатні підстави вважати, що інформація, що на них міститься, має значення для встановлення обставин у кримінальному провадженні, прокурор, слідчий має право здійснити пошук, виявлення та фіксацію комп'ютерних даних, що на них міститься, на місці проведення обшуку. Особи, які володіють інформацією про зміст комп'ютерних даних та особливості функціонування комп'ютерних систем або їх частин, мобільних терміналів систем зв'язку, можуть повідомити про це слідчого, прокурора під час здійснення обшуку, відомості про що вносяться до протоколу обшуку (ч. 6 ст. 236 КПК України). Ці зміни дадуть змогу більш оперативно отримувати інформацію з електронних систем. Крім того, окремо регламентовано огляд комп'ютерних даних, що дає змогу оглядати та фіксувати у тому числі ті дані, які є в мережі Інтернет, що важливо для документування воєнних злочинів та злочинів проти людяності, коли особи, які є безпосередніми очевидцями цих злочинів, викладають дані у Інтернет, у тому числі і в соціальні мережі. Такий огляд проводиться слідчим, прокурором через відображення у протоколі огляду інформації за допомогою електронних засобів, фотозйомки, відеозапису, зйомки та/або відеозапису екрана тощо або в паперовій формі.

Зважаючи на те, що в Україні є доволі багато технічних засобів на дорогах та в інших публічно доступних місцях (біля будинків, офісів, у магазинах тощо), важливою в тих умовах, що склалися, є отримання інформації з таких камер. Ці питання виникали й раніше, і єдності на практиці щодо належної правової процедури отримання не було. Відповідно, було додано нову слідчу (розшукову) дію: зняття показань технічних приладів та технічних засобів, що мають функції фото-, кінозйомки, відеозапису, чи засобів фото-, кінозйомки, відеозапису, яка проводиться за постановою слідчого, прокурора, у разі потреби залучається спеціаліст. Йдеться лише про технічні засоби в публічно доступних місцях, хоча добровільно та ініціативно надати запис із житла чи іншого володіння особи також можна, але на підставі ст. 93 КПК України. Таке зняття показань здійснюється у присутності слідчого, прокурора шляхом самостійного копіювання особою, яка є власником або володільцем відповідних приладів та засобів, або копіювання такою особою за участю спеціаліста відповідних записів на носії, які надаються слідчим, прокурором (ч. 5 ст. 245-1 КПК України).

Крім того, у КПК України було змінено назви деяких негласних слідчих (розшукових) дій у рахуванням загальних змін щодо комп'ютерних даних, комп'ютерних систем та їх частин: зняття інформації з електронних комунікаційних мереж, установлення місцезнаходження радіообладнання (раді-

оелектронного засобу) (останнє натепер можливо без ухвали слідчого судді, якщо власник проти цього не заперечує та подав про це заяву. Зважаючи на те, що сама особа вирішує, чи дозволити легітимно обмежити своє право, то в цьому питанні повністю забезпечено баланс інтересів).

Для дослідження оригінальності результатів негласних слідчих (розшукових) дій носії інформації, на яких вони зафіксовані, повинні зберігатися в стані, придатному для їх дослідження, до набрання законної сили вироком суду, і такі носії можуть бути досліджені експертом або спеціалістом. Це оновлене формулювання норми, до того йшлося про зберігання технічних засобів та первинних носії інформації (і дослідження саме технічних засобів), що не завжди було можливо з урахуванням технічного складника та строку судового розгляду.

Ще один блок змін стосується запобіжних заходів. Крім «делегування» повноважень керівнику органу прокуратури, внесено доповнення і до «загальної» статті 176 КПК України, що під час дії воєнного стану до осіб, які підозрюються або обвинувачуються у вчиненні злочинів, передбачених статтями 109-114-1, 258-258-5, 260, 261, 437-442 Кримінального кодексу України, за наявності ризиків, зазначених у статті 177 КПК України, застосовується запобіжний захід – тримання під вартою. Тобто безальтернативність тримання під вартою передбачена для таких злочинів: дії, спрямовані на насильницьку зміну чи повалення конституційного ладу або на захоплення державної влади; посягання на територіальну цілісність і недоторканність України; фінансування дій, вчинених з метою насильницької зміни чи повалення конституційного ладу або захоплення державної влади, зміни меж території або державного кордону України; державна зрада; колабораційна діяльність; пособництво державі-агресору; посягання на життя державного чи громадського діяча; диверсія; шпигунство; перешкоджання законній діяльності Збройних Сил України та інших військових формувань; терористичний акт; втягнення у вчинення терористичного акту; публічні заклики до вчинення терористичного акту; створення терористичної групи чи терористичної організації; сприяння вчиненню терористичного акту; фінансування тероризму; створення не передбачених законом воєнізованих або збройних формувань; напад на об›єкти, на яких є предмети, що становлять підвищену небезпеку для оточення; планування, підготовка, розв›язування та ведення агресивної війни; Порушення законів та звичаїв війни; застосування зброї масового знищення; розроблення, виробництво, придбання, зберігання, збут, транспортування зброї масового знищення; екоцид; геноцид. За цих обставин ризики є спробами: 1) переховуватися від органів досудового розслідування та/або суду; 2) знищити, сховати або спотворити будь-яку із речей чи документів,

які мають істотне значення для встановлення обставин кримінального правопорушення; 3) незаконно впливати на потерпілого, свідка, іншого підозрюваного, обвинуваченого, експерта, спеціаліста в цьому ж кримінальному провадженні; 4) перешкоджати кримінальному провадженню іншим чином; 5) вчинити інше кримінальне правопорушення чи продовжити кримінальне правопорушення, у якому підозрюється, обвинувачується. Як видно, ці ризики релевантні практиці ЄСПЛ за ст. 5 Конвенції про захист прав людини і основоположних свобод щодо позбавлення особи свободи до суду: а) ризик того, що підсудний не з'явиться в судове засідання; б) ризик того, що підсудний вживатиме заходів для запобігання відправленню правосуддя; в) вчинить інші правопорушення; г) стане причиною порушення громадського порядку (Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security. Updated on 30.04.2022, с. 39).

Щодо підстав застосування зауважимо, що хоча в ст. 176 КПК України в новій частині не вказано про обґрунтовану підозру, запобіжний захід може бути обраний лише за наявності обґрунтованої підозри, з огляду на загальну норму ч. 2 ст. 177 КПК України. Крім того, з формулювання «за наявності ризиків» випливає, що ризиків має бути як мінімум два.

Зазначимо, у що в недавній історії кримінального провадження України вже була схожа норма ч. 5 ст. 176 КПК України: запобіжні заходи у вигляді особистого зобов'язання, особистої поруки, домашнього арешту, застави не можуть бути застосовані до осіб, які підозрюються або обвинувачуються у вчиненні злочинів, передбачених статтями 109-114-1, 258-258-5, 260, 261 Кримінального кодексу України. Це положення визнано таким, що не відповідає Конституції України (є неконституційним), згідно з Рішенням Конституційного Суду № 7-р/2019 від 25.06.2019.

Якщо порівнювати формулювання цих норм, то треба визнати, що законодавець натепер виклав норму більш юридично визначено, прямо вказавши на наявність ризиків, як мінімум двох із переліку тих, що указані у ч. 1 ст. 177 КПК України.

Серед інших аргументів щодо неконституційності норми, Конституційний Суд України зазначив, що «положення частини п'ятої статті 176 Кодексу допускає застосування запобіжного заходу у вигляді тримання під вартою на підставі суто формального судового рішення, що порушує принцип верховенства права. В оспорюваній нормі обґрунтовується необхідність тримання під вартою тяжкістю злочину, що не забезпечує балансу між метою його застосування в кримінальному провадженні та правом особи на свободу та особисту недоторканність» (Рішення Конституційного Суду України у справі за конституційними скаргами Ковтун Марини Анатоліївни, Савченко Надії Вікторівни,

Костоглодова Ігоря Дмитровича, Чорнобука Валерія Івановича щодо відповідності Конституції України (конституційності) положення частини п'ятої статті 176 Кримінального процесуального кодексу України від 25 червня 2019 року № 7-р/2019). Треба відмітити, що ця проблема розглянута і ЄСПЛ. Зокрема, у рішенні «Aleksandrovskaya v. Ukraine» (https://hudoc.echr.coe.int/eng#{%22appno%22:[%2238718/16%22],%22itemid%22:[%22001-208759%22]}). ЄСПЛ зазначив, що у своїх ухвалах суди здебільшого посилались на частину п'яту статті 176 двічі, а то й тричі. На його думку, неодноразові посилання судів на це положення не може не підтвердити висновок, що це положення спотворило процес ухвалення рішень, а ухвалені ними рішення не ґрунтувалися на «відповідних і достатніх» підставах. Проте, у справі «Grubnyk v. Ukraine» (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204604%22]}), де теж були посилання на ст. 176 КПК України у контексті безальтернативності тримання під вартою, ЄСПЛ визнав, що районний суд, який мав повну юрисдикцію щодо цього, встановив, що під час провадження, яке не порушувало жодного іншого питання про відповідність пункту 3 статті 5 Конвенції, обґрунтовану підозру щодо заявника у зв'язку з цими конкретними обвинуваченнями підтверджували докази, а також був ризик його переховування у випадку звільнення з-під варти. Ці висновки були розглянуті та залишені без змін апеляційною інстанцією. З огляду на надані Суду матеріали немає підстав сумніватися в обґрунтованому характері висновків національних судів у зв'язку з цим. Дійсно, підстави, наведені в первинній ухвалі районного суду про тримання під вартою, були викладені стисло з огляду на очевидність ризику переховування заявника. Однак стислі міркування суду не можуть самі собою означати порушення статті 5 Конвенції. До того ж, ступінь конкретності мотивів національних судів з часом збільшувалася: 08 квітня 2016 року, під час залишення без змін ухвали про продовження строку тримання заявника під вартою, апеляційний суд послався на особливу роль заявника в організації протиправної діяльності як підставу вважати, що був ризик його переховування. Насамкінець, найголовніше, що ухвала від 20 жовтня 2015 року не ґрунтувалася на положенні про неможливість застосування певних запобіжних заходів, хоча й містила посилання на останнє, і, як уже пояснювалося, його наявність була результатом виваженої оцінки, під час якої було враховано тяжкість злочину, у вчиненні якого підозрювали заявника, та ризик, пов'язаний із його звільненням з-під варти. З огляду на зазначені обставини Суд вважає, що національні суди надали «відповідні» підстави тримання його під вартою, які за цих обставин були «достатніми», щоб відповідати мінімальним стандартам пункту 3 статті 5 Конвенції (Ibid.).

Зауважимо, що є і пропозиції розширити гіпотезу ст. 176 КПК України. Зокрема, проєктом Закону про внесення змін до Кримінального процесуального

кодексу України (щодо обрання запобіжного заходу до військовослужбовців, які вчинили військові злочини під час дії воєнного стану) № 7431 від 02.06.2022 (Проєкт Закону про внесення змін до Кримінального процесуального кодексу України (щодо обрання запобіжного заходу до військовослужбовців, які вчинили військові злочини під час дії воєнного стану) № 7431 від 02.06.2022) пропонується доповнити ст. 176 КПК України ч. 7 у такій редакції: «7. Під час дії воєнного стану до військовослужбовців, які підозрюються або обвинувачуються у вчиненні злочинів, передбачених статтями 402-408, 410, 420-425, 427, 431-433 Кримінального кодексу України, застосовується виключно запобіжний захід, визначений пунктом 5 частини першої цієї статті». Тобто безальтернативність тримання під вартою пропонується встановити за певний перелік злочинів виключно для військовослужбовців. Зауважимо, що ця пропозиція не може бути підтриманою, адже в процитованій редакції не вказано навіть про ризики, які мають бути згідно ст. 177 КПК України, що суперечить ст. 5 Конвенції про захист прав людини і основоположних свобод та уставленій практиці ЄСПЛ. Адже у рішенні «Grubnyk v. Ukraine» (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-204604%22]}) ЄСПЛ визнав, що будь-яка система обов'язкового тримання під вартою per se є несумісною з пунктом 3 статті 5 Конвенції (див. рішення в справі «Ілійков проти Болгарії» (Ilijkov v. Bulgaria), заява № 33977/96, пункт 84, від 26 липня 2001 року) (Ibid.). Суд неодноразово встановлював, що існування законодавчих механізмів, що обмежують повноваження національних судів щодо ухвалення рішень у справах про тримання під вартою під час досудового слідства, було порушенням пункту 3 статті 5 Конвенції. Крім того, правильною є думка, що, зважаючи на положення ст. 29 Конституції України, нові спроби закріпити випадки безальтернативного обрання тримання під вартою у ч. 6 ст.176 КПК суперечать Основному Закону (Fomina, Rogalska, 2022).

Одним зі стандартів справедливого суду є ефективна участь особи в провадженні, яка зачіпає її інтереси. Форми такої участі, особливо в умовах надзвичайних правових режимів (що довела вже пандемія COVID-19), можуть бути різними. Кримінальний процес України традиційно віддає пріоритет саме особистій участі в залі засідання, хоча є містить положення щодо проведення допиту, впізнання в режимі відеоконференції під час досудового розслідування, проведення процесуальних дій у режимі відеоконференції під час судового провадження.

Утім, з початком широкомасштабної агресії росії реалії змінилися, оскільки бути випадки неможливості фізичного прибуття в засідання як у слідчого судді, так і суду, неможливості організувати відеоконференцію за тими вимогами в частині технічних засобів, які містить КПК України. Після 24 лютого 2022 ці питання вирішувалися по-різному.

У розрізі регламентації, лише Законом № 2201-IX від 14.04.2022 ч. 2 ст. 336 КПК України було викладено в редакції, яка розширила можливості застосування відеоконференції: «Суд ухвалює рішення про здійснення дистанційного судового провадження за власною ініціативою або за клопотанням сторони чи інших учасників кримінального провадження. У разі якщо сторона кримінального провадження чи потерпілий заперечує проти здійснення дистанційного судового провадження, суд може ухвалити рішення про його здійснення лише вмотивованою ухвалою, обґрунтувавши в ній прийняте рішення. Суд не має права прийняти рішення про здійснення дистанційного судового провадження, у якому поза межами приміщення суду перебуває обвинувачений, якщо він проти цього заперечує, крім випадків здійснення дистанційного судового провадження в умовах воєнного стану». Отже, дистанційне судове провадження в умовах воєнного стану може здійснюватися незалежно від думки обвинуваченого, якщо він перебуває поза межами суду.

Утім, Листом Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» від 03 березня 2022 року № 2/0/2-22 у п. 7 було передбачено: якщо через об'єктивні обставини учасник кримінального провадження не може брати участь у засіданні в режимі відеоконференцзв'язку за допомогою технічних засобів, визначених КПК України, як виняток можна допускати участь такого учасника в режимі відеоконференцзв'язку за допомогою інших засобів (Лист Верховного Суду «Щодо окремих питань здійснення кримінального провадження в умовах воєнного стану» № 2/0/2-22 від 03 березня 2022 року). Проте, по-перше, це стосується лише судового засідання; по-друге, не вирішує питань, якщо проти такої форми участі заперечують учасники; по-третє, ст. 336 КПК України стосується лише судового провадження (за п. 24 ст. 3 КПК України, це кримінальне провадження в суді першої інстанції, яке включає підготовче судове провадження, судовий розгляд і ухвалення та проголошення судового рішення, провадження з перегляду судових рішень в апеляційному, касаційному порядку, а також за нововиявленими або виключними обставинами), а судове засідання, яке згадується в листі, може мати місце і в досудовому розслідуванні, що породжує суперечливість тлумачення меж участі у режимі відеоконференції, на що вже зверталася увага в цьому дослідженні.

У розрізі практичного застосування, наслідки неявки обвинуваченого, як і інших учасників, були різними: відкладення судового засідання; відкладення з подальшим проведенням засідання в режимі відеоконференції (Ухвала Оратівського районного суду Вінницької області від 20 квітня 2022 року (справа № 141/671/20)); оголошення розшуку (Ухвала Рівненського міського суду Рівненської області від 20 червня 2022 року (справа № 569/22264/21));

застосування приводу (Ухвала Шацького районного суду Волинської області від 11 травня 2022 року (Справа № 163/2796/20)). Така диференціація є зрозумілою, зважаючи на те, чи були відомості про причини неявки, чи були заяви про відкладення або оголошення перерви через воєнний стан, місцезнаходження суду в конкретний момент часу, можливість забезпечення відеоконференції тощо. Слушною є думка, що «у кожному конкретному випадку суд має визначити, чи є причина неприбуття обвинуваченого в судове засідання поважною. В умовах війни відповідними критеріями можуть бути оперативна ситуація на території розташування суду та місця перебування обвинуваченого, його перебування в іншому віддаленому регіоні, інтенсивність ведення бойових дій або встановлення тимчасових окупаційних режимів на відповідних територіях, функціонування транспортних комунікації, наявність зв'язку, у тому числі Інтернет, добросовісність виконання обвинуваченим своїх процесуальних обов'язків. Також має значення стадія судового провадження. Наприклад, намір обвинуваченого брати особисту участь у засіданні, коли запланований допит свідків, є цілком зрозумілим, у той час як його дистанційна участь у підготовчому судовому засіданні жодним чином не перешкоджає належній реалізації процесуальних прав і не може негативно вплинути на його захист» (Mikhailenko, 2022, p 77).

Отже, натепер є можливою участь сторони захисту в засіданні як у судовому провадженні (за ст. 336 КПК України), так і в слідчого судді (як роз'яснив Верховний Суд), у тому числі із застосуванням власних технічних засобів. Це є належною відповіддю на виклики воєнного часу, проте, з урахуванням діджиталізації у світі цих кроків недостатньо на майбутнє. Зокрема, з урахуванням умов воєнного стану вже є доктринальні пропозиції щодо того, щоб ч. 5 ст. 616 КПК України доповнити положенням: «Участь у судовому розгляді підозрюваного чи обвинуваченого про зміну запобіжного заходу у вигляді застави на особисте зобов'язання, якщо відповідне клопотання обґрунтовується бажанням використати кошти, передані в заставу (в повному обсязі або частково), для внесення на спеціальні рахунки Національного банку України для цілей оборони України є обов'язковою, і може бути дистанційною. Якщо підозрюваний чи обвинувачений через воєнний стан чи інший надзвичайний стан не може бути присутнім, то його інтереси мають бути представлені обов'язково захисником, а бажання використати кошти, передані в заставу (в повному обсязі або частково), для внесення на спеціальні рахунки Національного банку України для цілей оборони України підтверджене письмово» (Gabley, 2022, t. 2, c. 379-380).

Адже дотепер не вирішено питання щодо участі з-за кордону (у суддівській спільноті є різне розуміння такої можливості); технічні складнощі участі з-за

кордону через специфіку електронних мереж; брак для досудового розслідування нормативної регламентації дистанційної участі в судовому засіданні.

Проте, треба розуміти і ризики, на які поки що ні законодавство, на практика відповіді не надали: брак можливості належним чином встановити особу учасника судового процесу; неможливість отримати розписку щодо обізнаності про права та обов'язки; неможливість забезпечити конфіденційність, неупередженість та відсутність тиску на особу, що дає показання (Gluschko, Moiseeva, 2022).

Крім того, для недопущення порушення права особи на ефективну участь у провадженні з'явилася нова підстава зупинення судового провадження – призов обвинуваченого для проходження військової служби за призовом під час мобілізації, на особливий період. Після звільнення з військової служби провадження відновлюється. Отже, умовами зупинення є: оголошення мобілізації; особливий період; призов для проходження військової служби. Водночас, з огляду на загальний підхід до зупинення провадження, який традиційно пов'язується з наявністю обставин, які перешкоджають, а точніше, тимчасово унеможливлюють рух кримінального провадження в досудовому розслідуванні або судовому провадженні, висловлено слушну думку щодо того, ця підстава має призводити до об'єктивної неможливості обвинуваченого брати участь у судовому провадженні, що унеможливлює здійснення розгляду справи (Glotov, 2022, с. 11). Аналіз ухвал показує, що клопотання про зупинення заявляються і стороною захисту (Ухвала Шевченківського районного суду м. Львова від 31 травня 2022 року (справа № 466/7805/21)), і прокурором (Ухвала Саксаганського районного суду м. Кривого Рогу Дніпропетровської області від 19 травня 2022 року (Справа № 214/10763/21)).

Питання взаємодії з МКС: зміни до КПК України

В аспекті взаємодії України з Міжнародним кримінальним судом, важливо розглянути два сутнісні аспекти: (1) визнання юрисдикції та (2) процесуальна взаємодія.

Україна натепер не є учасницею Римського статуту, проте, визначала юрисдикцію Міжнародного кримінального суду. Як відомо, згідно з Римським Статутом, якщо відповідно до пункту 2 вимагається визнання юрисдикції державою, що не є учасницею цього Статуту, ця держава може подаючи заяву Секретареві, визнати здійснення Судом юрисдикції щодо відповідного злочину (ч. 3 ст. 12). Україна двома деклараціями визнала юрисдикцію Міжнарод-

ного кримінального суду: щодо діянь, які мали місце н території України з 21 листопада 2013 до 22 лютого 2014 року (https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf); та щодо діянь, які мали місце н території України з 20 лютого 2014 року (https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine). Крім того, положення про визнання юрисдикції містяться у Розділі IX-2 КПК України: «дія цього розділу поширюється виключно на співробітництво з Міжнародним кримінальним судом, з метою поширення його юрисдикції на осіб (громадян України, іноземних громадян та осіб без громадянства), які на момент вчинення злочину, що підпадає під юрисдикцію Міжнародного кримінального суду, були підпорядковані та/або діяли, з метою здійснення збройної агресії проти України, та/або на підставі рішень (наказів, розпоряджень тощо) посадових осіб, військового командування, або органів державної влади Російської Федерації або іншої країни, що здійснювала агресію, або сприяла її здійсненню проти України». Крім того, за ст. 617 КПК України, співробітництво з Міжнародним кримінальним судом здійснюється з метою сприяння у притягненні до кримінальної відповідальності та покаранні осіб, які вчинили злочини, що підпадають під його юрисдикцію.

До того ж, як зазначено на сайті Міжнародного кримінального суду, ситуацію щодо України було направлено Суду Литовською Республікою, згодом – мало місце об'єднане направлення інших країн (Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland) (до яких пізніше доєдналися Чорногорія та Республіка Чилі), а також ситуацію було направлено Японією та Північною Македонією (https://www.icc-cpi.int/ukraine).

Процесуальна взаємодія із Міжнародним кримінальним судом у національному українському законодавстві наразі регламентується Розділом IX-2 КПК України, який закріпляє основні положення співробітництва (обсяг, суб'єкти, консультації, загальні положення виконання прохання Міжнародного кримінального суду, захист відомостей, збереження доказів, запити (прохання) до Міжнародного кримінального суду, права особи, щодо якої на-

дійшло прохання Міжнародного кримінального суду про співробітництво) та конкретні форми, релевантні Римському Статуту та Правилам процедури та доказування (вжиття необхідних заходів на прохання Міжнародного кримінального суду про співробітництво; виконання прохань Міжнародного кримінального суду щодо розслідування злочинів проти відправлення правосуддя, що здійснюється Міжнародним кримінальним судом; тимчасова передача особи до Міжнародного кримінального суду для проведення процесуальних дій; передача особи (Римський статут містить формулювання «surrender»); передання кримінального провадження в рамках співробітництва з Міжнародним кримінальним судом; виконання Міжнародним кримінальним судом функцій на території України; виконання рішень Міжнародного кримінального суду) та норми, які забезпечують реалізацію такого співробітництва (затримання, тимчасовий арешт (Римський статут містить формулювання «попередній арешт» (provisional arrest)), транзитне перевезення особи, яка передається до Міжнародного кримінального суду).

Якщо порівняти із розділом з аналогічних питань КПК Франції (https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006071154/), то треба відмітити, що він містить розділ «Співробітництво з Міжнародним кримінальним судом», який регламентує суб'єктів та порядок виконання запитів, арешт та передачу, транзит через французьку територію, та деякі підрозділи: виконання покарань у вигляді штрафу та конфіскації та заходів відшкодування на користь потерпілих, виконання покарання у вигляді позбавлення волі.

Натепер у аспекті співвідношення Римського статуту та чинного законодавства України склалася доволі нетрадиційна ситуація. Адже Римський статут не був ратифікований у тому числі через висновок Конституційного Суду України 2001 року, де зазначено, що формулювання, за якими "Міжнародний кримінальний суд … доповнює національні органи кримінальної юстиції" суперечить Конституції України (Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (справа про Римський Статут) від 11 липня 2001 року N 3-в/2001). Зазначимо, що із цього питання можна висловити як мінімум зауваження, що таке формулювання Римського статуту не свідчить, що Міжнародний кримінальний суд став новим судом в усіх державах, які його ратифікували, а радше відображає принцип комплементарності юрисдикції цього суду. Крім того, натепер Конституція України містить положення в ст. 124: «Україна може визнати юрисдикцію Міжнародного кримінального суду на умовах, визначених Римським статутом Міжнародного кримінального суду». Тому слушно зазначається в доктрині, що є необхідним прийняття

нового висновку Конституційного суду України за встановленою законодавством процедурою (Scherban, 2021, с. 202).

Водночас, розділ IX-2 КПК України містить формулювання: «направлятися відповідно до Римського статуту Міжнародного кримінального суду»; «у випадках, передбачених цим Кодексом та Римським статутом Міжнародного кримінального суду»; «здійснюється у порядку, визначеному цим Кодексом та Римським статутом Міжнародного кримінального суду»; терміни, що вживаються в цьому розділі, якщо вони не визначені цим Кодексом, використовуються в значеннях, наведених у Римському статуті Міжнародного кримінального суду (ст. 617 КПК України); «Офіс Генерального прокурора відповідно до Римського статуту Міжнародного кримінального суду» (ст. 618 КПК України); консультації можуть проводитися в інших випадках, передбачених цим розділом або Римським статутом Міжнародного кримінального суду (ст. 619 КПК України) тощо. Крім того, Офіс Генерального прокурора як Центральний орган вирішує питання щодо відмови від спеціального правила, проте, такого правила у КПК України немає, проте, воно наявне у Римському статуті Міжнародного кримінального суду (ст. 101), і ці норми підлягають застосуванню з урахуванням бланкетної диспозиції безпосередньо під час вирішення питання про відмову від правила, що особа, яка передається Суду відповідно до цього Статуту, не підлягає процесуальним діям, покаранню або триманню під вартою у зв'язку з будь-яким діянням, вчиненим до передачі в розпорядження, крім того діяння або поведінки, які утворюють основу злочинів, за які ця особа передається (ч. 1 ст. 101). Ба більше, Римський статут містить вказівку про те, що Держави-учасниці правомочні задовольняти прохання Суду про відмову від вимог і мають прагнути зробити це; проте, Україна не є державою-учасницею, і поширення цього правила на Україну викликає питання.

Натепер положення КПК України в частині виконання прохань Міжнародного кримінального суду щодо розслідування злочинів проти відправлення правосуддя, що здійснюється Міжнародним кримінальним судом, виконання рішення Міжнародного кримінального суду про штраф та/або конфіскацію не є чинними, оскільки передбачено, що вони набирають чинності з дня набрання чинності Римським статутом Міжнародного кримінального суду для України. Тобто не весь Римський статут у частині міжнародного співробітництва, зважаючи, що КПК України має велику кількість бланкетних норм, застосовний на території України.

Тобто складається ситуація, коли КПК України містить посилання на застосовність нератифікованого Римського статуту, хоча за Законом України «Про міжнародні договори» чинні міжнародні договори України, згода на обов›язковість яких надана Верховною Радою України, є частиною національ-

ного законодавства і застосовуються у порядку, передбаченому для норм національного законодавства (ст. 19) (Закон України «Про міжнародні договори України» від 29 червня 2004 року № 1906-IV). Ця ситуація є незвичною для правової системи України та пояснюється тим, що України визнала юрисдикцію Міжнародного кримінального суду без ратифікації Римського статуту. Водночас, з огляду на те, що цей договір не ратифіковано, можуть виникнути питання щодо співвідношення його норм із нормами КПК України в разі наявності колізій (а колізії наявні).

КПК України доволі лапідарно регламентує форми співробітництва, вказуючи на вжиття необхідних заходів на прохання Міжнародного кримінального суду про співробітництво, в тому числі прохання про надання допомоги, про тимчасовий арешт, про арешт і передачу особи, а також інші прохання, які можуть направлятися відповідно до Римського статуту Міжнародного кримінального суду. Натомість Римський статут перелічує окремо значно більшу кількість форм співробітництва (ч. 1 ст. 93), у тому числі ідентифікацію і встановлення місця перебування осіб або предметів; одержання доказів, у тому числі показань під присягою, і збору доказів, включно з думками експертів та висновки експертизи, необхідні Суду; допити; вручення документів; проведення огляду місць або об'єктів, включно з ексгумацією та огляд поховань; проведення обшуків і накладення арешту тощо. Цікаво, що якщо КПК України містить бланкетну норму до Римського статуту, то Римський статут містить бланкетну норму, згадуючи національні законодавства: «надання будь-яких інших видів допомоги, не заборонених законодавством запитуваної держави з метою сприяння здійсненню розслідування і кримінального переслідування за злочини, що підпадають під юрисдикцію Суду». Отже, вичерпного переліку форм співробітництва наразі немає, що, з одного боку, є незвичним для національного законодавства, з іншого, є елементом забезпечення ефективності взаємодії, адже Міжнародний кримінальний суд може отримувати допомогу у формах, яких немає у Римському статуті без внесення змін та доповнень до нього.

Захист потерпілих та свідків, згаданий як окрема форма співробітництва в Римському статуті, не виділено як саме форму в КПК України, проте, ч. 8 ст. 621 передбачає повноваження Центрального органу України щодо такого захисту.

КПК України передбачає широку кількість підстав для проведення консультацій із Міжнародним кримінальним судом. Водночас з огляду на положення ст. 97 Римського статуту, такі консультації в передбачених випадках є обов'язковими та невідкладними, проте, за ч. 2 ст. 619 КПК України «консультації можуть проводитися».

Виконання Міжнародним кримінальним судом функцій на території України передбачено у КПК України, проте, дуже лапідарно регламентовано: проведення процесуальний дій на території України Прокурором Міжнародного кримінального суду (за винятком дій, які в Україні проводяться за погодженням із прокурором або з дозволу слідчого судді, суду); проведення засідань на території України. Окремих правил щодо присутності Прокурора Міжнародного кримінального суду або уповноважених осіб у КПК України немає, ці питання вирішуються Офісом Генерального прокурора. Зазначимо, що, наприклад, у КПК Франції окремо прописано, що запити про взаємну допомогу виконуються антитерористичним прокурором Республіки або слідчим суддею Парижу в присутності, у разі необхідності, прокурора Міжнародного кримінального суду або його представника, або іншої особи, зазначеної у запиті Міжнародного кримінального суду.

Доволі цікавим є формулювання ч. 1 ст. 626 КПК України, у частині запитів (прохань) щодо злочинів, що підпадають під юрисдикцію Міжнародного кримінального суду, або інших тяжких і особливо тяжких злочинів. Таке формулювання викликає сумніви у аспекті того, що в примітці до Розділу та ст. 617 КПК України йдеться виключно про злочини, що підпадають під юрисдикцію Міжнародного кримінального суду, а за ст. 86 Римського статуту Держави-учасниці всебічно співробітничають із Судом у проведенні ним розслідування злочинів, що підпадають під юрисдикцію Суду, і в здійсненні кримінального переслідування за ці злочини.

Детально в КПК України регламентовано передачу особи Міжнародному кримінальному суду та застосування для забезпечення цього затримання та тримання під вартою. Тимчасовий арешт застосовний до 60 діб за клопотанням прокурора та ухвалою слідчого судді (хоча у ч. 5 ст. 627 КПК України вказано лише на суд, не згадано слідчого суддю), у ситуації до подання прохання Міжнародного кримінального суду про арешт і передачу. За цих обставин слідчий суддя зобов'язаний встановити, чи підтверджують надані докази наявність обставин, які свідчать про те, що: 1) затримана особа є тією особою, стосовно якої надійшло прохання Міжнародного кримінального суду про тимчасовий арешт; 2) під час затримання особи були дотримані вимоги процесуального законодавства; 3) дотримані права затриманої особи, передбачені КПК України. Під час розгляду клопотання слідчий суддя не досліджує питання про винуватість особи та не перевіряє законність прохання Міжнародного кримінального суду про тимчасовий арешт стосовно особи (ч. 6 ст. 629 КПК України). Особа може надати згоду на передачу до Міжнародного кримінального суду в спрощеному порядку, тоді слідчий суддя розглядає питання про її затвердження.

Після надходження прохання Міжнародного кримінального суду про арешт і передачу особи за дорученням центрального органу України прокурор звертається до слідчого судді за місцем тримання особи під вартою або за місцем перебування особи з клопотанням про застосування до особи запобіжного заходу у вигляді тримання під вартою до її фактичної передачі та про передачу до Міжнародного кримінального суду на виконання виданого Міжнародним кримінальним судом ордеру на арешт або вироку про призначення покарання у виді позбавлення волі (ч. 1 ст. 631 КПК України). Проте, треба вказати на неточність формулювання, адже за ст. 91 Римського статуту, прохання про арешт і передачу особи у розпорядження подається стосовно розшукуваної особи (як і клопотання про попередній арешт за ст. 92 Римського статуту), а ст. 92 вказує на те, що «Суд може звернутися з проханням про попередній арешт розшукуваної особи до подання прохання про передачу в розпорядження та документів, передбачених у статті 91, що підтверджують це прохання», що свідчить про те, що стосовно особи, до якої застосовано вже арешт, прохання подається лише про передачу. Крім того, після отримання прохання знову ж закріплений механізм вирішення питання про обрання тримання під вартою для забезпечення передачі особи (ст. 631 КПК України).

Для порівняння, за КПК Франції після затримання особи та роз'яснення їй прав, якщо прокурор не звільняє цю особу, він забезпечує її присутність перед суддею зі свобод та ув'язнення, який приймає рішення про тримання під вартою. Однак, якщо він вважає, що її представництво у процесуальних діях у достатньому ступені гарантовано у відповідності до принципів, передбачених статтею 59 конвенції щодо статуту Міжнародного кримінального суду, підписаного в Римі 18 липня 1998 року, суддя зі свобод та ув'язнення уповноважений застосувати до особи інші заходи забезпечення її належної поведінки, передбачені статтями 138 та 142-5 КПК Франції. Рішення про передачу розшукуваної особи приймає Слідча камера, якщо що немає очевидної помилки.

КПК України передбачає спрощений механізм передачі: особа може звертатися з таким проханням, їй обов'язково роз'яснюється це право, відповідна згода затверджується слідчим суддею і передача здійснюється згідно ст. 630 КПК України. За КПК Франції, особа, яка була піддана попередньому арешту за умов, передбачених статтею 92 Статуту, може, за її згоди, бути передана Міжнародному кримінальному суду до того, як буде отримано офіційний запит про передачу. Рішення приймається Слідчою камерою Апеляційного суду Парижу після інформування особи про її право на формальну процедуру та отримання її згоди (ст. 627-14).

Статтею 90 Римського статуту регламентовано дії держав у разі одночасних прохань, тобто коли є прохання від Міжнародного кримінального суду

про передачу та прохання від держави про видачу, і ці дії залежать від низки умов: прийнятності справи, зв'язаності держави міжнародним зобов'язанням про видачу особи запитуючій державі, дати надіслання прохань, інтереси запитуючої держави, можливість подальшої передачі у розпорядження між Судом і запитуючою державою. Проте, у КПК України немає норм, які б регламентувати рішення Центрального органу у таких ситуаціях, хоча вони мали б бути, з огляду на доволі специфічну процесуальну ситуацію щодо взаємодії з Міжнародним кримінальним судом через формальну нератифікацію Римського статуту.

Питання виконання майнових санкцій регламентовано в КПК України доволі коротко: Рішення Міжнародного кримінального суду про штраф та/або конфіскацію центральний орган України надсилає до суду за місцем проживання особи, місцем відбування покарання особою або місцезнаходженням майна для звернення до виконання в тридцятиденний строк у порядку, визначеному статтею 535 КПК України; тобто звертається до виконання судом у порядку, передбаченому для виконання судових рішень у кримінальному провадженні. Таке виконання здійснюється без шкоди для прав добросовісних (bona fide) третіх сторін. Майно або доходи від продажу нерухомого майна чи у відповідних випадках від продажу іншого майна, отриманого в результаті виконання рішення, зазначеного у частині четвертій цієї статті, передаються до Міжнародного кримінального суду. У КПК Франції прямо передбачено судовий порядок вирішення питання про виконання: виконання покарання у вигляді штрафу та конфіскації або рішення щодо відшкодування дозволяються виправним трибуналом Парижу за зверненням прокурора Республіки. Трибунал зв›язаний рішенням Міжнародного кримінального суду, в тому числі щодо положень, що стосуються прав третіх осіб. Проте, у разі виконання рішення про конфіскацію, він вправі прийняти рішення про застосування заходів, щоб стягнути вартість доходів, майна чи активів, які суд постановив конфіскувати, якщо виявляється, що рішення про конфіскацію не може бути виконане. Трибунал заслуховує засудженого, а також будь-яких осіб, які мають права на майно, у разі потреби через доручення. Цих осіб може представляти адвокат. Якщо трибунал вважає, що виконання рішення про конфіскацію або відшкодування матиме наслідки у вигляді шкоди добросовісній особі, яка не може оскаржити рішення, він інформує прокурора Республіки та для скерування питання до Міжнародного кримінального суду, який його вирішує. Дозвіл на виконання тягне за рішенням Міжнародного кримінального суду передачу доходів від штрафів і конфіскованого майна або доходів від їх продажу до суду або до фонду на користь потерпілих. Це майно чи суми можуть бути надані потерпілим, якщо суд це вирішив і приступив до їх визначення.

Будь-який спір щодо розподілу надходжень від штрафів, майна або доходів від його продажу передається до Міжнародного кримінального суду, який його вирішує. Як видно, в аспекті захисту прав добросовісних третіх сторін КПК Франції містить більше гарантій, а КПК України, по суті, відтворює загальну норму ст. 109 Римського статуту, згідно з якою «Держави-учасниці забезпечують виконання рішень про штрафи й заходи з конфіскації, ухвалених Судом … без шкоди для прав bona fide третіх сторін і відповідно до процедури, передбаченої їхнім національним законодавством», що видно навіть із незвичної для України термінології «третя сторона». Римський статут містить загальну норму, оскільки він відсилає до національного законодавства, а у національному законодавстві, з огляду на новизну зобов'язань щодо виконання рішень Міжнародного кримінального суду, релевантної процедури немає. Отже, у КПК України треба передбачити механізм дій України у разі, якщо у процесі виконання рішення про штраф та/або конфіскацію може бути завдана шкода прав добросовісних (bona fide) третіх сторін; для цього варто скористатися досвідом КПК Франції щодо відповідних формулювань.

Перспективне законодавство та практика ЄСПЛ

Прецедентна практика Європейського Суду з прав людини сформувала стандарти ефективного розслідування в контексті збройного конфлікту та антитерористичної операції.

Вимоги до розслідувань порушень статей 2 і 3 у контексті збройного конфлікту були вперше вказані Великою палатою ЄСПЛ ще в справі Varnava and Others v. Turkey, яка стосувалася зникнень людей у 1974 році під час вторгнення Туреччини на Кіпр. Велика палата підкреслила, що розслідування не лише повинно бути незалежним, доступним для родини жертви, проводитися із розумною швидкістю та оперативністю, і включати елементи громадського контролю самого розслідування та його результатів, а й бути ефективним у тому сенсі, що воно повинно мати здатність призвести до визначення того, чи було спричинено смерть неправомірно, і, якщо так, до встановлення відповідальних та їхнього покарання (Повага до прав людини в умовах збройного конфлікту. Застосування судами норм міжнародного гуманітарного права та стандартів захисту прав людини).

Щодо розслідування загибелі осіб унаслідок правомірних воєнних дій, Суд неодноразово у своїй практиці наголошував на тому, що процесуальне зобов'язання за ст. 2 залишається чинним і в складних, з точки зору безпеки,

умовах, у тому числі й у контексті збройного конфлікту. У справі «Аль-Скейні проти Сполученого Королівства» Суд зазначив, що цілком зрозуміло, що за обставин, коли смерть, яка підлягає розслідуванню за статтею 2, сталася в умовах повсюдного насильства, збройного конфлікту чи заворушень, на шляху слідчих можуть виникнути перешкоди і, як також було зазначено спеціальним доповідачем ООН (пункт 93 рішення), певні обмежувальні умови можуть спонукати до використання менш ефективних слідчих заходів або спричинити затримки в розслідуванні (із посиланням на рішення в справі «Базоркіна проти Росії» (Bazorkina v. Russia), № 69481/01, п. 121, від 27 липня 2006 року). Втім, зобов'язання за статтею 2 із забезпечення захисту життя означає, що навіть у складних, з погляду безпеки, умовах, мають бути вжиті всі необхідні заходи для проведення ефективного, незалежного розслідування стверджуваних порушень права на життя (Case of Al-Skeini and Others v. the United Kingdom).

Суд неодноразово наголошував, що стаття 2 Конвенції стосується не лише умисного вбивства, а й ситуацій, за яких дозволено «застосування сили», яке може призвести, як ненавмисний результат, до позбавлення життя. Однак свідоме чи навмисне застосування смертельної сили є лише одним чинником, який має братися до уваги в оцінці її необхідності. Будь-яке застосування сили дозволено лише у разі «абсолютної необхідності» для досягнення однієї або кількох цілей, визначених у підпунктах (a) – (c). Ця умова вказує на те, що повинна застосовуватися більш жорстка та детальна перевірка необхідності, ніж та, яка зазвичай застосовується під час визначення відповідності дій уряду «потребам демократичного суспільства» відповідно до пунктів 2 статей 8-11 Конвенції. Відповідно, застосовувана сила має бути суворо пропорційна досягненню дозволених цілей (рішення ЄСПЛ у справі «Ісаєва, Юсупова та Базаєва проти Росії», Заяви № 57947/00; 57948/00; 57949/00).

Низка позицій ЄСПЛ у цьому контексті стосуються планування військових операцій. Вирішуючи питання про те, чи було позбавлення життя, здійснене під час військової або антитерористичної операції сумісним зі ст. 2 Конвенції, Суд передусім брав до уваги: 1) те, чи контролювалася та планувалася владою військова операція так, щоби звести до максимально можливому мінімуму використання летальної; 2) чи було застосування летальної сили виняткова необхідним сили (рішення ЄСПЛ у справах «Маккан та інші проти Сполученого Королівства», «Андроніку та Константіну проти Кіпру», «Ісаєва, Юсупова і Базаєва проти Росії») .

ЄСПЛ застосовував відповідний тест під час вирішення питання про порушення ст. 2 Конвенції в справі «Ісаєва, Юсупова і Базаєва проти Росії», яка стосувалася ракетного обстрілу цивільної колони військовими літаками під

час Другої російсько-чеченської війни в 1999 році. Суд зазначив, що його здатність оцінити законність нападу та планування та проведення операції, сильно обмежена дефіцитом наданої йому інформації. «Жодного плану не було подано, і жодна інформація не була передана щодо планування операції, оцінки можливих погроз та обмежень, або іншої зброї чи тактики, які були у розпорядженні льотчиків, коли вони зіткнулися з обстрілом із землі, на яку покликається Уряд. Варто особливо наголосити на тому, що не було надано жодної інформації, яка пояснювала, що було зроблено для оцінки та попередження можливого завдання шкоди цивільному населенню, яке могло перебувати на дорозі неподалік того, що військові вважали законними цілями» (п. 175).

Суд визнав, що ситуація в Чечні на той час вимагала виняткових заходів із боку держави, необхідні відновлення контролю над Республікою та придушення незаконного збройного повстання. «Ці заходи, ймовірно, могли включати і застосування військової авіації, озброєної важкою зброєю. Суд також готовий визнати, що якщо літаки зазнали нападу з боку незаконних збройних формувань, це могло виправдати застосування летальної сили, що призводить до ситуації у сферу дії пункту 2 статті 2» (п.178). Втім, ЄСПЛ зазначив, що «Уряд не надав переконливих доказів на підтримку таких висновків. Такий напад згадується лише у показаннях, які дали два льотчики та офіцер повітряного наведення. Ці свідчення були взяті у жовтні та грудні 2000 року, тобто через рік після нападу. Вони неповні й у них робляться покликання заяви, зроблені цими свідками під час слідства, які Уряд не розкриває. Вони зроблені майже в ідентичних виразах і містять короткий та неповний опис подій. Їхні заяви, наведені в документі від 5 травня 2004 р., включають дещо інший опис обставин обстрілу літаків із вантажівок, висоти, з якої льотчики обстріляли першу вантажівку та присутності інших автомобілів на дорозі. За браком всіх заяв, зроблених льотчиками, і відсутності пояснення очевидних невідповідностей, Суд ставить під сумнів достовірність цих заяв. Жодних інших доказів, які підтверджували б законність нападу Уряд не передав» (Case of Isayeva, Yusupova and Bazayeva v. Russia).

З огляду контекст конфлікту в Чечні й допускаючи те, що застосування сили можна пояснити метою, викладеною в параграфі 2 (a) статті 2 Конвенції, Суд у цій справі вирішував питання про те, чи були такі дії абсолютно необхідними для досягнення цієї мети. Суд узяв до уваги показання декількох свідків, які вказували на те, що декілька машин у колонні були уражені прямим влученням ракети. Крім того, ЄСПЛ визнав встановленим те, що за час цього досить значного відрізка часу льотчики здійснили кілька прольотів над дорогою, знижуючись і піднімаючись із 200 до 2000 метрів. Видимість була гарною, та вони не могли не помітити численних автомобілів на дорозі. Також

Суд вказав, що «військові використовували надзвичайно потужну зброю для досягнення своєї мети. Згідно з висновками місцевого слідства, було випущено 12 некерованих ракет С-24 «повітря-земля», по шість із кожного літака, що складає повне бойове навантаження. Під час вибуху кожна ракета утворює кілька тисяч одиниць шрапнелі. А її радіус поразки перевищує 300 метрів (або 600-800 м, як повідомлялося в деяких документах – §§ 30 та 88 рішення). У такий спосіб, мала місце низка вибухів на відносно короткому відрізку дороги, заповненому машинами. Всі, хто в цей момент перебували на дорозі, наражалися на смертельну небезпеку» (Ibid.).

У результаті, погоджуючись із тим, що застосування 12 некерованих ракет С-24 «повітря-земля» 29 жовтня 1999 р. мало під собою законні підстави, Суд не погодився з тим, що операцію біля села Шаамі-Юрт було сплановано та проведено з належною турботою про життя цивільного населення (п.199 рішення). На підставі цього, ЄСПЛ констатував порушення ст. 2 Конвенції в частині дотримання позитивного зобов'язання держави захищати право на життя.

Дещо схожий контекст мала справа «Бензер та інші проти Туреччини», яка стосувалася звинувачень заявників у тому, що в березні 1994 року турецькі військові бомбардували з літака два села, убивши понад 30 їхніх близьких родичів, поранивши самих заявників і знищивши більшу частину їхнього майна та худоби. ЄСПЛ констатував порушення статті 2 Конвенції через смерть 33 близьких родичів заявників і поранення трьох заявників та вкрай неналежне розслідування випадку (Case of Benzer and Others v. Turkey).

У справі «Фіногенов проти Росії» ЄСПЛ вирішував питання про порушення державою позитивних зобов'язань, передбачених ст. 2 Конвенції про захист прав людини та основоположних свобод під час планування та здійснення рятувальної операції у московському театрі на Дубровці.

Щодо оцінки планування операції, Суд зазначив, що «рятувальна операція не була спонтанною, оскільки у влади було близько двох днів для того, щоб її обміркувати та вжити певних заходів обережності. Деяка підготовка справді була проведена: були залучені сотні лікарів, рятувальників та інших фахівців, приймальні потужності лікарень було посилено, служба «швидкої допомоги» була попереджено про можливу масову евакуацію. Однак початковий план операції містив багато недоліків: мабуть, була відсутня централізована координація різних служб, залучених до участі у операції; були відсутні вказівки щодо обміну інформацією щодо потерпілих та їх стану (одним із наслідків цього було отримання деякими потерпілими кількох доз антидоту); неясно, який був встановлено порядок пріоритетів для медиків; під час масового перевезення потерпілих на міських автобусах медичної допомоги не надавали;

був відсутній чіткий план розподілу потерпілих за різними лікарням, тому значні групи надходили до однієї і тієї ж лікарні в один і той же час» (Case of Finogenov and others v. Russia).

На підставі цього Суд дійшов висновку про те, що рятувальна операція не була достатньо спланованою та визнав порушення ст. 2 Конвенції.

Водночас Суд не знайшов порушення в контексті застосування необхідної сили, яка цьому випадку полягала у використанні газу. У рішенні було зазначено, що «хоча національне законодавство допускало застосування зброї та спеціальних засобів щодо терористів, вона не вказувало, який тип зброї чи засобів може бути застосований, або обставини, у яких їх застосування є допустимим. Однак загальна невизначеність закону необов›язково тягне за собою порушення статті 2, в зокрема, у такій непередбачуваній та винятковій ситуації, як у справі, яка вимагала спеціального рішення. Хоча застосований газ і був небезпечний, і потенційно смертельний, але ціль заподіяння смерті була відсутня. Не можна стверджувати, що він застосовувався «нерозбірливо», оскільки залишав заручникам високий шанс на виживання, який залежав від ефективності наступних заходів щодо порятунку. Усі докази свідчили, що газ надав очікуваний вплив на терористів, позбавивши більшість із них свідомості, що полегшило звільнення заручників та знизило ймовірність вибуху» (Ibid.).

У справі «Тагаєва та інші проти Росії», яка стосувалася рятувальної операції по звільненню заручників, яких захопили терористи в школі м. Беслан у 2004 році, Суд відмітив, що на відміну від справи Фіногенова, у цьому випадку компетентні органи влади мали певну інформацію можливий теракт, але не вжили всіхможливих та необхідних заходів для його попередження. На підтвердження цього висновку, Суд наводить приклад, що в день нападу громадський порядок у школі забезпечував лише один неозброєний поліцейський, і навіть для того, аби сповістити відділ поліції про напад йому довелося використовувати стаціонарний телефон. Суд також констатував брак злагодженої взаємодії між компетентними органами, зокрема, вказав, що з огляду на можливу небезпеку, не було помітних зусиль створити якийсь командний центр, який би здійснював загальне керівництво превентивними заходами. З огляду на це, Суд констатував порушення державою позитивних зобов'язань, передбачених ст. 2 Конвенції.

У цій справі заявники скаржилися на ретельність розслідування інциденту, у тому числі фактів застосування компетентними органами летальної невибіркової зброї, що потягло за собою значні втрати. У цьому контексті Суд також встановив порушення ст. 2 Конвенції, зазначивши, що «слідство не змогло належним чином дослідити застосування смертоносної сили держав-

ними агентами під час операції 3 вересня 2004 року. Серед іншого, слідчі не встановили основних фактів про застосування невибіркової зброї, які були вирішальними для оцінки причинно-наслідкового зв'язку між їх використанням і втратами, і, отже, не повністю оцінили докази, які свідчать про використання невибіркової зброї в той час, коли терористів та заручників неможливо було розрізнити. У поєднанні з неповними доказами судово-медичної експертизи щодо причин смерті та травм, недоліків у заходах із забезпечення та збору відповідних доказів на місці, будь-які висновки, зроблені щодо кримінальної відповідальності державних агентів у цьому відношенні, не мають об'єктивних підстав і, таким чином, є неадекватними» (Case of Tagayeva and others v. Russia).

Зазначимо, що з 2014 року, коли почалася війна, виокремилися проблеми розслідувань, що може впливати на ефективність розслідування. До них відносяться: те, що в багатьох випадках традиційні засоби розслідування через наявність низки чинників негативного характеру не дають змоги досягти мети слідчої (розшукової) дії, ведуть до втрати доказів, а іноді ставлять під загрозу життя і здоров›я учасників кримінального провадження (Lazukova, 2018, с. 189); масштаб злочинів, ситуація в зоні АТО (Lazukova, 2016, с. 58); складнощі відновлення матеріалів (Bednarska, 2018, с. 12); питання збирання доказів у районі АТО потребує вдосконалення передусім щодо проведення огляду місця події в частині застосування відеозапису та складення протоколу огляду в безпечному місці; залучення до огляду місця події військових фахівців, які матимуть статус спеціалістів; проведення допиту свідків і потерпілих в порядку ст. 225 КПК України у випадках їх місцезнаходження на непідконтрольній Україні території (Lisenkov, 2017, с. 126); та ін. (Sidoruk, 2020, с. 315-324) Крім того, указується, основними проблемами збирання доказів у таких категоріях проваджень є: 1) неможливість доступу слідчого, прокурора до значної території України, яка підконтрольна терористичним організаціям «ЛНР», «ДНР» (частини Луганської та Донецької областей), з метою проведення слідчих дій; 2) неможливість проведення слідчих дій на лінії розмежування у зоні проведення АТО (території Луганської та Донецької областей) унаслідок мінування деяких територій та бойових зіткнень; 3) неможливість витребування необхідних речей та документів у установах, підприємствах та організаціях, що розташовані на територіях підконтрольних терористичним організаціям «ЛНР», «ДНР» (частини Луганської та Донецької областей); 4) перебування осіб, у розпорядженні яких є докази, на території України, яка не підконтрольна органам державної влади України; 5) не визнання особами, які захопили органи державної влади, інші установи та організації, юрисдикції органів державної влади України над ними (Bondarenko, 2018, с. 16).

Загалом, є такі особливості досудового розслідування в умовах надзвичайних правових режимів: 1) збалансоване поєднання розширення дискреційних повноважень органів, що здійснюють кримінальне провадження із додатковими гарантіями прав і законних інтересів учасників процесу; 2) диференціація процесуальної форми кримінальних проваджень в умовах надзвичайних правових режимів; 3) особливості початку досудового розслідування, пов'язані з обмеженням можливості внесення відомостей до ЄРДР в умовах надзвичайних ситуацій; 4) розширення дискреційної та альтернативної підслідності; 5) одночасне проведення процесуальних дій та аварійно-пошукових робіт, спеціальних операцій, воєнних дій; 6) особливе значення інституту невідкладних слідчих (розшукових) дій; 7) превалювання проведення допиту в режимі відеоконференції, а також депонування показань, які надаються в досудовому розслідуванні в судовому засіданні; 8) специфіка огляду місця події: специфічні процедури забезпечення безпеки учасників дії; залучення додаткових сил (військових, Національної гвардії, ДСНС, спеціалістів та ін.) та засобів до проведення огляду місця події (військова техніка, гелікоптери, 3Dсканери та ін.), особливості процесуального оформлення; 9) широке використання Інтернет-ресурсів для виявлення первинної та доказової інформації про кримінальні правопорушення в умовах надзвичайних правових режимів; 10) специфічний порядок застосування деяких заходів забезпечення кримінального провадження та можливості застосування більш правообмежуючих (порівняно із ординарними правовими режимами) заходів забезпечення; 11) додаткові підстави зупинення досудового розслідування; 12) здійснення кримінального провадження in absentia; 13) імплементація процедур міжнародного гуманітарного, кримінального права, права прав людини та ін. (Teteryatnik, 2021, c. 489).

З урахуванням ситуації війни та проблем, які були виявлені або актуалізовані у цій ситуації, є низки пропозицій щодо змін та доповнень до КПК України, у тому числі у аспекті ефективності розслідування в умовах воєнного стану.

Треба зазначити, що натепер у парламенті України зареєстровано чимало законопроєктів, які спрямовані на вдосконалення нормативного забезпечення здійснення кримінального провадження в умовах воєнного стану, до того ж дію багатьох положень пропонується поширити й на ординарну процедуру.

Чи не найбільше змін та доповнень до КПК України натепер передбачено Законом України № 2462-IX від 27 липня 2022 року (перебуває на підписі у Президента України) (Закон України «Про внесення змін до Кримінального процесуального кодексу України щодо удосконалення окремих положень досудового розслідування в умовах воєнного стану» № 2462-IX). Зазначений

закон передбачає впровадження нового суб'єкта кримінального провадження – особи, стосовно якої зібрано достатньо доказів для повідомлення про підозру у вчиненні кримінального правопорушення, але не повідомлено про підозру у зв'язку з її смертю під якою запропоновано розуміти фізична особа, яка не набула статусу підозрюваного, обвинуваченого у зв'язку з її смертю, але стосовно якої зібрано достатньо доказів для повідомлення про підозру у вчиненні кримінального правопорушення.

Крім того, пропонується оновити регламентацію порядку проведення такої слідчої (розшукової) дії як освідування особи. У редакції, передбаченої Законом України № 2462-IX від 27 липня 2022 року метою освідування виявлення на його тілі, одязі, у якому він перебуває, слідів кримінального правопорушення та їх вилучення або виявлення особливих прикмет, якщо для цього не потрібно проводити судово-медичну експертизу. Чинна редакції КПК України передбачає виявлення слідів лише на тілі особи. У ч. 3 ст. 241 КПК України пропонується також чітко прописати, що застосування примусу допускається лише у межах, необхідних для досягнення мети освідування. Ці норми мають універсальний характер і поширюються в тому числі й на ординарну процедуру кримінального провадження.

Низка змін та доповнень стосується і особливого режиму досудового розслідування в умовах воєнного стану. Зокрема, Закон України № 2462-IX передбачає 1) прийняття керівником органу прокуратури приймається у формі постанови та має містити обґрунтування правомірності здійснення ним повноважень слідчого судді (у разі реалізації делегованих повноважень) 2) оновлення нормативної регламентації затримання особи без ухвали слідчого судді: строк такого затримання не може перевищувати 72 годин, не пізніше 60 годин особа повинна бути доставлена до слідчого судді; якщо в умовах воєнного стану немає об'єктивної можливості доставити затриману особу до слідчого судді, суду у визначений строк, розгляд клопотання про обрання стосовно неї запобіжного заходу здійснюється із застосуванням доступних технічних засобів відеозв'язку з метою забезпечення дистанційної участі затриманої особи; якщо затриману особу неможливо доставити до слідчого судді, суду у визначений строк для розгляду клопотання про обрання стосовно неї запобіжного заходу або забезпечити її дистанційну участь під час розгляду відповідного клопотання, така особа негайно звільняється 3) уможливлено подання до суду скарг на будь-які рішення, дії чи бездіяльність прокурора, слідчого, прийняті або вчинені ним на виконання повноважень, визначених ст. 615 КПК України. Їх розгляд здійснює слідчий суддя того суду, у межах територіальної юрисдикції якого здійснюється досудове розслідування, а в разі неможливості з об'єктивних причин здійснювати відповідним судом право-

суддя – найбільш територіально наближеного до нього суду, що може здійснювати правосуддя, або іншого суду, визначеного в порядку, передбаченому законодавством 4) право суду в умовах воєнного стану обмежитися проголошенням резолютивної частини вироку з обов'язковим врученням учасникам судового провадження повного тексту вироку в день його проголошення.

Готується до другого читання Проєкт Закону про внесення змін до Кримінального процесуального кодексу України (щодо обрання запобіжного заходу до військовослужбовців, які вчинили військові злочини під час дії воєнного стану) № 7431 від 02.06.2022, який передбачає доповнення ст. 176 КПК України ч. 7 такого змісту: під час дії воєнного стану до військовослужбовців, які підозрюються або обвинувачуються у вчиненні злочинів, передбачених статтями 402-408, 410, 420-425, 427, 431-433 Кримінального кодексу України, застосовується виключно запобіжний захід, визначений пунктом 5 частини першої цієї статті. Водночас пропонується, аби максимальний строк дії ухвали слідчого судді, суду про обрання запобіжного заходу у вигляді тримання під вартою, обраного в такому порядку не перевищував 30 днів (Проект Закону про внесення змін до Кримінального процесуального кодексу України (щодо обрання запобіжного заходу до військовослужбовців, які вчинили військові злочини під час дії воєнного стану) № 7431 від 02.06.2022).

На розгляді Комітету з питань правоохоронної діяльності перебуває наразі Проєкт Закону України про внесення змін до Кримінального процесуального кодексу України щодо уточнення положень про відновлення втрачених матеріалів кримінального провадження, скасування запобіжного заходу для проходження військової служби в умовах воєнного стану № 7494 від 27.06.2022. Його автори пропонують доповнити ст. 615-1 КПК України нормою, яка б передбачала можливість відновлення втрачених матеріалів кримінального провадження, у якому не завершено судове провадження. Також пропонується закріпити норму, відповідно до якої неможливість точного відновлення матеріалів втраченого кримінального провадження не може бути підставою для відмови в розгляді відповідного клопотання або підставою для закриття розгляду клопотання про відновлення матеріалів втраченого кримінального провадження. На думку авторів законопроекту такі зміни зроблять процедуру відновлення втрачених матеріалів кримінального провадження більш доступною та менш обтяжливою (Проект Закону про внесення змін до Кримінального процесуального кодексу України щодо уточнення положень про відновлення втрачених матеріалів кримінального провадження, скасування запобіжного заходу для проходження військової служби в умовах воєнного стану № 7494 від 27.06.2022).

Проєкт Закону про внесення деяких змін до Кримінального процесуального кодексу України № 7615 від 29.07.2022 передбачає відмову від інституту

делегування повноважень слідчого судді керівнику органу прокуратури. Пропонується така нормативна регламентація цього питання: у разі введення воєнного стану та якщо немає об'єктивної можливості виконання слідчим суддею за місцем розташування органу досудового розслідування повноважень, передбачених статтями 140, 163, 164, 170, 173, 186, 187, 189, 190, 206, 219, 232, 233, 234, 235, 245-248, 250 та 294 цього Кодексу, – такі повноваження виконує слідчий суддя того суду, юрисдикція якого поширюється на нове місце розташування органу досудового розслідування згідно з відповідним відомчим розпорядженням щодо тимчасової зміни місцезнаходження слідчих цього органу (Проект Закону про внесення деяких змін до Кримінального процесуального кодексу України № 7615 від 29.07.2022).

Підсумовуючи, можна зазначити, що процес адаптації нормативної регламентації порядку здійснення кримінального провадження до умов воєнного стану натепер є незавершеним. Рушійною силою нормотворчості в цьому сегменті залишаються потреби правозастосовної практики, адже удосконалення законодавства відбувається в напрямі усунення тих неточностей і протиріч законодавства, які потягнули за собою неоднозначне тлумачення відповідних норм та складність у їх реалізації.

Висновки

Впровадження в національне кримінальне процесуальне законодавство положень, які регламентували порядок його здійснення в умовах екстраординарних правових режимів мало ретроспективний характер, як реакція на зміну військово-політичної ситуації в Україні навесні 2014 року.

В новітній українській історії точкою відліку, з якої починається формування військової кримінальної юстиції можна вважати 12 серпня 2014 року, коли Верховною Радою України було прийнято одразу три закони, що безпосередньо пов'язані зі здійсненням кримінального провадження в умовах воєнного стану: 1) Закон України «Про внесення змін до Кримінального процесуального кодексу України щодо особливого режиму досудового розслідування в умовах воєнного, надзвичайного стану або у районі проведення антитерористичної операції» № 1631-VII від 12 серпня 2014 року; 2) Закон України «Про здійснення правосуддя і кримінального провадження у зв'язку із проведенням антитерористичної операції» № 1632-VII від 12 серпня 2014 року; 3) Закон України «Про внесення змін до Закону України «Про боротьбу з тероризмом» щодо превентивного затримання в районі проведення антите-

роористичної операції осіб, причетних до терористичної діяльності, на строк понад 72 години» № 1630-VII від 12 серпня 2014 року.

Втім, відповідні норми мали доволі обмежений характер і стосувалися лише деяких інститутів кримінального провадження: судового контролю, підсудності, підслідності, затримання особи.

Концептуальна диференційована кримінальна процесуальна форма провадження в умовах воєнного стану почала формуватися лише після початку повномасштабного вторгнення рф в Україну 24 лютого 2022 року.

Оновлення нормативної регламентації порядку здійснення кримінального провадження в умовах воєнного стану актуалізувало питання щодо допустимості доказів, отриманих у межах цієї процедури. Ключове питання, яке повстане перед правозастосувачами в цьому контексті є виправданість застосування диференційованої процесуальної форми в конкретному кримінальному провадженні. Підстави здійснення процесуальних дій в порядку особливого процесуального режиму сформульовані через оцінні питання, тлумачити які мають суб'єкти оцінки доказів, визначені в ст. 94 КПК України при прийнятті відповідних кримінальних процесуальних рішень з огляду на обставини, які склалися на конкретній території в конкретний час.

Прецедентна практика ЄСПЛ сформувала стандарт, відповідно до якого процесуальне зобов'язання за ст. 2 залишається чинним і в складних, з погляду безпеки, умовах, у тому числі й у контексті збройного конфлікту, втім, в умовах повсюдного насильства, збройного конфлікту чи заворушень, певні обмежувальні умови можуть спонукати до використання менш ефективних слідчих заходів або спричинити затримки в розслідуванні.

Одним з основних питань за ст. 2 Конвенції, яке порушується у випадках збройного конфлікту є питання про те, чи було позбавлення життя, здійснене під час військової або антитерористичної операції сумісним зі ст. 2 Конвенції. Здійснюючи оцінку відповідних обставин на предмет дотримання державою позитивних зобов'язань, Суд зазвичай бере до уваги: 1) те, чи контролювалася та планувалася владою військова операція так, щоби звести до максимально можливому мінімуму використання летальної; 2) чи було застосування летальної сили виняткова необхідним сили.

Процес становлення воєнної кримінальної юстиції на сьогодні не є завершеним. В парламенті на різних етапах опрацювання перебуває низка законопроектів, спрямованих на вдосконалення деяких положень КПК України, які регламентують провадження в умовах воєнного стану. Їх аналіз засвідчує наявність фахової дискусії щодо доцільності існування тих чи інших правових процедур в умовах воєнного стану, однак указує на належну реакцію з боку законодавця на проблеми правозастосовної практики й намагання

забезпечити оптимальну процесуальну форму кримінального провадження в межах екстраординарного правового режиму.

Жорстока агресія росії проти України, яка має місце з 2014 року і яка є міжнародним збройним конфліктом, як би не перейменовували цю війну фейкові російські та російськомовні джерела, породила потребу спочатку створення, а 24 лютого 2022 року – інтенсивного оновлення кримінального процесуального законодавства, зокрема, але не виключного, такого особливого порядку кримінального провадження, який стосується кримінального провадження в умовах воєнного стану (хоча з 2014 року відповідний розділ у КПК України мав різні найменування).

Через специфіку фактичного здійснення кримінального провадження в надзвичайних умовах низка прийнятих змін та доповнень бути такими, що Україна повідомила про дерогацію, використавши ст. 15 Конвенції про захист прав людини і основоположних свобод. Питання обмеження конвенційних свобод в умовах воєнного стану є надзвичайно чутливим, адже Україна залишається державою, яка сповідує повагу до прав людини, європейські правові цінності, проте, обставини через дії росії склалися таким чином, що дотриматися звичайного порядку кримінального провадження стало неможливим через бойові дії, захоплення територій, неможливість функціонування судів, неможливість узяти участь у судовому засіданні, знищення матеріалів кримінальних проваджень тощо.

Без сумніву, попри те, що кримінальний процес є, по суті, інструментом забезпечення балансу між публічними та приватними інтересами в разі вчинення кримінально караного діяння, у внесених змінах перевага надана інтересам публічним, а точніше – інтересу ефективного функціонування кримінальної юстиції. І натепер за нормами, які набули чинності, рух у такому напрямку продовжується. Водночас, зважаючи на те, що чинники, які впливають на функціонування кримінальної юстиції, не є однаковим по території держави та залежать від фактичної ситуації з бойовими діями, ці норми, як видається, можуть бути уточнені, зокрема, у контексті найбільш інтрузивних процесуальних дій (наприклад, але не виключно, обшуку, негласних слідчих (розшукових) дій) та найбільш суворих запобіжних заходів – затримання та тримання під вартою, судовий контроль щодо яких, якщо вони застосовуються за постановою керівника органу прокуратури, натепер є примарним; це стосується і реалізації ст. 206 КПК України.

Деякі з внесених змін та доповнень потребують подальших уточнень, зважаючи на проблему, задля вирішення якої вони були прийняті, та реальності досягнення цієї мети. Зважаючи на те, що низку пропозицій уже було викладено вище, наведемо лише деякі ідеї щодо можливих подальших змін та

доповнень. Зокрема, зважаючи на брак кореляції щодо підстави зупинення досудового розслідування між п. 4 ч. 1 ст. 280 КПК України (наявні об'єктивні обставини, що унеможливлюють подальше проведення досудового розслідування в умовах воєнного стану) та ст. 615 КПК України (немає об'єктивної можливості подальшого проведення, закінчення досудового розслідування та звернення до суду з обвинувальним актом, клопотанням про застосування примусових заходів медичного або виховного характеру, клопотанням про звільнення особи від кримінальної відповідальності) (де, до речі, прямо про зупинення не вказано), доречними були б зміни до ст. 280 КПК України і переформулювання підстави зупинення досудового розслідування ідентично тому, як вони указані в ст. 615 КПК України.

В аспекті використання несудових показань для дотримання гарантій права на справедливий суд та правильного з'ясування обставин кримінального провадження можливим є запропонувати інше формулювання ч. 1 ст. 615 КПК України, яка б враховувала оцінку причин неявки свідка, потерпілого, а особливо обвинуваченого, а також забезпечення дотримання стандартів реагування на порушення ст. 3 Конвенції про захист прав людини і основоположних свобод: «11. Показання, отримані під час допиту свідка, потерпілого, у тому числі одночасного допиту двох чи більше вже допитаних осіб, у кримінальному провадженні, що здійснюється в умовах воєнного стану, можуть бути використані як докази в суді виключно у випадку неможливості явки до суду свідка, потерпілого або немотивованої відмови від давання показань, за умови, якщо хід і результати такого допиту фіксувалися за допомогою доступних технічних засобів відеофіксації, та відсутні скарги щодо жорстокого поводження під час допиту».

Затребуваним уже є механізм відновлення втрачених матеріалів кримінального провадження. Проте, вважаємо неправильним, що клопотання про відновлення розглядає слідчий суддя (пропонуємо віднести це повноваження до компетенції керівника органу прокуратури). Крім того, потребують диференціації вимоги клопотання залежно від суб'єкта подання (бо чинні вимоги для захисту та потерпілого нереалізуємі), та заповнення прогалини щодо браку порядку розгляду та вирішення клопотання.

Зазначимо, що, на наше переконання, деякі внесені зміни та доповнення мають перспективу стати не спеціальними нормами, а бути передбаченими як загальні правила кримінального провадження вже після припинення або скасування воєнного стану. Це стосується міжвідомчих слідчих груп, зберігання кримінальних проваджень в електронній формі, більш використання відеоконференції, у тому числі із застосуванням власних технічних засобів (проте, з урахуванням нечіткого законодавства вже зараз, на період воєнного

стану, потрібні уточнення до КПК України стосовно поширення вимог норм ст. 336 КПК України щодо участі у судовому засіданні у досудовому розслідуванні, у тому числі із застосуванням власних засобів зв'язку через ідентифікацію шляхом демонстрації документу, який посвідчує особу та направлення його скану / фото на адресу суду або у чаті конференції, і аналогічним чином надсилання пам'ятки про права та обов'язки).

Внесення змін до КПК України щодо взаємодії з Міжнародним кримінальним судом теж є наслідком збройної агресії. З урахуванням того, що Римський статут не ратифікований, проте, КПК України містить посилання на цей документ, які є бланкетними нормами, виникає цікава ситуація з позицій доктрини стосовно реальної дії цього документу та території України в умовах, що склалися. Разом з тим, є певні недоліки в нормах КПК України, що регламентують взаємодію, які мають бути усунені, щоб не було жодних ризиків для взаємодії під час розслідування міжнародних злочинів, вчинених росією на території України. Зокрема, йдеться про:

– ч. 2 ст. 619 КПК України, згідно з якою «консультації можуть проводитися» (а за ст. 97 Римського статут вони є обов'язковими);
– ч. 1 ст. 626 КПК України, у частині запитів (прохань) щодо злочинів, що підпадають під юрисдикцію Міжнародного кримінального суду, або інших тяжких і особливо тяжких злочинів (оскільки у примітці до Розділу та ст. 617 КПК України йдеться виключно про злочини, що підпадають під юрисдикцію Міжнародного кримінального суду, про інші злочини не йдеться);
– ч. 5 ст. 627 КПК України, де щодо застосування тимчасового арешту вказано лише на суд, а не про слідчого суддю;
– ч. 1 ст. 631 КПК України, яка не враховує положення ст. 91 Римського статуту;
– браку норм щодо одночасних прохань (прохання від Міжнародного кримінального суду про передачу та прохання від держави про видачу);
– брак норм щодо дій та рішень під час виконання рішення про штраф та/або конфіскацію може бути завдана шкода прав добросовісних (bona fide) третіх сторін.

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Chapter 7

War, Crime, Victimology, Human Rights and Criminal Justice Holistic Approach

ABSTRACT

International and national substantial criminal law protects human rights and maintains a balance between people's security and the state's apparatus. New hybrid and aggressive war challenges necessitate understanding the stability of criminal legal form and social care amidst evolving public and social relations. By analyzing crime and abuse of power tendencies, we can challenge social control schemes related to international society, the state, perpetrators, victims, and civil society attitudes. This article explores the interrelationships among war consequences, crime, modern victimology, human rights, and criminal justice, using a holistic approach grounded in human rights discourse. It highlights the integration of international and national means within modern criminal justice to safeguard victims from crime and abuse of power at individual and collective levels. The article particularly focuses on the interplay between war and crime, fragmentation of international criminal law, victims' reparations, and criminal policy development.

Keywords: security, penal law, victim, human rights, war, crime, holistic approach

From 4 a.m. on 24 February 2022, when the Russian Federation's armed attack against Ukraine started, to midnight 9 June 2022 (local time), the Office of the UN High Commissioner for Human Rights (OHCHR) recorded 9,585 civilian casualties in the country: 4,339 killed and 5,246 injured. This included a total of 4,339 killed (1,646 men, 1,098 women, 102 girls, and 105 boys, as well as 67 children and 1,321 adults whose sex is yet unknown) and a total of 5,246 injured (1,073 men, 730 women, 120 girls, and 151 boys, as well as 172 children and

3,000 adults whose sex is yet unknown (*Ukraine: Civilian Casualty Update…*). It is estimated that since 2014 to February 2022, the conflict between Russia and Ukraine resulted in more than 40,000 casualties. It was also reported earlier that as of 2021, more than 3,300 civilians lost their lives because of the conflict and the number of injured civilians exceeded 7,000. NB, according to the Crisis Group analysis, there was no unified source for casualties resulting from this conflict. While international organizations provided concrete, triangulated data on civilian casualties and the Ukrainian government issued detailed statements about its reported military losses, statements from de facto officials have been patchy. In many cases, the Crisis Group has sought to triangulate data using social media posts or to gather more information through communications with private citizens (*Conflict in Ukraine's Donbas…*).

February 24, 2023 – a full of Russian aggressive imperial war against Ukraine (UA). A huge number of changes in life, social values, interactions, legal solutions notwithstanding from what side you are. The ideas on sanctioning and declaring Russia as the state-terrorist that have been spread in the beginning of 2022 by academia and realized in political statements, joint declarations, sanctions packages, etc. Ukrainian news is at the top of the list, and victims' treatment became a trend in the whole world, causing unexpected reactions from survivors of military conflicts in other parts of the planet.

The problem of interrelationships of consequences of war, crime, modern victimology, human rights and criminal justice in holistic approach methodology is based on the idea of uniting international and national means of modern criminal justice to protect victims of crime and abuse of power on individual and collective level through human rights discourse. Special attention should be brought to war and crime interrelationships in the context of the fragmentation of international criminal law, victims' reparations and criminal policy development.

The reports of ongoing extrajudicial and military killings of civilians as well as the concepts of crime of aggression and its consequences should also be analyzed from the legal perspective of the humanitarian and economic crisis and the possibilities of respecting human rights.

What does the 'state as a victim' mean in international and domestic law? Should the state be treated as a victim of international crime? Since Arie Friberg's concepts, there have not been many works highlighting this theoretical and practical lacuna (Freiberg, 1988). International tribunals, political and economic sanctions, military operations, diplomatic measures are supported by international mechanism of restitution and compensation. Calling international community to continue providing humanitarian support to Ukraine means not only to punish perpetrator but to organize and promote fair compensation, restitution and reparation processes. New actors in international war crimes and crimes against humanity (private secu-

rity and international private warfare companies) should also be treated in view of the concept of responsibility and reparations. Therefore, the system of international criminal policy should be changed.

The interest of the international community lies not only in ensuring that individual victims of international crimes obtain justice and reparations and perpetrators of atrocities receive fair trial and just sentence, but also in constituting the state as a collective victim in line with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1986 and 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 of 15 December 2005 According to these documents, "'victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally" (Declaration of Basic Principles…).

International and national criminal law is a fundamental tool to protect human rights. New hybrid-war challenges make it necessary for us to understand how global and regional imbalances and conflicts affect the rule of law. In order to grasp the importance of maintaining a stable criminal justice system and social care initiatives amidst evolving public and social dynamics, it is crucial to challenge existing social control mechanisms within the realms of international society, state institutions, perpetrators, victims, and civil society's responses to crime and abuses of power. By critically examining these control schemes, we can discern the potential discord that may arise between them and the progressive nature of public and social relationships and processes. It is imperative to analyze how these systems interact and adapt to changing societal dynamics to ensure their efficacy and alignment with evolving social norms and values.

The way international criminal justice is understood and implemented can have significant implications for society. When there is a lack of consensus within the world's biggest actors regarding the principles and goals of rule of law, it can lead to situations where the state or individuals and social groups feel entitled to mistreat their opponents. This can manifest in the formation of armed groups and a tolerance for local restrictions on freedom of movement. These conditions, in turn, create an environment where imperial thinking, ideology of terrorism and rebellion as well as aggressive wars may be justified as a means of seeking justice or challenging an illegitimate authority. Such circumstances undermine the fundamental idea of the legitimacy of power in transitional periods of development.

In simpler terms, when there is a lack of agreement on how international and substantial criminal law should be enforced, it can lead to situations where states or people feel justified in mistreating others. It is important to strive for a common understanding and consensus on the principles of law enforcement to maintain a just and stable world through new system of management. It is known that in response to Russia's military aggression against Ukraine, the European Union has adopted sectoral and individual measures in the form of asset freezes and entry restrictions, as well as anti-circumvention provisions that prohibit knowledge and intentional participation in activities aimed at circumventing these measures. In order to further counteract the risk of violation of such measures, a proposal was adopted to add violation of the Union's restrictive measures to the areas of crime defined in Article 83(1) of the Treaty on the Functioning of the European Union to define violations of the Union's restrictive measures legislation as a particularly serious crime with a cross-border dimension.

The question to ask is whether, on the abovementioned background, we must develop a theoretical model of war, crime, and international criminal justice from victimological perspectives. The concept is quite simple: criminal justice shows the transition from absolute forms of public-law relationships to today's postmodern approach with a holistic system that is essentially based on the concept of human rights primacy and the ideology of basic human values landscape protection in local and international levels.

War consequences and crime tendencies are the last Horsemen of Apocalypse that should be analyzed in this respect.

"Justice" and "criminal law" were identified with the understanding of truth and justice.

In contemporary political discourse, there is an increasing concern regarding the post-truth phenomenon and its influence on the interpretation and application of the law. This concept encompasses the deliberate misuse of legal principles to erode the foundations of justice and truth. It is not limited to individual cases but extends to the theoretical underpinnings that explain the occurrence of interstate and mass misuses and abuses of power. These distortions of law reflect various manifestations, including acts of aggression, hybrid attacks, corruptive practices, and the pursuit of political interests. They are influenced by the attitudes, values, and beliefs of individuals, as well as the prevailing communicative and religious norms, both at the national and international levels of interaction. Within this context, contemporary criminal policy serves as a crucial instrument to enforce a shift in the framework of social relationships, moving away from outdated structures towards a new transnational public law. This entails a reevaluation of established legal paradigms and the adoption of innovative approaches that align with the demands of a rapidly

changing global landscape. By implementing a modern criminal justice policy, societies can address the challenges posed by post-truth interpretations and promote a more just and inclusive legal framework.

It is more dynamic and flexible; it is constantly changing and contributes to breaking the legal forms and outdated stereotypes at the same time. Unity and sovereignty are changed to the legality of international criminal law virtual relationships, where the production of certain types of criminal offenses is given to international society's universal jurisdiction scheme. However, this creates the possibility of non-governmental transnational authorities and other supra-national actors influence on local legislative level by protection of international interests (like the proposed 'ad hoc tribunal' for Putin's aggression with the paragraph 2 of Article 7 of European Convention on Protection of Human Rights, 1950).

Criminal law is a tool for protecting the sovereignty and security of human rights and freedoms, which is the main tool that symbolizes the legal, moral and social attitude of people, society and the state to defend against various threats and criminogenic factors. Thus, criminal responsibility and victims' compensation schemes on domestic and international levels constitute mutual rights and obligations between the state (legality and justice), offender (punishment), victims (fair treatment), and third persons (cognitive control) on crime commission. Mutual rights mean that criminal norms should be constructed to effectively modify forbidden human behavior respecting all actors' needs. Such complex holistic approach and new law constructing as the result of new security paradigms based on internationalization of domestic laws. and mutual recognition of all parties' rights and obligations should produce positive effects in combatting international and transnational crime. The shift for criminalizing those non obeying the sanctions on the EU level is a strict argument for the abovenamed thesis (Communication from the Commission…).

It seems that we have not to make a choice between the law in force, the law in media, the law in minds, and the law in communications, but to find out a common model of multipolar crime and its victims through modern conditions of the aggressive war in UA. That approach should help to describe and implement new rules regarding the usage of the universal principle of justice for collective victims and societies, too (Tuliakov, 2023).

This theoretical methodology needs to carry out:

– Formulating human rights oriented theoretical approach of victimology means (concepts of legality, crime, and punishment regarding state of the victim on domestic, supranational, and international level).
– Structural analysis of international, state, social, communicative, and cognitive approach to victims of aggression and international crimes common indicators through war and crime interrelationships background.

– Formulating the Academic Matrix as a tool for collective and individual victims' treatment (dignity, sanctions, reparations, restitution, and compensation, right to self-destruction and self-defense).

That practice should be reflected as in crime of genocide's corpus delicti and other international crimes and crimes against humanity' as well as at special construction of individual and collective victim's notion in General Part of Draft Criminal Code of Ukraine (Tekst proiektu novoho Kryminalnoho kodeksu Ukrainy, 2023).

Thus, the final aim is to prepare a new theoretical background to Ukrainian criminal law doctrine development as from its path to EU standards and ROL, as from changes that war and crime "contributed" to the civil society of nowadays (Tuliakov, 2022a).

The development of the new criminal legislation of Ukraine in the context of using modern European narratives and discourses of public understanding of the importance of criminal law influence should prove how global and regional contradictions, imbalances and conflicts have affected the rule of law and how human security should be protected in general on the European continent.

Understanding how stable should be the criminal legal form that is dissonant with the development of public and social relations and processes challenges the social schemes of effective control of crime by the state, the victim and civil society.

To be happy means to feel safe, secure and independent. The status of happiness reflects the commonly accepted sense of peace and security in today's sustainable world.

But the role of the state is changing in a multipolar post-truth information society. Abuse of power and large-scale corruption practices in the transition period of development lead to the situation that the criminal legal form of ensuring sustainable development may be in dissonance with the development of civil liberties.

Moreover, the understanding of the criminal law differs according to the level of education of citizens, characteristics of the media, narratives of social groups and networks, and security discourses in law enforcement. It also differs between victims and perpetrators, civil society and police and judges. The criminal legal protection of fundamental rights and freedoms opens less prospects for abuse of power (lack of the right to appeal, the right to legal assistance in most disciplinary proceedings, ample opportunities for abuse of law, etc.) And this problem is not exclusively national in nature. Interpretative characteristics in cases of competition of paradigms in the absence of significant violations of human rights are transferred to national jurisdictions, recognizing, as a rule, subsidiarity, complementarity of interstate institutional mechanisms. Thus, the Lisbon Treaty in Art. 83.1 states that

> […] the European Parliament and the Council may, by directive adopted in accordance with the ordinary legislative procedure, lay down minimum rules on the definition of criminal offences and sanctions in the field of particularly serious crimes with cross-border characteristics arising from the nature or consequences of such offences or from the special need to combat them on a common basis. These areas of crime are as follows: terrorism, trafficking in human beings and sexual exploitation of women and children, drug trafficking, arms trafficking, human trafficking, money laundering, corruption, counterfeiting, computer crime and organized crime (Communication from the Commission…, COM/2010/0171 final).

In other words, disciplinary practices related to criminal law in the form of harmonization of sanctions for particularly serious crimes are spreading across the entire system of public law norms. And therefore, European Commission will add the breakage of EU sanctions to the list of EU crimes (Sanctions: Council requests…; Tuliakov, 2021).

This is the central discourse (model) of penalization of relations at different levels of social interaction based on subsidiarity and proportionality, legality and necessity demand. Thus, as it was noted above, the new criminal legislation, victimological and penological practice are formed based on a multidisciplinary matrix, taking into account the norms of European criminal law and human rights law.[1] The Council

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[1] Strategic guidelines for legislative and operational planning within the area of freedom, security and justice adopted by the European Council by 26/27 June 2014. Retrieved from: https://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf; Council framework decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member State;
Council framework decision 2008/947/JHA 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Directive 2014/62/EU 15 May 2014 of the European Parliament and of the Council on the protection of the euro and other currencies against counterfeiting by criminal law; Council framework decision 2003/568/JHA 22 July 2003 on combating corruption in the private sector; Directive 2014/42/EU 3 April 2014 of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; Directive 2014/57/EU 16 April 2014 of the European Parliament and of the Council on criminal sanctions for market abuse; Directive 2013/40/EU 12 August 2013 of the European Parliament and of the Council on attacks against information systems; Directive 2011/36/EU 5 April 2011 of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims;
Directive 2017/541 15 March 2017 of the European Parliament and of the Council on combating terrorism; Council framework decision 2008/913/JHA 28 November 2008 on 66 combating certain forms and expressions of racism and xenophobia; Directive 2008/99/EC 19 November 2008 of the European Parliament and of the Council on the protection of

of Europe has adopted a significant number of recommendations aimed at criminalization of certain crimes and procedural aspects of combating them (Complete list…).

However, the issues of harmonization of national legal systems and approximation of international normative acts are not solved effectively enough or not solved at all. In addition, according to the latest trends, the European Union criminal policy seeks to achieve only a basic level of harmonization in terms of criminalization of cross-border crimes and in terms of supporting mutual recognition of judgments. There is also a separate impact of transnational norms of corporate conduct of non-state actors (Lex Mercatori, Lex Medici, Lex Sportive) on the dynamics of criminalization in national jurisdictions.

The cross-border nature of the actions of the IMF, WHO, FIFA, which ensure the systemic impact of their norms on the legislation of individual states, does not require proof. But it is the processes of interpretation of criminal prohibitions in accordance with the requirements of transnational structures that require criminological analysis in terms of compliance of the latter with jurisdictional processes and sovereignty of the country. Otherwise, the primacy of interstate narratives leads to the weakening of state coercion. Accordingly, criminal law dissolves in the processes of transit and limitations of the sovereignty of national political and legal forms. At the same time, it is in the field of criminal law that the process of fragmentation is increasingly seen, when the primacy is given to national rather than interstate standards.

Even the final completion of the process of joining the European system of combating crime, signing, ratification, accession, recognition of international treaties does not justify innovations. The reason is also connected with turbulent state of developing a new system of interrelations through traditional criminal senses to "Crimistrative" penological contest that is more flexible to executives.

The state has the right to punish its citizen and compensate victims. Only the state. This is an axiom of transition from talion laws to a democratic system of governance.

The limitations of this rule on international level need to create a new system of ad hoc tribunals and ad hoc compensating international schemes. But these measures are limited by the "ad hoc" rule. Complementarity is a working principle for a certain state or a certain type of victims. Thus, the question of frozen Russian assets usage to compensate losses from the current Russian aggression is open to for-

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the environment through criminal law. Retrieved from: https://eur-lex.europa.eu/homepage.html.

mulate a legal solution that solves the contradiction between legality and necessity on EU governance and Human Rights legislation. The same was considered at International and the UN level while the The Draft of Ljubljana—the Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes and the United Nations Conventional mechanism on restitution and compensation for victims of crime and abuse of power still exists as a principle not the norm (Redo, 1997; Ljubljana–The Hague Convention, 2023).

According to EU legislation, Council Directive 2004/80/EC of 29 April 2004 related to compensation to crime victims, each EU country has its own system for compensating victims for the damage they have suffered because of a crime. As a victim of crime, you have two channels of compensation: you can claim compensation from the offender during the criminal proceedings or you can claim compensation from the state (from the compensation authority or any other relevant body in the country) (Council Directive 2004/80/EC…).

Despite the traditional constitutionalist understanding of the primacy of international treaties over national law, criminal law has a certain degree of protection. As a rule, conventional norms or human rights law are applied in the criminal law sense only when they become part of the national legislation, being implemented or approximated into the national criminal law. In addition, European states seek to achieve a basic level of harmonization and approximation of legislation only in terms of criminalization of cross-border crimes and support for mutual recognition of judgments.

In this sense, it is extremely important to resolve the issue of adequate understanding of criminal prohibition as a necessary tool for the political establishment to ensure public and national security, a guarantor of public peace, a regulator of antisocial activity of citizens in specific spatial, temporal, and historical boundaries, backed by the coercive power of the state. It is the limitation of criminal prohibition by spatial limits that does not provide an opportunity to ensure the effectiveness of the process of approximation and harmonization of national criminal legislation and the formation of artificial supranational criminal law.

The limit of punishment is connected precisely with the state of development of political and legal ideology in the state, the degree of permission to use punishment by the state and the tacit permission of society to use coercion against its individual members. At the same time, criminal law coercion (punishment and other measures of criminal law influence) and criminal law compromise (reconciliation, restitution, and compensation), being in formal contradiction, provide an effective limitation of the punitive power of the state. As for supranational structures, the possible solution to the issues of union cooperation in criminal matters (European Arrest Warrant,

etc.) does not provide an incentive to formulate a unified punitive policy; in this case we are talking about the inevitability of responsibility, not the unity of punishment and compensational mechanisms (Tuliakov, *Approximation…*; Tuliakov, 2009; Tuliakov, 2022c).

We refer to the famous decision of the Grand Chamber of UA Supreme Court in the case 635/6172/17 (Supreme Court UA, 2022) on compensation for non-pecuniary damage caused by the death of an individual, in which Ukrainian Supreme Court drew attention to the fact that

> […] the ECHR, having analyzed the provisions of Article 1177 of the Civil Code of Ukraine in the wording that was in force until June 9, 2013, and Article 1207 of this Code, in the cases of applications № 54904/08 and № 3958/13 (filed by the victims, to whom the state did not compensate for the damage caused as a result of a criminal offense), indicated that obtaining compensation on the basis of these orders is possible only under the conditions provided for in them and in the presence of a separate law, which does not exist, and which should determine the procedure for awarding and paying the relevant compensation. Therefore, the ECHR noted that the right to compensation by the state to victims of a criminal offense in Ukraine has never been unconditional. Since the applicants did not have a clearly established right of claim for the purposes of Article 1 of the First Protocol to the Convention, they could not claim that they had a legitimate expectation of receiving any specific amounts from the state. In view of this, the ECtHR declared the applicants' complaints of violation of Article 1 of the First Protocol to the Convention incompatible with the provisions of the Convention ratione materiae (see the ECtHR admissibility judgments of 30 September 2014 in the case of Petlyovanyy v. Ukraine (no. 54904/08) and 16 December 2014 in the case of Zolotyuk v. Ukraine (no. 3958/13)). Part one of Article 19 of the Law No. 638-IV provides for a special rule, according to which compensation for damage caused to citizens by a terrorist act shall be paid from the State Budget of Ukraine in accordance with the law and with the subsequent recovery of the amount of this compensation from the persons who caused the damage in accordance with the procedure established by law. In addition, in the manner prescribed by law, compensation for damage caused by a terrorist act to an organization, enterprise or institution is carried out (part two of Article 19 of Law No. 638-IV). Considering the content of these provisions of the Law No. 638-IV, the exercise of the right to receive the said compensation is made dependent on the existence of a compensation mechanism to be established in a separate law. The law regulating the procedure for compensation at the expense of the State Budget of Ukraine for damage caused by a terrorist act is absent both at the time of the disputed legal relations and at the time of consideration of the case by the courts. Moreover, the legislation of Ukraine lacks not only the procedure for payment of the said compensation (see, for comparison, mutatis mutandis, the ECHR judgment of 24 April 2014 in the case of Budchenko v. Ukraine, application no. 38677/06, § 42), but also clear conditions necessary for

> making a property claim against the State for such compensation (see, mutatis mutandis, the ECHR admissibility judgment of 30 September 2014 in the case of Petlevany v. Ukraine). Thus, the right to compensation by the state in accordance with the law for damage caused by a terrorist act, provided for in Article 19 of Law No. 638-IV, does not give rise, without a special law, to a legitimate expectation to receive such compensation from the State of Ukraine for non-pecuniary damage caused to the plaintiff as a result of the death of his mother during a terrorist act during the ATO, regardless of whether the act took place in the territory controlled or uncontrolled by Ukraine. There is no such legal basis in the legislation of Ukraine that allows to determine the specific property interest of the plaintiff regarding the right to claim under the Law No. 638-IV against the state for compensation for non-pecuniary damage caused in connection with the death of the plaintiff's mother during the ATO (see similar conclusions in the resolutions of the Grand Chamber of the Supreme Court of September 4, 2019 in case No. 265/6582/16-ц (paragraphs 36, 69), of September 22, 2020 in case No. 910/378/19 (paragraphs 7.5, 7.11)) (Supreme Court UA, 2022).

Alas, the right to compensation by the state in accordance with the law for damage caused by a terrorist act does not give rise, without a special law, to a legitimate expectation to receive such compensation… It is strictly understandable from a legal perspective but politically makes a shift towards widespread understanding of victim in individual, societal and governmental level as forgotten figure.

Making possible systematic analysis of national criminal, criminal procedural, preventive and criminal enforcement legislation of Ukraine with the aim to bring it in compliance with:

1.1. EU Strategy on victims' rights for the period 2020-2025, which established the principles of further development of legislation on the rights of crime victims (Communication from the Commission…, COM/2020/258 final);
1.2. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (the 'Victims' Rights Directive');
1.3. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA;
1.4. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (the 'Compensation Directive');
2. Ratification of the COE European Convention on Compensation for Victims of violent crimes Strasbourg 11/24/1983 ETS No. 116, signed by Ukraine on April 8, 2005.

Considering that the huge amount of EU and COE prescriptions have not been implemented properly at national legislation, the question is to organize its legal background for individual and group victims at national level and state victims at UN legislation as well.

Therefore, the decision within the UA National framework requires:

1. Introduction of the term "victim" in the General Part of the Criminal Code (Chapter IV PERSON SUBJECT TO CRIMINAL LIABILITY (SUBJECT OF A CRIMINAL OFFENSE) and VICTIM OF A CRIMINAL OFFENSE) in line with EU aquis law and the Code of Criminal Procedure.
2. Amendment to the General Part of Criminal Code by Section XIV-2 Restitution and compensation (according to the rules of ETS #116).
3. Adopting of UA Draft Law on Compensation for victims of crime with a special attention to tourists, victims of terrorism, victims of war crimes, and crimes against humanity.

International treaties should be amended by special UN basic principles of justice for victims of international (transnational) crimes, resolving the case of states immunities, compensation, and reparation like it was done before in the UN. "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" (Doc E/CN.4/RES/2005/35, 20 April 2005).

But as the practice shows, the latter is still hard to achieve.

Should we format a positive obligation of international community to react to the acts of interstate violence and aggression, slavery and misuse of law, supply chains and development via security system and obligation to compensate and recover?

The answer is "yes" but this depends on sovereignty and good will.

On 29 April 2022, the Federal Republic of Germany instituted proceedings before the International Court of Justice against the Italian Republic for allegedly failing to respect its jurisdictional immunity as a sovereign State. In its Application, Germany recalls that, on 3 February 2012, the Court rendered its judgment on the issue of jurisdictional immunity in the case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). The Applicant indicates that, "[n]otwithstanding [the] pronouncements [in that Judgment], Italian domestic courts, since 2012, have entertained a significant number of new claims against Germany in violation of Germany's sovereign immunity" (Germany institutes proceedings…).

Being united means to divide sovereignty from common approach and interests realizing principle of proportionality and the rule of law (as recommendation to criminalize nonfulfillment of EU sanctions). But as S. Kandelbach truly noted:

> Rather, it is to be seen in the antagonism between subject matter and procedural law: whereas we are witnessing an increasing empowerment of the individual with respect to his or her rights in international law, the modes of implementing these rights are still strictly consensual. The individual has no standing before international courts or national courts of a foreign state unless states are willing to grant it, be it by agreement or by the waiver of immunity (Kadelbach, 2021).

Therefore, a joint concept of criminal responsibility constitutes mutual rights and obligations between state (legality and justice), offender (punishment), victims (fair treatment) and third persons (cognitive control) on crime commission. Mutual rights mean that one should construct criminal norms in order to effectively modify forbidden human behavior only respecting all actors' needs through national and international requirements. The second point of interest is connected with the development of contemporary methodology analysis based on multipolar understanding of criminal sanctioning while constructing administrative, disciplinary and criminal punishment in respect of compensation and restitution measures.

The truth and justice for victims on all levels of social interaction is over here.

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Chapter 8

The System of Military Justice in Ukraine in Wartime

ABSTRACT

In Ukraine, there is no complete system of military justice. The development of the military justice system of Ukraine shows a gradual course towards demilitarization. This course has changed since 2014, however, the changes aren't deep and systematic. Therefore, a revival of the military justice system should be considered as a temporary measure. It is necessary to provide a possibility of its drawdown with the end of Russian-Ukrainian War.

The military justice system should be built based on the following concept: the body carrying out operational search activity and prejudicial investigation of war crimes—the body carrying out criminal prosecution on such crimes—the body considering actual cases on such crimes. This concept corresponds to the following system of military justice: military police—military prosecutor's office—military court.

The reform of the military justice system has to take place comprehensively. Reforms of the military police, the military prosecutor's office and the military court have to be harmonized in regard to their competence and interaction. To this end, a uniform concept of reforming the military justice system in Ukraine has to be developed. Scholars, representatives of various bodies of military justice and military management, public figures and foreign experts should take part in its creation.

There are gaps in the sphere of legislative regulation of the military justice system. At the same time, the legislative regulation of the bodies of military justice should be carried out in their entirety as they are closely linked. For this purpose, it is necessary to develop and accept a simultaneous package of laws pertaining to military courts, military prosecutor's office and military police and introduce corresponding changes into the Criminal Procedural Code, the Laws About Judicial System and the Status of Judges, About the Prosecutor's Office, and others.

The political will of the Ukrainian authorities, first of all of the President of Ukraine since these matters belong to his competence, is necessary for reforming the military justice system. Care should be taken that the issues of the creation of military courts or military

police do not become a subject of political struggles. The architecture of this reform has to be depoliticized and developed by independent experts. Support of foreign partners of Ukraine, who often spoke against the existence of military justice previously, is also expedient.

The role of public organizations and mass media in the reform of military justice is not satisfactory. To strengthen it, questions related to the reform have to be debated in public and published in the media properly.

Keywords: military justice, judicial reform, military court, military prosecutor's office, military police

Introduction

Ukraine is of considerable interest among post-Soviet states as regards studying reform problems of the military justice system. This is due to the military action in the country as a result of external military aggression: the "hybrid war" since 2014 and occupation of a part of the Ukrainian territory. Thus, functioning of the military justice is important for Ukraine in the context of the opportunities it creates for the security of the state and countering military aggression.

Ukraine is as a striking example of a country forced to revive the institutes of military justice which were liquidated as a result of the demilitarization. The general course of the judicial and legal reform of the state over a period of over 20 years brought the total repudiation of militarization of court and law enforcement agencies. However, unforeseen events have changed this course radically. In this sense, the system of military justice of Ukraine is being formed in "field conditions." It lacks a firm theoretical base and objective expert assessment.

The system of military justice of Ukraine is at a stage of reform. It is characterized by contradictory tendencies: some agencies of military justice were liquidated and the question of their revival is being debated (for example, military courts and the military prosecutor's office); others demand modernization according to the current realities (for example, the Military Service of Law and Order).

Ukraine has rich historical experience of military justice agencies. However, this experience comes mainly from its time in the structure of the Soviet Union, which causes the denial of this experience and any ties with the military justice agencies as rudiments of the Soviet past. Hence, studying of the international experience and the best world practices of the functioning of military justice is important for Ukraine. Besides, Ukraine needs approval from foreign partners in the development of the military justice system and their practical support in the reform.

The reform of the military justice system of Ukraine proceeds under the acute economic crisis and continuous political debates. In the Ukrainian society and the

expert environment, there is no consensus concerning the tasks and competence of the military justice agencies. The reform of military justice isn't a priority for the Ukrainian authorities, therefore taking important political decisions in this sphere is constantly postponed, though they are periodically discussed. Thus, there is neither the complete concept of the reform of the military justice system, nor the program of its development, nor the united center responsible for these matters.

All the above-mentioned factors make the Ukrainian experience of reforming the military justice system unique among the states of the former Soviet Union. At the same time, this experience is valuable to other democratic states that consider the expediency of preservation or elimination of the military justice system.

General Characteristic of the Military Justice System of Ukraine

The term the "system of military justice" refers to judicial and law enforcement agencies, united by subordinative and coordinative connections, whose competence concerns the legal relationship arising in reference to the organization and activity of the Armed Forces of Ukraine, paramilitary forces and persons having the status of the military personnel.

The characteristic features that allow to ascribe a given body to the system of military justice are:

– *Special area of competence*. This is the military sphere, concerning both paramilitary formations and security activities (military administration, military-industrial complex, military science and military education).
– *Features of the organization and activities*. The bodies of military justice are paramilitary bodies. Their structure is built according to the military-political, instead of the administrative-territorial, structure of the state. Their employees have the status of military personnel. Being part of the relevant judicial system or a particular law enforcement agency, these bodies operate with a significant degree of autonomy.
– *Communication with other bodies of military justice*. Military justice becomes a system precisely because of subordinate and coordinating ties with other bodies of military justice. These bodies are institutionally independent from each other, as they belong to different law enforcement systems or even branches of government. However, they carry out their functions in an interconnected manner, and at the same time, independently from other bodies that are not part of the military justice system.

Guided by these principles, the following agencies should be included within the military justice system of Ukraine:

(1) *Military courts*. To date, they don't exist in Ukraine, which shall be discussed later. Military courts belong to the judicial branch of the power. They administer justice on military affairs and moreover, have judicial control of other military justice agencies.
(2) *The military prosecutor's office*. So far, this agency is quasi-military, acting as a Specialized Prosecutor's Office in the Military and Defense Sphere. It is part of the Ukrainian prosecutor's office, which operates independently and does not belong to any of the branches of state power. The Specialized Prosecutor's Office in the Military and Defense Sphere implements the organization and procedural management of the pre-trial investigation of military crimes, supports the public prosecution in the court on these affairs, exercises the public prosecutor's supervision of the activity of law enforcement bodies in the military sphere.
(3) *Military Service of Law and Order in the Armed Forces of Ukraine* works as a part of the Armed Forces of Ukraine and answers to the Minister of Defense of Ukraine. Its functions include ensuring the rule of law and the military discipline is obeyed among the military personnel of the Armed Forces of Ukraine. In the long run, military police will be created on this basis that will conduct pre-trial investigations of the crimes committed by the military personnel.

It should be noted that the need of creation of other military justice agencies is also under consideration. In particular, there were initiatives to create a National Bureau of Military Justice. However, there is a lack of the specificity of the competence of this structure and its place in the system of the military justice.

Various structures that implement material, organizational, scientific and educational security contribute to functioning of the military justice system of Ukraine, for example, Ministry of Defense of Ukraine, educational institutions. The organizational chart of the military justice system of Ukraine is presented in the Appendix 1.

The Roots of the Military Justice System in Ukraine

The modern history of military justice of Ukraine can be divided into four periods: (1) the stage of the formation of military justice of independent Ukraine; (2) the maturity stage of military justice; (3) the stage of crisis of military justice; (4) the stage of revival of military justice. (Лапкін, 2020).

The stage of the formation of military justice covers 1991-96. It began with the moment of the declaration of independence of Ukraine in 1991. At that time,

Ukraine had the bodies of military justice inherited from the Soviet Union: military courts and the military prosecutor's office. During the Soviet period, these bodies had broad powers and acted autonomously from the "civilian" judicial and law enforcement system. In addition, they had their own rigidly centralized system, directly subordinated to the Supreme Court of the USSR. At that stage, Ukraine addressed the problems of removing bodies of military justice from Soviet Union's hierarchy and submitting their activity to the new state.

In the key document of this stage, *The Concept of Judicial and Legal Reform* of April 28, 1992 (Про Концепцію судово-правової реформи в Україні: Постанова Верховної Ради України № 2296-XII від 28.04.1992), it was noted that taking into account the specifics of military formations, military courts remain in the system of the general courts. They have to be significantly reformed and exempted from any dependence on military command. These courts can only hear cases of military crimes of the military personnel and cases of their social protection. Thus, the strategic decision on preservation of military justice and its partial reform was made. As a result, in February 1993, military tribunals were renamed by the Resolution of the Supreme Council of Ukraine "military courts." (Про перейменування військових трибуналів України у військові суди України і продовження повноважень їх суддів: Постанова Верховної Ради України № 2979-XII від 03.02.1993).

At this stage, the bodies of military justice received registration in Laws of Ukraine. So, for example, existence of military prosecutor's offices was enshrined in the Law "About the Prosecutor's Office" (Про прокуратуру: Закон України № 1697-VII від 14.10.2014) of November 15, 1991, its system was defined together with the requirements to its staff.

Military courts received a legislative regulation in 1994 when the previous Law "About the Judicial System of the Ukrainian SSR" of 1981 was supplemented with Chapter 3-1 "Military Courts." (Про судоустрій України: Закон України № 2022-X від 05.06.1981) The tasks, types and structure of military courts, their competence and other details of the organization and functioning of these courts were settled. In particular, it was determined that the activities of military courts were aimed at protecting the security of Ukraine from any infringement, the combat capability and combat readiness of its Armed Forces and other military formations, protecting the rights and freedoms of military personnel and other citizens, as well as the rights and legitimate interests of military units, institutions and organizations.

That stage could be considered complete with the adoption of the Constitution of Ukraine on June 28, 1996, which attributed the matters of military justice to regulation in laws, because this issue was not regulated in the Constitution itself.

The following ***maturity stage of military justice*** covers the period from 1996 to 2010. During this time, bodies of military justice were working at full capacity and with maximum efficiency.

Legal status of military courts was reformed with adoption of the new Law of Ukraine "About the Judicial System" of February 7, 2002 (Про судоустрій України: Закон України № 3018-III від 7.02.2002). Military courts were included in the general courts. Their competence was defined as implementation of justice in the Armed Forces of Ukraine and other military formations according to the law. According to the Code of Criminal Procedure of Ukraine of December 28, 1960 (Кримінально-процесуальний кодекс України № 1001-05 від 28.12.1960), military courts considered cases of crimes of the military personnel. The system of military courts consisted of three levels: military courts of the garrisons operating as courts of the first instance; military Courts of Appeal of regions and Court of Appeal of the Navies of Ukraine; the Military Judicial Board operating in the structure of the Supreme Court of Ukraine as court of cassation. However, in this Law, unlike the previous one, much less attention was paid to military courts. In particular, their competence, the procedure for logistics, equipment and other issues were not regulated. It demonstrates the diminishing interest of the Ukrainian legislator in military courts.

The military prosecutor's office was working during this period according to the Law "About the Prosecutor's Office" from 1991. Military prosecutor's offices of regions and the military prosecutor's office of the Navies of Ukraine (as regional) and military prosecutor's offices of garrisons (as urban) answered to the bodies of the military prosecutor's office. Its chief activity was supervision of compliance with the law in the Armed Forces of Ukraine, the Ministry of Defense of Ukraine, at the military enterprises and other military sphere objects. Also, the military prosecutor's office carried out pre-trial investigation of military crimes and the prosecution of these cases in court. In addition, it represented the interests of military personnel in courts and supervised the application of restrictions on their personal freedom to military personnel. It should be noted that military prosecutors carried out their functions related to participation in court hearings precisely in military courts.

During this period in Ukraine, the Military Service of Law and Order in the Armed Forces of Ukraine was created according to the Law of March 7, 2002. (Про Військову службу правопорядку у Збройних Силах України: Закон України» № 3099-III 7.03.2002) This Service was assigned a wide range of law-enforcement functions in the military sphere, for example, providing law and order and military discipline among the military personnel of the Armed Forces of Ukraine, prevention of crimes among them, etc. In accordance with Art. 101 of the Criminal Procedure Code of Ukraine of 1960, employees of the Military Law Enforcement Service had the authority to initiate criminal cases and carry out investigations into crimes committed by servicemen of the Armed Forces of Ukraine.

At the same time, at the end of this period the tendency towards the elimination of military justice was seen. In *The Concept of Improvement of Legal Proceedings for*

the Adoption of Fair Trial in Ukraine according to the European Standards of 2006 (Концепція вдосконалення судівництва для утвердження справедливого суду в Україні відповідно до європейських стандартів: затв. Указом Президента України № 361/2006 10.05.2006), it was noted that there should be no military courts in the judicial system of Ukraine. Special legal status of judges of military courts was pointed out as contradictory to the principle of the uniform status of court; since these judges are in military service, have military ranks, and receive additional payments, it is contrary to the principle of a single status of the court and doesn't conform to the European standards. This document became a program basis for the liquidation of military courts.

The stage of crisis of military justice began in 2010 and coincided with coming to power of President Victor Yanukovych in Ukraine. However, its prerequisites go back to 2006 and Viktor Yushchenko's presidency, which was known for the pro-Western orientation. Despite difference in political views, Victor Yanukovych followed the course of his predecessor and finished the elimination of the military justice system.

In July 2010, the new Law of Ukraine "About the Judicial System and the Status of Judges" (Про судоустрій і статус суддів: Закон України № 2453-VI від 7.07.2010) was adopted which didn't provide the existence of military courts in the judicial system of Ukraine. The Decree of the President of Ukraine "About liquidation of military appeal courts and military local courts" was issued on its basis in September of this year. Accordingly, 15 military courts were liquidated: 2 appeal courts and 13 local courts, with the total number of about 75 working judges (Про ліквідацію військових апеляційних та військових місцевих судів: Указ Президента України № 900/2010 від 14.09.2010).

The liquidation of military courts was justified by the general course towards demilitarization. The existence of military courts didn't correspond to the principles of unity and specialization of the judicial system. The number of cases considered by military courts was so insignificant that their maintenance became economically inexpedient. A significant role was played by western experts who spoke against the preservation of military courts. According to some experts, military courts were liquidated intentionally as a part of collapse of the military justice system (**Шульгина, Собко**, 2015)

The military prosecutor's office was reformed in 2012. Due to the adoption of the new Criminal Procedural Code of Ukraine of April 13, 2012 (Кримінальний процесуальний кодекс України № 4651-VI від 13.04.2012), norms of military prosecutor's offices were excluded from the Law "About the Prosecutor's Office." (Про внесення змін до деяких законодавчих актів України у зв'язку з прийняттям Кримінального процесуального кодексу України: Закон України № 4652-VI від

13.04.2012). The property and finances intended for the maintenance of the military prosecutor's offices were transferred from the operational department of the Ministry of Defense to the discretion of the General Prosecutor's Office of Ukraine.

It should be noted that military prosecutor's offices weren't liquidated completely, and were reorganized into prosecutor's offices on supervision of compliance with the laws in the military sphere. These prosecutor's offices worked as specialized, based on the civil law. They lost ties with the Ministry of Defense, and their employees lost the status of military personnel. Existence of specialized prosecutor's offices wasn't provided in the draft of the new Law "About the Prosecutor's Office" (Про прокуратуру: Проект Закону України № 3541 від 5.11.2013) prepared in 2013. Thus, with its acceptance, the institute of military prosecutor's offices in Ukraine had to be liquidated completely.

The prerequisites for the reorganization of the military prosecutor's offices, as well as military courts, included both the course towards the demilitarization of the state and cost savings. A prerequisite for the liquidation of these prosecutor's offices was the reduction of the competence of the prosecutor's office, in particular, the sphere of supervision over the observance of laws. Thus, the military prosecutor's offices, which supervise the observance of the laws in the military sphere, were gradually left without work. The liquidation of the military courts also accelerated the process of their reorganization, although the military prosecutor's offices were not dependent on the military courts for their work.

The stage of revival of military justice began after the aggravation of the military and political situation in Ukraine in 2014. After the beginning of military aggression of the Russian Federation against Ukraine, there was a need of renewal of various military institutes including military justice.

The first step was the recovery of military prosecutor's offices by amendments to the Law "About the Prosecutor's Office" of August 14, 2014. It is important to note that military prosecutor's offices weren't created from scratch, but were reorganized basing on prosecutor's offices on supervision of compliance with the laws in the military sphere, which had continued to work since 2012. The status of military prosecutor's offices as separate link of the prosecutor's office system was enshrined, their levels and also particularities of the status of staff of military prosecutor's offices were determined in the new Law of Ukraine "About Prosecutor's Office" adopted in October, 2014. However, due to the absence of military courts and the reduction of the functions of the prosecutor's office, the scope of its activities was rather narrow.

An extensive discussion about other institutes of military justice: military courts and military police, began after the recovery of military prosecutor's offices. These issues are considering by practitioners, scientists, social activists and parliamentarians and find support in various sectors of society. Some results of these discussions

have received registration in legislative initiatives, however, all of them have been removed from the agenda of parliament. Besides, in strategic documents in the sphere of judicial authority (Про Стратегію реформування судоустрою, судочинства та суміжних правових інститутів на 2015-2020 роки: Указ Президента України № 276/2015 від 20.05.2015) and national security (Про рішення Ради національної безпеки і оборони України від 6 травня 2015 року «Про Стратегію національної безпеки України»: Указ Президента України № 287/2015 від 26.05.2015), the military justice system isn't mentioned at all.

In 2019, after the election of Volodymyr Zelenskyy as President of Ukraine, pacifist sentiments prevailed in the political environment. As a result, military prosecutors were again turned into civilian specialized prosecutors in the military and defense sphere. The issue of the establishment of military courts and military police was also dropped.

Paradoxically, after the beginning of the full-scale military aggression of the Russian Federation against Ukraine in February 2022, the situation of the military system has not changed. Although due to the active phase of the war, Ukraine has significantly increased its armed forces and experienced a dramatic increase in military crimes, the issue of creating an effective military justice system is not a priority. Some initiatives in this area related to the restoration of military prosecutors or the creation of military police did not find support from the Ukrainian authorities. According to the Supreme Court Chairman, military courts will be created neither during the war, nor after it. There's no money to do that, and there's no procedures of appointing judges to these courts («Мало ймовірно, що в умовах…»).

Thus, for the last 8.5 years, the idea of creating a military justice system in Ukraine has continued to be actively discussed in the expert community and, together with other steps aimed at strengthening the military sphere of the state, has had the support of the population, as well. However, these ideas have not received legislative formalization so far.

The Legal Basis of the Military Justice System in Ukraine

The legal basis of the military justice system covers the norms of various normative acts regulating the status of military justice bodies, their system and types, competence and status of their employees, as well as the scope of their activities.

Depending on the legal force of the relevant acts, they can be divided into the following groups: (1) the Constitution of Ukraine; (2) laws of Ukraine; (3) acts of the President, Supreme Council, and Cabinet of Ministers of Ukraine; (4) departmental acts.

Depending on their scope, these norms are divided into the following types: (a) general norms; (b) rules relating to military vessels; (c) rules relating to military prosecutors; (e) regulations relating to the military police and other bodies; (e) rules relating to other matters of military justice.

The act of the highest legal validity in Ukraine is the Constitution of 1996. (Конституція України від 28.06.1996 в редакції 30.09.2016) It provides the general legal basis for functioning of the military justice system, though it doesn't mention it directly. According to some researchers, military courts actually fall into the category of creation of extraordinary courts, which is directly forbidden by Art. 125 of the Constitution. Besides, the status of judges of military courts as the military personnel doesn't comply with the requirements to the judges formulated in the Constitution (Висоцька, 2015). In our opinion, this point of view is unreasonable as military courts functioned nearly 15 years in Ukraine under the current Constitution (from 1996 to 2010). During this time, the question of their discrepancy of the Constitution of Ukraine has never appeared. Thus, the absence of any reference in the Constitution to the bodies of military justice isn't an obstacle for their creation.

Functioning of the bodies of military justice requires an appropriate legislative base that isn't full in Ukraine. Among laws of ***the general character***, which extend to all or most bodies of military justice, it is necessary to highlight:

– Criminal Code of Ukraine of April 5, 2001 (Кримінальний кодекс України № 2341-III від 5.04.2001). This act defines the list of crimes and punishments for their commitment. In particular, the Section XIX regulates crimes against an established order of rendering of military service (military crimes).
– Criminal Procedural Code of Ukraine of April 13, 2012 (Кримінальний процесуальний кодекс України № 4651-VI від 13.04.2012). This act regulates an order of pretrial investigation of criminal offenses and their judicial review. The creation of new bodies of military justice demands additions and changes in the CPC of Ukraine.
– Law of Ukraine "On operational-search activities" of March 18, 1992 (Про оперативно розшукову діяльність. Закон України № 2135-XII від 18.02.1992). This act regulates the procedure for conducting search, intelligence and counter-intelligence actions and establishes a list of bodies authorized to carry out these actions. Since the identification and investigation of military crimes implies the conduct of operational-search activities, this law can be attributed to acts of a general nature in the field of military justice.

Acts of special character concern separate bodies of military justice. At the same time, among all these bodies a separate law regulates Military Service of Law and Order (Про Військову службу правопорядку у Збройних Силах України: Закон України № 3099-III від 7.03.2002). The law defines its status, system, competence, the status of employees.

The norms devoted to the military prosecutor's office were previously contained in the Law of Ukraine "On the Prosecutor's Office" of October 14, 2014. The rules regarding it were provided for in various articles of this Law (articles 7, 8, 27, 81, and others). The reorganization of military prosecutors in 2019 was carried out by excluding these norms from the Law "On the Prosecutor's Office." Now the legal status of prosecutors in the military and defense sphere is determined by the general norm on the possibility of creating specialized prosecutors by the Prosecutor General (part 2 of art. 7 of the Law "On the Prosecutor's Office"). In accordance with it, by the decision of the Prosecutor General, if necessary, specialized prosecutors may be formed on the rights of: a structural unit of the Office of the Prosecutor General; regional prosecutors; a unit of the regional prosecutor's office; district prosecutors; or a unit of the district prosecutor's office. The list, formation, reorganization and liquidation of specialized prosecutor's offices, determination of their status, competence, structure and staffing are carried out by the Prosecutor General.

After February 24, 2022, there were several attempts to revive military prosecutors. On April 01, 2022, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amending Some Legislative Acts to Improve the Activities of the Prosecutor's Office in the Context of Armed Aggression against Ukraine," which, among other things, was intended to determine the features of the legal status of prosecutors who are military personnel (Про внесення змін до деяких законодавчих актів щодо удосконалення діяльності органів прокуратури в умовах збройної агресії проти України: Проект Закону України № 7058 від 16.02.2022). The President of Ukraine did not sign the said Law, pointing out that it did not take into account the tasks assigned by the Constitution of Ukraine to the Armed Forces of Ukraine, the nature and essence of military service.

The next step was the Draft Law "On Amendments to the Law of Ukraine 'On the Prosecutor's Office' to ensure the activities of specialized military prosecutors," submitted to the parliament by a group of people's deputies in July 2022 (Про внесення змін до Закону України «Про прокуратуру» щодо забезпечення діяльності спеціалізованих військових прокуратур: Проект Закону України № 7576 від 21.07.2022). It actually provides for the return to the model of military prosecutors, which operated in Ukraine until 2019. As of October 2022, this bill is under consideration by the Verkhovna Rada of Ukraine.

There is no mention of military courts in the Ukrainian legislation. Based on their previous regulation, it may be assumed that these norms have to be included in the Law of Ukraine "On The Judicial System and the Status of Judges" of June 2, 2016 (Про судоустрій і статус суддів: Закон України № 1402-VIII від 2.06.2016). It is expedient to provide a separate section or article devoted to military courts in this Law where their system, competence and requirements to judges of these courts should be regulated.

In recent years, several bills concerning introduction of military courts have been registered in the Verkhovna Rada of Ukraine. In 2015, these were among others: "About Introduction of Amendments to the Law of Ukraine, 'About the Judicial System and the Status of Judges' (concerning the renewal of military courts in the system of general jurisdiction)" (No. 1896 from 1/30/2015) (Про внесення змін до Закону України «Про судоустрій і статус суддів» (щодо відновлення в системі загальної юрисдикції військових судів)»: Проект Закону України № 1896 від 30.01.2015) and "About Introduction of amendments to Some Acts of Ukraine (concerning the formation of military courts and single organizational issues)" (No. 2557 from 4/6/2015) (Про внесення змін до деяких законодавчих актів України (щодо утворення військових судів та окремих організаційних питань): Проект Закону України № 2557 від 6.04.2015). However, none of the specified bills has been considered by the parliament. The bill No. 1896 was rejected and withdrawn on September 15, 2015, and the bill No. 2557 was withdrawn on February 21, 2017.

At the end of 2017, the fastest possible introduction of the bill of creation of military courts by the President of Ukraine (**Законопроект про військові суди буде у Раді на початку 2018 року.** Українське право. 21.12.2017) was announced, however, to date, no legislative initiatives have been taken in this respect.

In 2018, the next attempt to introduce military courts took place. Two bills were registered in the Verkhovna Rada of Ukraine: No. 8392 of 22 May 2018 and No. 8392-1 of 01 June 2018 "On Amendments to the Law of Ukraine 'On the Judicial System and the Status of Judges' on Military Courts." (У ВРУ зареєстровано законопроекти щодо…). Neither was considered and both bills were withdrawn by their initiators on 29 August 2019.

It is no different with the military police, which was supposed to be created on the basis of Military Service of Law and Order. At the beginning of 2015, the bill of military police (Про військову поліцію: Проект Закону України № 1805 від 21.01.2015) has been registered in the parliament; however, it wasn't even included in the agenda. Further, the Ukrainian authorities repeatedly announced the creation of the military police (Жолобович, 2016) In December 2017, it was reported that the Ministry of Defense of Ukraine has prepared the bill of the military police (Рощенко, 2017), however, it hasn't been introduced in the parliament. The next draft Law "On the Military Police" was submitted to parliament on February 15, 2022 and included in the Plan of Legislative Work of the Verkhovna Rada of Ukraine for 2022 (Про військову поліцію: Проект Закону України № 6569-1 від 15.02.2022). Due to the start of the Russian invasion, it was not considered as scheduled and as of October 2022, it is in an uncertain position. Nonetheless, the parliament can return to its consideration at any time and adopt it according to an accelerated procedure, should there be the political will to do so.

There were also alternative approaches to regulating the military justice system. For example, in 2018, there was a legislative initiative to create the State Bureau of Military Justice. In the Draft Law "On the State Bureau of Military Justice" № 8387 of 21 May 2018, this body was proposed to exercise control over all military formations of Ukraine (Про Державне бюро військової юстиції: Проект Закону України № 8387 від 21.05.2018). It was supposed to include military police officers, military investigators and military inspectors and combine the functions of the military police and the military prosecutor's office. The alternative bill, № 8387-1 of 25 May 2018, proposed that the State Bureau of Military Justice be created only as a body for the prevention, detection and investigation of military and some other crimes (Ibid. № 8387-1 від 25.05.2018). However, neither of these bills was considered by the parliament and they were withdrawn by their initiators.

At the end of January 2022, a new Draft Law "On the State Bureau of Military Justice" was submitted to the parliament. It proposed to create a new body for the pre-trial investigation of military crimes and control over law and order in the Armed Forces of Ukraine (Ibid. № 6569 від 28.01.2022). In fact, this body was conceived as a counterpart of the military police. However, this bill has not yet been considered by the people's deputies.

Except legislative acts, the organization and activity of bodies of military justice are regulated by subordinate and departmental acts. For example, the matters of the organization of activity of the specialized prosecutors in the military and defense sphere and their competence are regulated by orders of the Prosecutor General (Про особливості організації діяльності спеціалізованих прокуратур у військовій та оборонній сфері: Наказ Генерального прокурора № 370 от 22.11.2022). Internal matters of the organization and functioning of Military Service of Law and Order are regulated by numerous acts of the Ministry of Defense of Ukraine (Про затвердження Інструкції про організацію патрульно-постової служби Військовою службою правопорядку у Збройних Силах України: Наказ Міністерства оборони України № 515 від 10.10.2016).

Thus, there are gaps in the sphere of legislative regulation of the military justice system. So far, no decent options have been offered to fill them. At the same time, the legislative settlement of military justice bodies should be carried out comprehensively, since these bodies are closely related to each other. To do this, it is necessary to simultaneously develop and adopt a package of laws on military courts and military police as well as amendments to the Criminal Procedure Code, Laws on the Judicial System and the Status of Judges, On the Prosecutor's Office, and others. On their basis, a by-law and departmental settlement of the military justice bodies will be built.

Jurisdiction of Military Justice

The sphere of military justice is not defined by the legislation of Ukraine to date. Military crimes should be considered the main criterion of its definition. Their concept and list are defined in the Section XIX of the Criminal Code of Ukraine. Military crimes are the crimes provided by this section against the order of performing the military service as established by the legislation, and committed by military personnel or persons liable for military service and reservists during their performing of the military training. The military personnel of the Armed Forces of Ukraine, the Security Service of Ukraine, State Border Guard Service of Ukraine, National Guard of Ukraine, and other military formations as well as the Public Special Service of Transport, Public Service of Special Communication and Information Security of Ukraine can bear responsibility for these crimes.

Civilians can be criminalized for commitment of these crimes if they are accomplices of military crimes.

The feature of criminal liability for commitment of military crimes is that the person committing them can be exempted from criminal liability with application to him or to her of the measures provided by the Disciplinary Regulations for the Armed Forces of Ukraine. So, the criminal liability can be replaced by disciplinary punishment. It is an effective way to avoid criminal liability for insignificant military crimes.

It is necessary to remember that till 2010, the jurisdiction of military courts extended to all crimes committed by the military personnel. Such an approach brings a risk of a conflict between military and civil jurisdictions and makes the sphere of military justice overly broad. At the same time, the military personnel committing other crimes can face obstacles in consideration of their cases by bodies of civil justice, especially in wartime. Therefore, it is necessary to provide a possibility of spreading the jurisdiction of military justice to other crimes of the military personnel in exceptional cases provided by law, for example, if the civil justice authorities do not operate in the relevant territory or if there are hostilities there. This will more fully protect the rights of the military personnel (Лапкин, Авдеева, 2018).

Beyond criminal cases, the sphere of military justice can also extend to the appeal of decisions, actions or inactivity of various bodies of military management. To date, such cases are considered by specialized administrative courts. However, these cases demand specialized knowledge of the military sphere which military courts can provide.

Thus, in case of the revival of military courts and the military prosecutor's office or the creation of a military police, one of the most important issues is a clear definition of their competence.

Transformation of the Military Justice System in Ukraine at the Present Stage

The necessary prerequisites of the reform of military justice in Ukraine can be divided into three groups: (1) factual; (2) ideological; (3) economic.

The main *factual prerequisites* that determine the need for a reform of military justice are:

- The conduct of hostilities on the territory of Ukraine and the annexation of part of its territory, which requires the restructuring of judicial and law enforcement agencies. In case when the territorial bodies of justice do not operate, there is a need for mobile structures that can flexibly adapt to the system of military bodies.
- An increase in the number of military crimes and other legal cases in the military sphere, and the spread of weapons among the civilian population require adequate attention from the justice authorities.
- The need to increase the effectiveness of the activities of the court, the prosecutor's office and the police in the military sphere. The civilian counterparts of these bodies do not take into account the specifics of the military sphere and do not correspond to its structure, therefore they are not equipped to resolve legal conflicts in this area.

The ideological prerequisites are the totality of ideas, theories, and concepts that are formed around the functioning of the military justice system. They can be positive, that is, justifying and supporting the existence of military justice, or negative, that is, denying its necessity. It can be concluded that since 2014, the ideology of military justice has been significantly transformed, with the vector turning from neutral or negative to positive. Until 2014, most scientists, experts and citizens either denied the need to preserve military justice in Ukraine or did not consider it significant. The priority during this period was the idea of global demilitarization of Ukraine. However, since 2014 the situation has changed. Faced with the factual circumstances outlined above, there are more and more proposals for the creation of military courts, military prosecutors and military police in Ukraine by scientists, government officials and military command, public activists and politicians. It can be argued that in today's Ukraine, there is a public demand for strengthening the defense capability of the state and its militarization. As a result, initiatives to create military justice bodies are supported by both military personnel and civilians.

The economic prerequisites relate to the availability of sufficient budget funds to finance the military justice system. It should be noted that economy was one of the decisive factors in the decision to liquidate military courts and military prosecutor's offices in 2010-12. Their maintenance seemed economically inexpedient in terms

of a small amount of work. In addition, the maintenance of military justice bodies is a priori more financially costly than territorial justice bodies, which is due to the peculiarities of their deployment, the need to ensure security, and increased guarantees for their employees as military personnel.

However, in recent years, defense financing in Ukraine has been a priority and is constantly growing, for example, in 2018, spending on the Ministry of Defense increased by UAH 16.6 billion, that is, by 24.3% compared to 2017, and amounted to UAH 86.6 billion (Офіційний сайт Міністерства оборони України). In 2021, this amount rose to about UAH 121.5 billion, and for the whole of 2022, it was planned to allocate UAH 133.5 billion for the needs of the Ministry of Defense (Ibid). However, in fact, after the start of Russian aggression, Ukraine spends more than UAH 100 billion per month on defense. Therefore, the budget for 2023 provides funding for the Ministry of Defense in the amount of UAH 850 billion, and more than UAH 1.1 trillion is planned to be spent on the military sphere (50% бюджету – на війну. За що житиме Україна у 2023 році? Українська правда. 15.09.2022).

In view of these figures, it can be assumed that the state is able to finance the creation of a military justice system, although specific calculations on the size of such costs have not been made.

Thus, at this stage in Ukraine, there are all the necessary prerequisites for reforming the military justice system.

Subjects of the Reform of the Military Justice System in Ukraine

Among the subjects playing the defining role in reforming the military justice system of Ukraine, the following can be enumerated: President of Ukraine; parliament; individual departments; representatives of civil society and the media; academic institutes and certain scholars; foreign partners of Ukraine.

Traditionally, the crucial role as regards any military justice reform in Ukraine is played by ***the President of Ukraine***. It follows from the Constitution of Ukraine, which states that the President is a guarantor of the state sovereignty and territorial integrity of Ukraine, the Supreme Commander, who manages national security and defense of the state. The President also defines strategic directions of reforming judicial authority and law enforcement agencies of Ukraine. He plays a key role in the creation of courts as he has the exclusive right to introduce the bill on these matters in the Supreme Council of Ukraine after consultations with the Supreme Court of Justice (part 2 of Art. 125 of the Constitution of Ukraine).

The President can implement policy in the field of military justice through various channels: by submitting his own legislative initiatives to the parliament; through the parliamentary faction of people's deputies under his control; through the National Security and Defense Council, which he chairs.

In 2014, the President possessed an initiative of the revival of military prosecutor's offices. In the spring of 2017, the President spoke in favor of the creation of military courts, which caused public discourse (*Порошенко пропонує створити військові суди в Україні. BBC. 28.03.2017*). In December 2017, the President's representative in the Verkhovna Rada of Ukraine announced that the President would shortly introduce the bill of military courts in the parliament (Порошенко внесе в Раду законопроект про військовий суд. Українська правда. 18.12.2017). Therefore, it is the President who is being expected to take decisive steps in the sphere of reforming the military justice system.

Any initiatives of the President in this sphere demand the approval from the ***parliament***. According to the Constitution of Ukraine, the judicial system and the trial, the organization and activity of the prosecutor's office and the bodies of prejudicial investigation are only defined by laws of Ukraine adopted by the Verkhovna Rada of Ukraine. Besides, the creation, reorganization and liquidation of each court in Ukraine is defined by law.

Thus, the President is forced to interact with the parliament in matters of reforming military justice. It is the parliament that has the decisive word in matters of legislative formalization of military justice bodies.

These issues are considered by the parliament on the basis of a legislative initiative, which may come from the President, the government or individual people's deputies. The bills concerning military justice that have been under consideration by the Supreme Council of Ukraine in recent years came from individual people's deputies. For example, the draft law "On the Military Police" № 1805 was submitted by MPs M.P. Palamarchuk and V.M. Korol, who were representatives of the pro-presidential faction Petro Poroshenko's Bloc. Representatives of the leading parliamentary factions, I.Yu. Vinnik and S.V. Pashinsky, presented a draft law "On Amendments to Certain Legislative Acts of Ukraine (Regarding the Formation of Military Courts and Certain Organizational Issues)" № 2557. In 2022, representatives of the presidential faction Servant of the People submitted to the parliament the bills "On the Military Police" № 6569-1 and "On Amendments to the Law of Ukraine 'On the Prosecutor's Office' to Ensure the Activities of Specialized Military Prosecutor's Offices" № 7576. However, this did not ensure the support of these bills in this parliament.

In general, the Ukrainian politicians declare the support of the military justice system, which increases in view of the exacerbation of the war. For example, intro-

ducing bills to the parliament concerning bodies of military justice coincided with defeats of the Ukrainian forces at the front. The bill of renewal of military prosecutor's offices was adopted when the "Ilovaisk boiler" was becoming the most considerable defeat of the Ukrainian forces in 2014. Bills of military courts and the military police were introduced at the beginning of 2015, during the "Debaltseve boiler" which ended with the defeat of the Ukrainian military. The President of Ukraine Petro Poroshenko announced for the first time the renewal of military courts after the resonant verdict on the General Nazarov in March 2017 (Порошенко ініціював відновлення військових судів після вироку у справі щодо катастрофи ІЛ-76. ТСН. 28.03.2017). The draft law "On the Military Police" № 6569-1 was submitted to the Parliament on February 15, 2022, and the draft law "On Amendments to Certain Legislative Acts to Improve the Activities of the Prosecutor's Office in Conditions of Armed Aggression against Ukraine" № 7058 on February 16, 2022, that is on the eve of the Russian invasion, which was expected in advance and the prospects of which were widely discussed in the media.

Thus, the activation of the reform of military justice bodies sometimes has situational character. It is an attempt of the authorities to show the public their activity in the military sphere. The problem is that these attempts are often publicity-oriented, because after the resonance of individual events decreases, politicians lose interest in the reform of military justice. At the same time, the Ukrainian authorities do not have a coherent vision of reforming the military justice system. Thus, the issue of creating bodies of military justice is politically motivated and does not have a proper theoretical study. Conceivably, this can explain why the final decision on the military justice system in Ukraine has still not been made.

It is also necessary to consider an important role of a ***departmental factor*** in initiating decisions in the sphere of reforming military justice. For example, the President of Ukraine made the decision of the need of revival of the military prosecutor's office in 2014 on the basis of the proposal from the Prosecutor General's Office of Ukraine (Капсамун, 2015). The project of military police is developed by the Ministry of Defense of Ukraine (Законопроект про Військову поліцію знаходиться на розгляді в Адміністрації Президента України. Офіційний сайт Міністерства оборони України. 15.12.2017). The interested departments often push the key subjects (the President and the parliament) to decision-making in the sphere of military justice reforming.

In the area of the judicial authority, an important role in the creation of military courts is played by the Supreme Council of Justice, which has to consult the President about the creation, reorganization or liquidation of courts, military ones included. However, up to now, the Supreme Council of Justice has not expressed its position about the revival of military courts in Ukraine. Earlier, in 2015, certain

judges of the Supreme Court spoke in favor of such plans (Верховний суд виступає за відновлення військових судів в Україні. День. 9.09.2015), however, this stance has not been confirmed after the reform of the Supreme Court in 2017.

Civil society and ***the media.*** An important role in reforming military justice is played by representatives of civil society and the media. However, it isn't decisive and generally comes down to discussion of the initiatives of the state leaders. Representatives of the public express their opinion on the revival of military courts within various conferences, briefings or media appearances. In turn, the media provide fairly strong information support to the questions pertaining to military justice and they influence formation of public views on those matters to a large extent.

However, when evaluating the role of the media, it should be taken into account that issues of military justice only rarely acquire visibility and are quickly lost in the flood of more dramatic news. The institutions of civil society in Ukraine do not have effective levers of influence on the authorities in matters of military justice. A number of public activists generally have a negative attitude towards the courts and law enforcement agencies, and they relay this attitude to military justice agencies, that is, what concerns the military aspect is perceived positively by them, and what concerns the sphere of justice is perceived negatively. In addition, the proposed legislative initiatives in this area have not undergone full-fledged public hearings, which may be considered their significant drawback.

Civil society exercises control over the system of military justice. Its forms are defined by the Law of Ukraine "About National Security" of June 21, 2018 № 2469-VIII (Про національну безпеку: Закон України № 2469-VIII від 21.06.2018). In accordance with par. 5 of part 1 of Art. 1 of this Law, democratic civilian control is a set of legal, organizational, informational, personnel and other measures carried out in accordance with the Constitution and laws of Ukraine to ensure the rule of law, legality, accountability, transparency of security and defense sector bodies and other bodies whose activities are related to with restriction in certain cases of human rights and freedoms, promotion of their effective activities and performance of their functions, strengthening the national security of Ukraine.

Citizens participate in control over the military organization and law enforcement agencies in the following forms: (1) by public organizations they belong to; (2) through deputies of representative authorities; (3) personally: by the address to the Representative of the Supreme Council of Ukraine or another public authority.

While controlling, public organizations have the right to request and obtain information of the activity of the Armed Forces of Ukraine, other military formations, law-enforcement activity, except for the data containing state secrets; to conduct academic research; to carry out public expertize of bills; to participate in public discussions; to get acquainted with the conditions of service and welfare of the military personnel.

The controlling role of the media is regulated, too. The media are entitled to request and obtain information; to disseminate it, except for state secrets; to publish official replies of public authorities and military management to the materials published earlier.

In order to inform the public systematically about the activities of the security and defense sector of Ukraine, to ensure the validity of decisions of state bodies on issues of national security and defense, on the status of implementation of measures for the development of the security and defense sector, periodically, but at least once every three years, security and defense sector bodies issue "White Papers" or other analytical documents (reviews, national reports, etc).

At present issues of military justice also attract the interest of ***researchers***. In recent years in Ukraine, there are more and more academic publications devoted to this subject. With participation of scholars and experts, various scientific and practical conferences, seminars and round table meetings are held. The following meetings can be considered the most productive: a round table *Military Justice in Modern Conditions: The Prospects of Development and Reforming* held at the Institute of the Legislation of the Supreme Council of Ukraine on November 24, 2015 (Військова юстиція в сучасних умовах: перспективи розвитку та реформування. 24.11.2015); a round table *Military Justice in Ukraine: Current Problems of the Organization and Implementation* held in the State and Law Institute of V.M. Koretsky of National Academy of Sciences of Ukraine on June 6, 2017 («Відновлення військових судів – пріоритетний крок у реформуванні військової юстиції». 19.06.2017). Workshop of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) *Legal Frame of the Security Sector Reform* held on October 5, 2017 in the National Legal University of Yaroslav the Wise (Legal Frame of the Security Sector Reform. 05.10.2017); the round table *The Military Justice of the Partner Countries Directed to Protection of the Military Personnel* held on January 17, 2018 in Command of Ground Forces of the Armed Forces of Ukraine, etc. (В Командуванні Сухопутних військ ЗС України відбувся круглий стіл за темою: «Військова юстиція країн-партнерів: спрямована на захист військовослужбовців. 17.01.2018).

Generally, the recommendations of these scholarly events have supported the renewal of the military justice system in Ukraine. These conclusions are published and sent to public authorities, but are rarely followed in practice.

Thus, any initiatives in the sphere of reforming of military justice have to be widely discussed in public. An important role in it is played by the media which should inform society objectively about the reform of military justice and form positive public opinion on these issues. It is necessary to involve scholars and experts in the solution of these problems in the sphere of military justice.

The Role of an External Factor in Reforming Military Justice of Ukraine

In reforming processes of the military justice system, some role is played by an ***external factor***. As regards the reform of the judicial and law-enforcement system, Ukraine listens to the recommendations of the Venetian Commission "For Democracy through Law," US Agency for International Development (USAID) (within the program of New Justice) and other organizations. Besides, Ukraine is dependent on foreign financial aid, which is often combined with demands for legal reforms.

However, in this context, the role of the foreign factor can be estimated as rather negative. For the entire period of the independence, the foreign bodies have demanded of Ukraine consistent demilitarization, including the liquidation of bodies of military justice. For example, the important role in making decision on liquidation of military courts was played by a principled stand of the Venetian Commission "For Democracy through Law." In 2000-2001 and 2010 it provided opinions concerning Laws of Ukraine "About judicial system" and was against existence of this institute in Ukraine, considering it an atavism of the former Soviet judicial system (Заключение Венецианской комиссии относительно Закона Украины о судоустройстве и статусе судей, 25 октября 2010 года). The Ukrainian legislator decided to follow the opinion of the authoritative European expert organization, especially as it coincided with the internal political climate in the country.

Similar remarks were also made by the Venetian Commission about military prosecutor's offices. In 2012, it approved the liquidation of military prosecutor's offices, considering it a necessary step towards the simplification of the prosecutor's office system. Moreover, the Venetian Commission criticized provisions of the draft of the new Law "About the Prosecutor's Office" regarding the renewal of military prosecutor's offices and the status of military prosecutors, though in general it acknowledged the possibility of their existence provided they conformed to European standards and practice (Коментарі Генерального директорату з прав людини і верховенства права (Директорату з прав людини) Ради Європи щодо Закону України «Про прокуратуру» від 14 жовтня 2014 року).

Now the approval and support of the relevant initiatives by foreign partners is essential for decision-making at the national level. Therefore, the efforts to examine military justice problems in Ukraine and to develop relevant proposals in this sphere are very important. Results of this activity seem to be able to stimulate the Ukrainian legislator to take more active steps in reforming the military justice system.

The Prospects of the Renewal of Military Courts in Ukraine

Today, there are no military courts in Ukraine, although many experts and politicians speak out in favor of creating them. Public opinion can also be considered favorable for their implementation. Functioning of military justice of Ukraine in the format of the military prosecutor's office and the Military Service of Law and Order is of demonstrable low efficiency without the military court (Лапкін, 2017). A coordinated system of the following elements should function in the state: military police—military prosecutor's office—military court.

The following are arguments in favour of military courts in Ukraine:

- ***Availability of justice***. In those territories where the judicial system of Ukraine temporarily doesn't work, protection of military laws and civilians is necessary. Best of all, this task is performed by the military courts being very close to the areas of military operations or territories beyond the Ukrainian control.
- ***Mobility***. As military courts aren't tied to specific administrative and territorial units, they can easily move in connection with the redeployment of military formations or a military operational and tactical situation. Besides, they can dispense justice for the civilian population in the places where the system of territorial courts doesn't work (for example, in territories beyond the Ukrainian control).
- ***Efficiency***. Due to the big load of territorial courts, they consider the cases with considerable excess of procedural time limits. Military courts are capable of providing a speedy consideration of such cases because of their mobility and the professionalism of the judges.
- ***Specialization***. The special subject field of the activity of military courts is constituted by the following: (1) objects are military crimes; (2) subjects are members of the military personnel; (3) the standard regulation are special norms of military law. The specificity of this sphere demands specialization of judicial system.
- ***Competence and professionalism***. The specificity of the military sphere demands the appropriate level of competence of judges considering such cases. They must have profound knowledge of the system of military law, practical experience of the military service and also military security clearance (Оверчук, 2015). Some experts point out that ordinary judges can successfully solve military cases by means of conclusions of subject-matter experts (Луценко, 2017). However, the order at which the cases of the military personnel are considered by military judges demands not only higher quality of their decisions, but also an disciplinary effect.
- ***Traditions and experience***. Ukraine has a long history of functioning of military courts. The system of these courts has been liquidated relatively recently. In

this regard, there is an opportunity to engage the judges who worked in military courts till 2010 (Сидоров, 2015). Besides, Ukraine has a well-organized system of preparation and training of military lawyers.

The renewal of military courts in Ukraine requires addressing a number of key issues:

– ***The status of military courts***. Military courts have to be a part of judicial system, which is united in Ukraine. Within the existing judicial system, these courts can be considered as specialized. All features of their organization and activity have to be justified by the specificity of the military sphere and none may contradict the general principles of judicial authority enshrined in the Constitution and laws of Ukraine.

As creation of military courts in Ukraine is a necessity caused by a military-political situation, it is expedient to provide the temporary status of these courts. They have to be liquidated after the end of the military operations and the establishment of sovereignty of Ukraine upon its whole territory. After that, military courts have to merge with the general judicial system. In view of that, there shouldn't be essential differences from the other judicial system of Ukraine in the organization of military courts and the status of military judges.

– *The* ***system of military courts***. Possible versions of the military courts system are the following:

(1) Three-level system of military courts. This was the system that worked till 2010. It provided military courts of garrisons as courts of the first instance; military courts of regions as appellate courts; Military Judicial Board at the level of the Supreme Court as the cassation instance. The bill № 1896 suggested returning to this option (Про внесення змін до Закону України «Про судоустрій і статус суддів» (щодо відновлення в системі загальної юрисдикції військових судів): Проект Закону України № 1896 від 30.01.2015). A similar project was supported by the Ministry of Defense of Ukraine, which disclosed that the bill of military courts provided creating 12-14 garrison courts, the Military Court of Appeal, and the Military Chamber (Законопроект щодо відновлення військових судів передбачає створення близько 12-14 гарнізонних судів і Військову палату. Інтерфакс-Україна. 11.08.2017). Such a system of military courts would correspond to the system of the military prosecutor's office, which is three-tiered. This is important as these organs work closely together. In this version, the system of military courts would be the fullest and the most autonomous. However, it would also be closed, which creates the threat of lacking external control and breaks the principle of unity of the judicial authority.

(2) Two levels of military courts: the first instance and the appeal instance. In that case, the cassation of their decisions would be exercised by the Supreme Court

in the general order. A similar model was provided by the bill № 2557, which suggested instituting local military courts of garrisons and appeal military courts (Про внесення змін до деяких законодавчих актів України (щодо утворення військових судів та окремих організаційних питань)»: Закон України № 2557 від 6.04.2015). Likewise, the bill No. 8392-1 of 01 June 2018 "On Amendments to the Law of Ukraine 'On the Judicial System and Status of Judges' on Military Courts" proposed creating military local courts and military courts of appeal (У ВРУ зареєстровано законопроекти щодо…).

(3) The creation of military courts only at the first instance level. In that case, the appeal of their decisions would be exercised in territorial Courts of Appeal. This makes for a closer connection of military courts with the general judicial system and is also the simplest and cheapest option. The specificity of military justice would be lost at the level of the court of appeal, however, the most important is that military courts function in the first instance, anyway.

The actual number of military judges and courts has to be determined on the basis of the requirements of hearing military cases. At the time of their liquidation in 2010, 2 appeal and 13 local military courts with 75 active judges were operating in Ukraine. Since that time, the number of crimes committed by military personnel has grown significantly. In 2017, there were registered 4577 military crimes in Ukraine, from which 2596 criminal cases were directed to court with an indictment. Besides, 1210 similar cases registered in former years were directed to court (Єдиний звіт про кримінальні правопорушення за січень-грудень 2017 р). For 8 months of 2022, 6,998 military crimes were registered, out of which 1,086 criminal proceedings were sent to court with an indictment (Ibid. за січень-серпень 2017 р). Thus, the potential workload of military courts reaches about 3000 criminal cases a year, which is comparable to the performance indicators of 10-15 general local courts with total of 100-150 judges. Accordingly, it is possible to predict the approximate number of 12-15 courts of garrisons and about 150 military judges.

– ***The competence of military courts.*** Till 2010, the competence of military courts was defined as hearing of cases concerning crimes of the military personnel. The jurisdiction of cases between the military courts of the garrisons and the military courts of the regions was distributed depending on the military rank of the defendants, their position or the severity of the crimes. Thus, the military courts of the garrisons, as courts of first instance, had jurisdiction over cases of crimes of persons with military ranks up to lieutenant colonel, captain of the second rank. As courts of first instance, the military courts of the regions and of the Naval Forces of Ukraine had jurisdiction over: 1) cases of crimes of persons with the military rank of colonel, captain of the 1st rank and above; 2) cases of crimes of persons holding positions from the regiment commander or ship commander

of the 1st rank and above, as well as persons equal to them in official position; 3) cases of all crimes for which, in peacetime, the possibility of imposing a sentence of life imprisonment is provided (Article 36 of the Code of Criminal Procedure of Ukraine of 1960). As a rule, if one person or a group of persons were accused of several crimes and the military court had competence at least over one of the cases, then the case was considered by the military court (article 40 of the CPC of Ukraine, 1960).

At the present stage, the competence of military courts can be considered in two ways: (1) hearing of cases about military crimes; (2) hearing of cases about the crimes committed by the military personnel. The first criterion is subject, and the second one is personal, however, both substantially coincide since, according to the Criminal Code of Ukraine, military personnel are the subjects of military crimes. Besides, it is necessary to give military courts the authority of judicial control over the actions of the military police, over the military prosecutor's office and over the application of coercive measures or criminal penalties (confinement on a guardroom or in the disciplinary battalion) to the military personnel. They can also receive powers of consideration of appeals of the military personnel and civilians against the decisions, actions or inactivity of the bodies of military management that violate human rights.

Besides, in territories where the judicial system of Ukraine doesn't work, administration of justice for the civilian population also has to be assigned to military courts. This applies to the temporarily occupied territories of Donetsk, Zaporozhye, Lugansk and Kherson regions, and also the Crimea.

– ***The requirements to judges of military courts.*** Judges of military courts have to comply with the general requirements to the judges established by part 1 of the article 69 of the Law "On The Judicial System and the Status of Judges." He or she must be a citizen of Ukraine, be at least 30 years of age but not older than 60, have higher legal education and at least 5 years of professional experience in law. Moreover, they have to be competent, respectable and to speak the state language. These requirements are basic and can't be reduced. Besides, the specifics of justice on the military cases provide for additional requirements to judges of military courts. They must have an officer rank and be either on active military service or in the reserves. These requirements are additional to those made to civil judges.

Candidates for military judgeship need to be provided the corresponding training related to the specificity of the military sphere. The current program of the special training, which all candidates for judgeship in Ukraine pass, doesn't provide specialization. Also the qualification examination taken by candidates for judgeship is uniform. Therefore, the special knowledge in the military sphere must be provided

to judges by their personal practical experience of the military service and special training programs or training in studying of military law.

– ***The appointment procedure of judges of military courts.*** Taking into account the abovementioned requirements, it follows that the main reservoir for military courts are: (1) sitting judges who worked in military courts before their elimination in 2010; (2) sitting judges having officer ranks and staying in the reserves or having experience of the military service in the past; (3) former staff of military prosecutor's offices; (4) other persons complying with the mentioned requirements.

The increased requirements to judges of military courts need to be observed when staffing these courts. On the other hand, the creation of military courts will demand staffing them as fast as possible. Therefore, the balance between speed and ensuring professionalism has to be observed while staffing military courts (Лапкін, 2018).

According to the legislation of Ukraine, judges can get to court in two ways: by appointment and by transfer. In both cases, a public competition for a judge post is carried out and the applicant wins who ranks the highest in rating. The rating is based on the results of a qualification examination (for candidates for the judge post) or a qualification estimation (for sitting judges). However, the operating order doesn't consider special requirements to judges of military courts.

The existing order of appointment to the judge post regulated by the Law of Ukraine "On The Judicial System and the Status of Judges" is difficult and takes considerable time. It includes 15 stages and takes on average 1,5 till 2 years. Thus, it is impossible to provide fast appointments of judges of military courts from the former military prosecutors or other military lawyers. It is possible to stuff military courts with currently sitting judges only and/or those candidates for the judge post who stay in the reserve at the time of their creation and comply with the specified requirements.

Another option is to transfer judges from other courts to military courts. As noted above, many judges who used to serve in military courts before these were liquidated in 2010 continue to serve in general courts. Some of them may want to return to the re-established military courts. In addition, there are persons with military service experience among the current judges. They could also be used in completing military vessels. In accordance with Article 82 of the Law of Ukraine "On the judiciary and the status of judges," the transfer of judges is also carried out based on the results of the relevant competition. That is, when appointed to a vacant position, current judges compete with candidates, although they have an advantage over them if they get the same position in the rating.

Thus, the current procedure for obtaining the position of a judge cannot ensure rapid staffing of military courts with specialized high-level professionals. Even if the abovementioned requirements for judges of military courts are legislated, the selection procedure will not take into account the level of their special knowledge in the military sphere.

Also for applicants for judge posts of military courts, it is necessary to provide an additional qualification examination in military law whose results would be defining.

– ***The material and social support of military courts and their judges***. During the previous period, military courts had a special order of material support from the Ministry of Defense of Ukraine. To date, the material support of all courts is carried out by State Judicial Administration. Therefore, it is necessary to resolve the issues of interaction of this body with the Ministry of Defense concerning providing military courts. The bill № 2557 states that in respect of logistics of military courts, providing them with transport, means of communication and the military equipment and also in respect of mobilization issues, the public judicial administration interacts with the Ministry of Defense of Ukraine (Про внесення змін до деяких законодавчих актів України (щодо утворення військових судів та окремих організаційних питань): Проект Закону України № 2557 від 6.04.2015).

An increased material support of military courts can positively resolve the issue of their staffing. To employ sitting judges in military courts, it is necessary to make the position in military courts more prestigious than in the general courts. The additional material support from the Ministry of Defense can play a certain role in it, as well as the surcharge for a military rank and special working conditions in military courts (for example, obtaining the status of the combatant).

– ***Ensuring independence, impartiality and justice of the military court.*** The establishment of any features of the organization and activity of military courts creates some risks to their independence and impartiality, which should be minimized. The threat of the dependence of military courts on the military command is especially significant. For its elimination, it is necessary to exclude any participation of the bodies of military management in appointment to positions of military judges, as well as the transfer or dismissal from these positions and also bringing of military judges to justice. Thus, all personnel procedures concerning military judges have to be carried out in the same order as in the case of general courts judges. This purpose is served by such independent bodies as the High Council of Justice and the High Judicial Selection Commission in Ukraine. Powers of these bodies concerning military judges must not be limited.

The Ministry of Defense of Ukraine can participate in material support of military courts. However, it must not do so individually, but in conjunction with Public Judicial Administration of Ukraine, which is controlled by the High Council of Justice of Ukraine. Any direct contacts between the Ministry of Defense and military courts have to be minimized and take place with the participation of a self-government body of the judiciary.

The main guarantee of impartial and fair justice in military courts is that their consideration of legal cases will be carried out according to the general legal procedure provided by the procedural legislation of Ukraine. Special simplified procedures not provided for other courts must not be applied in military courts. The principles of publicity, competitiveness and ensuring of the right of defense, observance of procedural terms, and others have to be fully guaranteed. Thus, no exceptional procedural features, except jurisdiction, can be provided for these courts.

An important guarantee of their impartiality is the possibility of the appeal of solutions of military courts in the general courts. To this end, it is necessary to provide that solutions of military courts of the first instance are revised by the General Courts of Appeal of the respective areas or by the Supreme Court.

The Military Prosecutor's Office

At the present stage, there is no military prosecutor's office in Ukraine. Instead, since 2019, there has been a civilian specialized prosecutor's office in the military and defense sphere. It is part of the unified system of the prosecutor's office of Ukraine, but enjoys some autonomy. However, after the 2019 reform, this prosecutor's office retained the structure and competence of the military prosecutor's office. Its main differences were demilitarization, which meant the loss of the status of military personnel by prosecutors and the lack of formal ties with the Ministry of Defense.

Legal regulation. The organization and activities of The Specialized Prosecutor's Office in the Defense Sphere are regulated by the Law of Ukraine "On the Prosecutor's Office" (Articles 7, 9), which provides for the authority of the Prosecutor General to create specialized prosecutor's offices (Про прокуратуру: Закон України № 1697-VII від 14.10.2014). At the departmental level, the issues of military prosecutors are regulated by the order "On the peculiarities of the organization of the activities of specialized prosecutors' offices in the defense sphere" № 130, dated May 17, 2023 (Про особливості організації діяльності спеціалізованих прокуратур у сфері оборони: Наказ Генерального прокурора № 130 від 17.05.2023). It establishes the priorities of the specialized prosecutor's offices in the military and

defense sphere and the objects of their activities, specifies their system, and regulates other issues.

The system of specialized prosecutor's offices in the military and defense sphere consists of three levels:

(1) The Specialized Prosecutor's Office in the Defense Sphere, acting as a department of the Prosecutor General's Office. Its status is defined by the Regulations on the Specialized Prosecutor's Office in the Defense Sphere (as a Department) of the Prosecutor General's Office (Положення про Спеціалізовану прокуратуру у сфері оборони (на правах Департаменту) Офісу Генерального прокурора: затверджене Наказом Генерального прокурора № 144 від 30.05.2023). It is an independent structural subdivision of the Office of the Prosecutor General, subordinate to the Deputy Prosecutor General in accordance with the distribution of duties. It is headed by a leader who is appointed by the Prosecutor General. The Specialized Prosecutor's Office includes 3 departments: the first department as part of three sections of procedural management of pre-trial investigation and maintenance of public prosecution; the second department consists of: the section for the organization of procedural management of pre-trial investigations in the prosecutor's offices of the regions; the section for maintaining public accusations in court and supervising the observance of laws in the execution of court decisions in criminal cases; the section of supervision of compliance with laws in the conduct of operational-investigative activities; the third department consists of: the section for representing the interests of the state in court; the section of the organization of the prosecutor's activities in proceedings in cases of administrative offenses.

(2) The Specialized Prosecutor's Office in the Defense Sphere of the regions. They act on the rights of regional prosecutor's offices. Order of the Prosecutor General № 130 provides four such offices: the Specialized Prosecutor's Office in the Defense Sphere of the Central Region of Ukraine (its jurisdiction extends to military installations in the regions of Zhytomyr, Kyiv, Poltava, Sumy, Cherkasy, Chernihiv and the city of Kyiv); Specialized Prosecutor's Office in the Defense Sphere of the Southern Region (covers the regions of Vinnytsia, Kirovohrad, Mykolaiv, Odesa and Kherson, the Autonomous Republic of Crimea and the city of Sevastopol, as well as in the Black Sea naval zone, which includes the waters of the territorial sea and internal waters of Ukraine in the Black Sea); Specialized Prosecutor's Office in the Defense Sphere of the Western Region (the regions of Volyn, Zakarpattia, Ivano-Frankivsk, Lviv, Rivne, Ternopil, Khmelnytskyi and Chernivtsi); Specialized Prosecutor's Office in the Defense Sphere of the Eastern Region (the regions of Dnipropetrovsk, Donetsk, Zaporizhia, Luhansk and Kharkiv, as well as in the Azov naval zone, which includes the internal waters of Ukraine in the Sea of Azov and the Kerch Strait). Specialized Prosecutor's Offices in the Defense Sphere of the regions coordinate and

control the activities of the garrison prosecutor's offices subordinate to them. The heads of regional prosecutor's offices are appointed and dismissed by the Prosecutor General on the recommendation of the Council of Prosecutors of Ukraine.

(3) Specialized prosecutor's offices in the defense sphere of garrisons. They act on the level of district prosecutor's offices. There are 30 specialized prosecutor's offices in the defense sphere of garrisons. These offices implement the functions of the prosecutor's office within the corresponding military formations. Their heads are appointed and dismissed by the Prosecutor General on the recommendation of the Council of Prosecutors of Ukraine.

Thus, the specialized prosecutor's offices in the defense sphere has its own structure that functions independently from other bodies of the prosecutor's office, though it belongs to the general system of the prosecutor's office (Шандула, 2016). This allows for respecting the specificity of the military sphere and also guarantees independence and mobility of the offices.

The problem identified by law of the system of specialized prosecutor's offices in the defense sphere is that it doesn't correspond to the military administrative division of Ukraine with four military land zones: "North," "South," "West." and "East." (Про затвердження військово-адміністративного поділу території України: Указ Президента України № 39 від 5.02.2016). Therefore, the system of specialized prosecutor's offices in the military and defense sphere needs to be brought in line with this division.

The status of staff members of specialized prosecutor's offices in the defense sphere is not affected by their functioning in the military sphere and does not differ from the status of other prosecutors. This is determined by the rule that prosecutors in Ukraine have a single status, regardless of the place of their office in the prosecutor's office of Ukraine or the administrative position that the prosecutor occupies in the prosecutor's office (Part 2, Article 15 of the Law of Ukraine "On the Prosecutor's Office").

Until 2019, military prosecutors were appointed from among officers performing military service or being in reserve. In some cases, by order of the General Prosecutor, persons who were not military personnel could be appointed to the position of prosecutors and investigators of the military prosecutor's office. Military personnel of the military prosecutor's office did military service according to the Law "The military service obligation and military service" (Про військовий обов'язок і військову службу: Закон України № 2232-XII від 25.03.1992) and other laws establishing legal and social guarantees, pension, medical and other types of provision for officers of the Armed Forces of Ukraine. In this regard, researchers note the dual-use nature of legislative regulation of service in the military prosecutor's office: Law "About the Prosecutor's Office" and the military service law (Шандула, 2017).

The draft law "On Amendments to the Law of Ukraine 'On the Prosecutor's Office' to ensure the activities of specialized military prosecutors' offices" № 7576 proposed to provide that specialized military prosecutors' offices be staffed by servicemen: officers of the Armed Forces of Ukraine who undergo military service under a contract or who are called up for military service during mobilization or for a special period by sending them to the Prosecutor General's Office to carry out their duties with military service. The delegation is carried out in accordance with the legislation on military duty and military service. To fill the vacant positions of the specialized military prosecutors, the Prosecutor General or the Deputy Prosecutor General for Military Affairs sends a written request to the Ministry of Defense of Ukraine with a request to send military personnel who meet the requirements of candidates for the position of prosecutor. Seconded servicemen are appointed to the positions of prosecutors and administrative positions in specialized military prosecutor's offices.

However, this approach would mean the militarization of the prosecutor's office and a return to the model that existed before 2019. Most likely, these initiatives will not be supported by Ukraine's international partners.

The competence of specialized prosecutor's offices in the defense sphere isn't regulated by law. In general, it can be deemed as the implementation of functions of the prosecutor's office in the military sphere. It is the organization and the procedural control in prejudicial investigation of military crimes, maintenance of public prosecution for these cases in the court, supervision of investigative and search efforts of law enforcement bodies in the military sphere, and also representation of the interests of the state in court in exceptional cases provided by law.

Besides, prejudicial investigation and coordination of law enforcement agencies for crime counteraction in the military sphere were conducted. In 2016, investigators of the military prosecutor's office investigated more than 15 thousand criminal cases, 3641 indictments were sent to court, and by means of representative powers, the state obtained compensation for more than 790 million hryvnias (Матіос відзвітував про результати роботи Військової прокуратури за 2016 рік. Цензор. 17.12.16). In 2014-19 the pre-judicial investigation of military crimes and some other categories of crimes was the main activity of military prosecutor's offices. On these cases, the military prosecutor's office investigated, exercised prosecutor's supervision and maintenance of public prosecution in court, so it had monopoly for criminal prosecution for military crimes.

According to the Constitution and the Code of Criminal Procedure of Ukraine, the prosecutor's office lost function of prejudicial investigation with the beginning of functioning of the State Bureau of Investigation, whose competence included military crimes. Formally, the State and Intelligence Investigations Bureau was created

on March 1, 2016 (Про Державне бюро розслідувань: Закон України № 794-VIII від 12.11.2015). With it, military prosecutor's offices actually lost their main function of military crimes investigation (Лапкін, 2018).

The specialized prosecutor's offices in the defense sphere exercises the procedural control in these investigations. In accordance with the Order of the Prosecutor General № 130, these prosecutor's offices carry out procedural management of the pre-trial investigation of the following: crimes against the established procedure for performing military service (military criminal offenses); crimes committed during the performance of duties of military service by military personnel, persons liable for military service (including reservists, volunteers of the Territorial Defense Forces of the Armed Forces of Ukraine and volunteer formations of the territorial community) during military service and training, as well as during the performance of official duties by employees of military units, enterprises, institutions and organizations belonging to the sphere of administration of the Ministry of Defense of Ukraine, the Armed Forces of Ukraine, other military formations and public authorities which are staffed by military personnel; crimes committed in the performance of official duties by employees of the military-industrial complex of Ukraine on the territory of deployment of military units, institutions, organizations, other objects of permanent and temporary deployment of the defense forces, the military-industrial complex of Ukraine and the State Space Agency of Ukraine; crimes in the sphere of official activity and against property, whose object of encroachment is military property and/or funds for the needs of defense; other criminal offenses in the manner determined by the Code of Criminal Procedure of Ukraine, if at least one of the accomplices of the criminal offense is an above-mentioned subject or at least one offense in criminal proceedings meets the above criteria. Also, the specialized prosecutor's office in the military and defense sphere supports public prosecution in court in these criminal cases.

However, the carrying out of these functions can be problematic as the State Bureau of Investigation has a territorial structure that is incompatible with the specialized prosecutor's offices in the military and defense. It is compose of 7 Territorial Departments in Lvov, Khmelnytskiy, Nikolaev, Melitopol, Poltava, Kramatorsk, and Kiev. Thus, the creation of the Bureau leads to the need of making changes in the system of specialized prosecutor's offices in the military and defense sphere.

Specialized prosecutor's offices in the defense sphere supervise the observance of laws in the conduct of operational investigative activities by operational subdivisions: operational subdivisions of the Foreign Intelligence Service of Ukraine; management of state security of Ukraine; Main Intelligence Office of the Ministry of Defense of Ukraine; special police of the National Police of Ukraine; The Main Office of Internal Security of the Security Service of Ukraine (except operational

and investigative cases on organized and transnational crime) and the Department of Military Counterintelligence of the Security Service of Ukraine; subdivisions of the State Border Service of Ukraine; divisions of the State Bureau of Investigation.

Besides, the specialized prosecutor's office in the defense sphere represents the interests of the state in court regarding legal relations related to the activities of: the Ministry of Defense of Ukraine, the Armed Forces of Ukraine, the Ivan Chernyakhovsky National Defense University of Ukraine, the State Border Guard Service of Ukraine, the Foreign Intelligence Service of Ukraine, the Security Service of Ukraine, the State Security Department of Ukraine, the State Special Transport Service, the State Service for Special Communications and Information Protection of Ukraine, the National Guard of Ukraine, the Ministry of Strategic Industries of Ukraine, the State Export Control Service of Ukraine, the State Space Agency of Ukraine and enterprises, institutions and organizations that are subordinate to it; the State Concern Ukroboronprom and enterprises that are subordinate to it and in respect of which the corporate rights of the state are managed; the joint civil-military air traffic management system of Ukraine and the state enterprise Ukraerorukh; State Agency of the Reserve of Ukraine (on the issues of the state mobilization reserve); state customers in the field of defense and executors, co-executors (subcontractors) of the state contract (agreement) for defense procurement; other central and local law enforcement bodies of executive power, bodies for local self-government, enterprises, institutions and organizations that accumulate and store material assets of the state mobilization reserve; civil-military administrations.

Another function of specialized prosecutor's offices in the defense sphere is to supervise the observance of laws in the execution of court decisions in criminal cases, the application of other coercive measures related to the restriction of the personal freedom of citizens, as well as the organization of convoying of persons detained, taken into custody and sentenced to the deprivation of freedom: in military units, regarding service restrictions for servicemen, deprivation of a military special title, rank, rank or qualification class, deprivation of the right to occupy certain positions or engage in certain activities; exemption from serving a sentence with probation, in respect of persons exempted from criminal liability due to the transfer of bail to the collectives of military units, as well as in military units of the National Guard of Ukraine for the organization of convoying of detainees, taken into custody and sentenced to imprisonment; in rooms (cells) for temporarily detained persons of the Military Law and Order Service in the Armed Forces of Ukraine, in special wards of the Health Care Institution of the Armed Forces of Ukraine for detained servicemen, as well as in guardhouses for punishment in the form of arrest and detention; upon execution of the punishment in the form of detention of servicemen in the disciplinary battalion.

The absence of military courts negatively affects functioning of the specialized prosecutor's offices in the defense sphere. Thus, in the absence of other elements of the military justice system, there are doubts as to the expediency of preservation of the specialized prosecutor's offices in the military and defense sphere. Even with its maximum load, some experts doubt the efficiency of this body (Маркевич, 2015). Consequently, it is necessary either to develop other institutes of military justice, or to liquidate the specialized prosecutor's offices in the military and defense sphere.

Military Service of Law and Order

The Military service of law and order in the Armed Forces of Ukraine is a special law-enforcement formation as part of the Armed Forces of Ukraine responsible for strengthening the legality, law and order and military discipline in the Armed Forces of Ukraine and also ensuring constitutional rights of the military personnel. It has acted in Ukraine since 2002. The inclusion of this body in the military justice system is debatable as it doesn't conduct prejudicial investigation. However, this body is the only specialized body responsible for providing law and order in the Armed Forces of Ukraine and therefore it is considered in this review.

Legal regulation. The organization and activity of the Military Service of Law and Order is regulated by law of Ukraine "About Military Service of Law and Order in the Armed Forces of Ukraine" of March 7, 2002 (Про Військову службу правопорядку у Збройних Силах України: Закон України № 3099-III від 7.03.2002). The details of its functioning are regulated by orders of the Ministry of Defense of Ukraine (Про затвердження Інструкції про організацію патрульно-постової служби Військовою службою правопорядку у Збройних Силах України: Наказ Міністерства оборони України № 515 від 10.10.2016).

Competence. Under the purview of Military Service of Law and Order fall: 1) providing law and order and military discipline among the military personnel of the Armed Forces of Ukraine; 2) prevention of crimes and other offences in the Armed Forces of Ukraine and their cessation; 3) protection of life, health, rights and legitimate interests of the military personnel, persons liable for military duty during military training, employees of the Armed Forces of Ukraine; 4) protection of property of the Armed Forces of Ukraine against theft and other unlawful infringements; 5) fighting subversion and acts of terrorism on military facilities. This body performs a wide range of tasks which include: execution of decisions on the maintenance of servicemen on guard duty; execution of a criminal sentence in the form of detention of servicemen in a disciplinary battalion; assistance to bodies car-

rying out operative investigative activities and pre-trial investigation, etc. According to researchers, the specialization of Military Service of Law and Order consists in distribution of its competence on the Armed Forces of Ukraine and their structural elements (Котляренко, 2013).

The Military Service of Law and Order has the right to apply physical force, special means and firearms while implementing its functions.

System. The Military Service of Law and Order consists of: (1) governing bodies, including the Head Department of the Military Service of Law and Order of the Armed Forces of Ukraine; Central Management in the City of Kiev and Kiev Region and Territorial Departments (Western, Southern, and Eastern); zone departments (that can be created in garrisons, military units etc); (2) divisions: protection of military facilities; uniformed police; traffic safety; special forces; (3) Training Center of the Military Service of Law and Order. Thus, the system of the Service corresponds to the structure of Armed Forces.

The general management of the Military Service of Law and Order is performed by the Minister of Defense of Ukraine through the Chief of the General Staff of Ukraine. The Minister of Defense makes decisions on the creation of divisions of the Service and defines their areas of operation. He also appoints chiefs of the Head Department of the Service, its Central and Territorial Departments, their deputies for representation of the chief of the General Staff. Other heads of structural divisions of the Military Service of Law and Order are appointed by the chief of the General Staff on the recommendation of the chief of the Head Department of the Service.

The size of the personnel of the Military Service of Law and Order is defined by the Minister of Defense of Ukraine, proceeding from dislocation of troops. The maximum size of the Service must not exceed 1,5% of the total number of the Armed Forces of Ukraine. As this number is determined by the relevant Law for 261,000 people (Про чисельність Збройних Сил України: Закон України № 235-VIII від 05.03.2015), the maximum size of the Military Service of Law and Order is 3915 employees.

Reform. It is planned to create military police on the basis of the Military Service of Law and Order. It is provided by the *Strategic Defensive Bulletin of Ukraine* of 2016 (Про рішення Ради національної безпеки і оборони України від 20 травня 2016 р. «Про Стратегічний оборонний бюлетень України»: Указ Президента України № 240/2016 від 6.06.2016) and of 2021 (Про рішення Ради національної безпеки та оборони України від 20 серпня 2021 р. «Про Стратегічний оборонний бюлетень України»: Указ Президента України № 473/2021 від 17.09.2021). In accordance to it, the military police must be able to perform the tasks of maintaining law and order in the system of the Ministry of Defense of Ukraine. At the same time, it is planned to develop the capabilities of investigative units and operational-search

units of the military police, and develop the capabilities of its governing bodies to ensure law and order and anti-terrorist support of potentially dangerous objects in the system of the Ministry of Defense of Ukraine. It is also expected to achieve compatibility of the military police with the relevant structures of NATO member states.

The bill of military police № 1805 was presented to parliament in 2015, however, it wasn't included in the agenda (Про військову поліцію: Проект Закону України № 1805 від 21.01.2015). Further on, the Ministry of Defense of Ukraine developed the bill of military police (Рощенко, 2017), but it did not present the results. At the beginning of 2022, new legislative initiatives in this area appeared, related to the bills "On the State Bureau of Military Justice" № 6569 (Про Державне бюро військової юстиції: Проект Закону України № 6569 від 28.01.2022) and "On the Military Police" № 6589-1 (Про Військову поліцію: Проект Закону України № 6569-1 від 15.02.2022). They are in the parliament, but have remained without consideration so far.

The main difference between military police and the existing Military Service of Law and Order is the expansion of its competence for crime investigation committed by the military personnel and/or military crimes (Лапкін, 2018). For example, the bill № 1805 provided the military police would investigate military crimes and also crimes committed by employees of the Ministry of Defense and of the Armed Forces of Ukraine during their official duties or in the territory of military facilities. *The Strategic Defensive Bulletin* suggested allotting military police with prejudicial investigation functions and carrying out operational search activity. These functions had to be implemented in the military crimes committed by the military personnel of the Armed Forces of Ukraine.

It is necessary to consider that allotting military police with such functions will be in conflict with the competence of the State Bureau of Investigation, to which investigation of military crimes is entrusted by part 4 of article 216 of the Criminal Procedure Code of Ukraine. It is supposed that investigation of such crimes by military police will be more effective because its structure corresponds to the system of the Armed Forces of Ukraine more. For example, in justifying the creation of military police, the authors of draft law № 6569-1 pointed out that the Military Law Enforcement Service in the Armed Forces of Ukraine does not have any authority to carry out operational-search measures, pre-trial investigation of military criminal offenses and bring perpetrators to criminal responsibility. In 2021, about 12,000 servicemen who left their places of service without official leave were put on the wanted list. At the same time, the bodies of the National Police of Ukraine did not conduct a proper search for these persons in the framework of their operational-search cases. The leadership of the National Police initiated the involvement of servicemen of the operational units of the State Bureau of Investigation in the search. However, during

2021, the State Bureau of Investigation opened only one operational-search case to search for a serviceman who left the place of service without official leave, and does not respond to suggestions about the need to intensify this work (Пояснювальна записка до проекту Закону «Про Військову поліцію» № 6569-1 від 15.02.2022).

However, corporate solidarity can be a problem because both the military police and objects of its activity belong to the sphere of management of the Ministry of Defense. From this point of view, the State Bureau of Investigation is more a independent, objective and impartial body. So, it is necessary to create additional guarantees of the independence of military police from the military command.

The definition of the system and structure of the military police is another important issue. In accordance with draft law No. 6569-1, the activities of the military police are managed by the chairman and his deputies. The military police will consist of the following units: 1) the central office; 2) main zonal administrations and local administrations; 3) special units; 4) guardhouse; 5) disciplinary battalions; 6) training centers.

The personnel of the military police consists of military personnel, civil servants, and other employees. The personnel will be formed, first of all, on the basis of the servicemen of the Military Law Enforcement Service in the Armed Forces of Ukraine.

The basis of the military police will be: 1) military policemen, who will perform the main functions of ensuring military discipline, preventing the commission of crimes among military personnel, adequate and prompt response both to the facts of administrative offenses and criminal acts committed by military personnel; 2) investigators who will carry out pre-trial investigation of crimes, and interrogators who will investigate criminal offenses; 3) inspectors who will carry out special prevention in the form of inspections of compliance with the legal requirements in the Armed Forces of Ukraine, other military formations, the Ministry of Defense of Ukraine, territorial defense authorities, state customers in the field of defense, and executors of the state contract (agreement) for defense procurement; 4) officers on special assignments who will assist prosecutors in representing the interests of the state in the field of defense and national security of Ukraine in courts, represent the interests of the military police in courts, as well as exercise other powers in the cases specified by law.

Education and Preparation

Effective work of the military justice system requires a high level of training of its personnel considering specificity of the military sphere. The staff of these bodies must have a sufficient level of the general legal knowledge and also special knowledge in the sphere of military law. Such knowledge includes the basics of the tactics and methods of combat operations, departmental acts of the Ministry of Defense, disciplinary charters for military personnel, and more.

Today, studying of military law in Ukraine is provided by the training program of two higher educational institutions only: the Military Institute of the Kiev National University of Taras Shewchenko and Military Law Faculty of the National Legal University of Yaroslav the Wise.

For example, a military advocate faculty functions within the structure of the National Legal University of Yaroslav the Wise. It conducts now training of lawyers for the Ministry of Defense of Ukraine, Military Service of Law and Order, National Guard of Ukraine, Public Service of Ukraine on Emergency Situations, State Protected Service of Ukraine, and the Public Special Service of Transport. During their training at the faculty, students and cadets study about 20 special disciplines, such as history of wars and military art, tactics, Charters of the Armed Forces of Ukraine, legal work in the Armed Forces of Ukraine, the basics of military management, etc. Thus, training of graduates of the faculty provides optimum connection of fundamental legal knowledge with special skills of the military personnel (Official site of Military Law Faculty).

The training of military lawyers at the Military Faculty of Finance and Law of the Military Institute of the Kiev National University of Taras Shewchenko has a similar program. Future military lawyers are taught in two majors there: (1) "Legal support of activity of troops" for legal service of the Ministry of Defense of Ukraine; (2) "Law-enforcement activity in the Armed Forces of Ukraine" for the Military Service of Law and Order (Official site of Military Institute of Taras Shevchenko National University of Kiev).

As needed, the tasks of training military courts and military police personnel can be added to the existing majors at these universities. The problem is a small number of students. Their number is defined by the provisional order from the Ministry of Defense and other structures. The duration of the studies is 5,5 years. Thus, it is impossible to teach quickly a large number of staff for the bodies of military justice.

Another problem is that the fixed order of selection of judges and prosecutors provides an open competition for all interested in these positions. Therefore, there are no guarantees the position of the military prosecutor or the military judge will

be taken by the person having special knowledge in the military sphere. The acquisition of this knowledge is possible after appointment to the post, for example, by means of a refresher training for military prosecutors or military judges. For this purpose, it is necessary to develop appropriate programs in special educational institutions: Training Center for Prosecutors of Ukraine and National School of Judges of Ukraine. It is also possible to create their specialized units on the basis of the higher educational institutions training staff for military justice.

Conclusions

1. There is no complete system of military justice in Ukraine. The only body functioning fully in this area is the Specialized Prosecutor's Office in the Military and Defense Sphere, which is not a military body. Separate powers belong to Military Service of Law and Order. However, their activity isn't coordinated. The necessary element of the military justice system, namely military courts, is absent.

   The military justice system should be built based on the following concept: the body carrying out operational search activity and prejudicial investigation of military crimes—the body carrying out criminal prosecution on such crimes—the body considering actual cases on such crimes. This concept corresponds to the following system of military justice: military police—military prosecutor's office—military court. For this purpose, Ukraine needs to reform Military Service of Law and Order into military police and to create military courts.
2. The history of the military justice system of Ukraine shows a gradual course towards demilitarization. This course has changed since 2014, however, the changes aren't deep and systematic. Therefore, a revival of the military justice system should be considered as a temporary measure. It is necessary to provide a possibility of its drawdown with the end of the war between Ukraine and the Russian Federation and the restorative transition period after that.
3. The subject sphere of military justice demands clarification. The main criterion for its definition are the military crimes committed by the military personnel. Civilians can be subject to jurisdiction of military justice only in case of complicity in military crimes. At the same time, it is necessary to provide a possibility of distribution of jurisdiction of military justice for other than military crimes of the military personnel in exceptional cases, for example, in the absence of bodies of civil justice or in combat situations. Also, it is necessary to include issues of the appeal of decisions, actions or inactivity of the bodies of military command in the jurisdictional competence of military justice.

4. The political will of the Ukrainian authorities, first of all of the President of Ukraine since these matters belong to his competence, is necessary for reforming the military justice system. Care should be taken that the issues of the creation of military courts or military police do not become a subject of political struggles. The architecture of this reform has to be depoliticized and developed by independent experts. Support of foreign partners of Ukraine, who often spoke against the existence of military justice previously, is also expedient.
5. The reform of the military justice system has to be made comprehensively. The reforms of the military police, the military prosecutor's office and the military court have to be harmonized as regards their competence and interaction. The uniform concept of reforming of the military justice system in Ukraine has to be developed for this purpose. Researchers, representatives of bodies of military justice and military management, public figures and foreign experts have to be included in its creation.
6. The sphere of legislative regulation of the military justice system has gaps in it. At the same time, the legislative regulation of the bodies of military justice should be carried out in their entirety as they are closely linked. For this purpose, it is necessary to develop and accept a simultaneous package of laws pertaining to military courts and military police and introduce corresponding changes into the Criminal Procedural Code, the Laws About Judicial System and the Status of Judges, About the Prosecutor's Office, and others. The draft of the Military Code may be proposed which would settle the questions of the organization and activity of various bodies of military justice. The efforts of certain developers of bills (Presidential Office, the Prosecutor General's Office, the Ministry of Defense) should be coordinated from a uniform center.
7. Military courts need to be revived as part of judicial system. Their jurisdiction has to extend to military crimes, judicial control of investigation of these crimes and application to the military personnel of coercive measures, administrative cases of military command. In some cases, military courts must be given jurisdiction in consideration of all crimes committed by the military personnel and also replace civil courts in territories where the system of the general courts doesn't work.

   Ukraine needs approximately 12-15 military courts with a total number of 150 judges. The creation of military courts is necessary at the level of the first instance. Military courts should not form a closed system, therefore, it is necessary to provide a possibility of the appeal of their decisions in the general Courts of Appeal or in the Supreme Court.

   Judges of military courts must have special knowledge in the military sphere. Accordingly, it is necessary to provide additional requirements for the candidates: they must have officer ranks and be on military service or in reserve.

It is important that military courts have no extraordinary or special status that is forbidden by the Constitution. Therefore, all matters of their creation, the appointment of judges and the implementation of legal proceedings have to be carried out by the general rules of the judicial system of Ukraine.

8. The specialized prosecutor's offices in the defense sphere are the important element of the military justice system exercising supervision of activity of law enforcement bodies in the military sphere, the organization and the procedural control in investigation of military crimes, maintenance of public charge for these cases, and representation of the interests of the state in court. However, the existence of this prosecutor's office loses expediency due to the functioning of the State Bureau of Investigation. Therefore, it is necessary to specify its competence. It is also necessary to improve the system of this prosecutor's office so that it corresponds to the military-political structure of Ukraine.
9. The Military Service of Law and Order is the body carrying out police and disciplinary functions in the Armed Forces of Ukraine. It has to be reformed into military police, which needs to have the functions of carrying out operational search activity and prejudicial investigation in military crimes and other crimes of the military personnel. Therefore, military crimes should be excluded from the jurisdiction of the State Bureau of Investigation. Military police needs to guarantee its independence from the bodies of military management and to communicate with the military prosecutor's office and the military court in matters of functional competence.
10. The role of public organizations and the mass media in the reform of military justice is not satisfactory. To strengthen it, questions related to the reform have to be debated in public and published in the media properly.

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Chapter 9

Protection of the Owner's Rights to Property Damaged during the War

ABSTRACT

Property is an economic, social, and legal phenomenon. Owning property is an inalienable natural human right. Destruction and damage to property belonging to a person during military operations, being forced to leave it in the occupied territories, a significant decrease in the value of the property, and other reasons for the impossibility of extracting benefits from the property are the realities in which many citizens of Ukraine found themselves. Military operations continue, and human life goes on. All owners, whose property was negatively affected by the war, seek to restore their rights. Adequate protection of the rights of owners, however, is not possible with the usual legal mechanisms used in peacetime. In emergencies, such as hostilities, martial law, and state of emergency, neither vindication, nor restitution, nor negative actions are possible. Currently, it is difficult to bring to justice the perpetrator of damage to private Ukrainian owners, since the damage was caused by military actions by the state that invaded Ukraine and does not recognize the norms of international law. Therefore, the realities require effective legal mechanisms, the use of which would allow the application of the norms of public law, including international, and humanitarian law, for real compensation to private individuals for the damage caused by the war. The scale of such damage is currently very significant, and legal mechanisms are absent or ineffective.

Keywords: property rights, objects, private property, property destruction, property damage, international law, humanitarian law, effective protection of property rights.

Introduction

Any war has a significant, direct or indirect, impact on property rights. This is not limited to the destruction of property, but includes the possibility of its forced requisition for public needs, a decrease in the income of private individuals due to the termination of work and contractual relations, forced emigration, damage caused to the health or the death of the breadwinner, etc.

While conducting a research on the peculiarities of protection of private property in the context of various war-related circumstances (military operations, armed conflicts, hostilities, etc.), the emphasis should be put on the following aspects:

– types of violations of property rights and other negative consequences for the owner (property requisition; damage as a result of the termination of contracts with private individuals; termination of other contracts; failure to perform contract obligations due to force majeure);
– peculiarities of property rights protection in wartime;
– subjects of responsibility;
– conditions of civil liability;
– the amount of compensation for damage, the procedure for its determination;
– sources of compensation.

I. Adverse Consequences for the Owner Arising from Hostilities

The issue of war as a civil-law delict and grounds for compensation for property damage in civil legal relations in Ukraine has not been investigated yet. There are probably many reasons for this, but of course, the main is that we used to live in peace and therefore the question of compensation for damage due to hostilities did not arise previously. However, the situation has changed and now this issue has become not only relevant, but also one that extends to many legal areas. One of them is the possibility for private individuals, if not to restore their property status which was affected during the hostilities, then at least to acquire resources for existence and normal life activities. The range of problems that arise in this case is too large, and therefore we will dwell on only some of them, focusing on the possibility for private individuals to receive compensation in the most effective way.

At the same time, it should be noted that in order to present this topic, we must inevitably refer not only to purely civil constructions, but also to other branches of law: humanitarian, international, procedural, etc.

The Impact of War on Property Rights

The owner's exercise of their right and, in general, the sense of being an owner definitely differs in times of peace and war. What a person used to consider their own, in wartime may cease to belong to them without any possibility for this person to do anything about it. Moreover, protecting one's right becomes so difficult that even attempts to do so become senseless and sometimes simply impossible.

This is true about all categories of owners: individuals and legal entities being subjects of private property law, and subjects of communal and state property law. The protection of private property rights raises the biggest number of questions. However, the subjects of communal property rights need protection since communal property also suffers from shelling and explosions. In addition, objective consequences of the war include a decrease in revenues to local budgets due to the destruction of objects used in business activities; the cessation of such activity by individuals due to forced migration or to other reasons; an increase in costs for supporting the city life, communications, removal of debris from damaged buildings and structures, etc.

Moreover, one cannot overlook the issue of protecting the right of state ownership of property which, for example, remained in captured and occupied territories or belonged to the state as a subject of authority, as well as a participant in other legal relations (for example, recreation facilities, medical facilities, educational institutions, energy facilities, etc.).

It is also necessary to take into account the location of the property during the war. It can be situated on the territory of the countries that are in military conflict (for example, Ukraine and the Russian Federation), as well as outside their borders (if we talk about such influence on property rights as sanctions imposed on certain citizens of the Russian Federation).

First of all, three groups of circumstances of the impact of war on private property should be noted.

The first group involves circumstances which are forced and actually unavoidable in such a period. These are: (a) significant restrictions on the owner's ability to use and dispose of their property, including funds on bank accounts; (b) forced seizure of property from the owner for military purposes, assistance to victims, etc.

The second group includes situational violations of property rights due to various actions of participants in the military conflict and other persons: (a) first of all, destruction and damage to property as a result of military operations (both by the enemy and own forces); (b) threats to property rights, which often turn into violations: looting, high risks linked to giving weapons to civilians; (c) use of the circumstances for illegal reregistration of ownership of real estate; (d) failure to perform contrac-

tual obligations due to force majeure; (e) refusal to the insurance sum by insurance companies due to force majeure; (f) devaluation of securities, increase in market prices of goods and, as a result, of services not only in the countries where military action takes place, but also in other countries due to globalization processes.

The third group of various circumstances which affect the right to property in one way or another can include, for example, the following: (a) the complexity of judicial protection due to changes in the territoriality of the consideration of disputes related to military actions in certain territories, the lack of formation of the composition of courts, which now happens to be the case in Ukraine, etc.; (b) judicial immunity; (c) the impossibility of protecting property rights due to the absence of agreements between the states in military conflicts; (d) termination of the right of ownership (de facto and according to the legislation of the state that seized the territories of another state, where property of private individuals is located), (e) uncertainty, under Ukrainian legislation, of the legal position of the owner of property in uncontrolled territories, etc.

The right of ownership is negatively affected by numerous circumstances that arise in the period of military operations—from the depreciation of property (both movable or immovable and property rights, securities) and its unavailability for use due to damage and destruction.

Forced and Unavoidable Factors and Consequences of Their Influence on Private and Communal Property during the War

Such well-known grounds for the forced termination of property rights as requisition (Article 353 of the Civil Code of Ukraine) and confiscation (Article 354 of the Civil Code of Ukraine) with the introduction of martial law acquire new meanings which are absent in peacetime. Since this is caused by the extraordinary factor of war, these influencing factors affect the constitutional principles that determine the scope of property rights. This is precisely what is defined in the Decree of the President of Ukraine №64 of February 24, 2022 "On the imposition of martial law in Ukraine." (On the imposition of martial law in Ukraine: Decree of the President of Ukraine No. 64 dated February 24, 2022) According to section 3, it is allowed to limit the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30–34, 38, 39, 41–44, 53 of the Constitution of Ukraine, due to the introduction of martial law in Ukraine and for this period of time.

This regime allows to restrict property rights in the following ways: to use the capacities of all Ukrainian companies for defense purposes; to force alienation of property that is in private or communal ownership; to confiscate property of state

enterprises and state economic associations for the needs of the state; to seize electronic communication equipment, television, video and audio equipment, computers, as well as, if necessary, other technical means of communication; to force admission of military personnel, members of the ordinary and senior staff of the law enforcement agencies, personnel of the civil protection service, evacuated population in their premises, etc. (On the legal regime of martial law: Law of Ukraine No. 389-VIII dated May 12, 2015, paragraphs 4, 5, 12).

The range of powers of military administrations also affects the property rights (Part 1, Article 15 of the said Law), since these administrations are allowed to attract, on a contractual basis, the funds of legal entities located in the relevant territory, and the funds of civilians, for the construction, expansion, repair and maintenance of social and industrial infrastructure facilities and for measures to protect the environment; transfer of governance over various objects of communal property rights to these administrations; establish for communal legal entities the size of the share of profit, which shall be transferred to the local budget, etc.

Such legal provisions affect the extent of an owner's powers in the following ways: they allow to use private and communal property and even to terminate ownership rights to it against the will of the owner. This is evidenced by the terminology used in the Law of Ukraine "On the Legal Regime of Martial Law": 'removal,' 'admission,' 'forced alienation,' etc. It is also worth noting that the possibilities of coercive influence on property rights, provided by this Law, are even greater than that envisaged by the Civil Code of Ukraine. If, according to Art. 350, 351, 353, the seizure of property is allowed only for monetary/financial compensation, and only under Art. 354 it is gratuitous (confiscation as a sanction for a criminal offense), the Law "On the Legal Regime of Martial Law" allows to seize property for free. Only relevant documents of the prescribed format are issued (item 4, part 1, article 8). This Law does not specify other compensations for the owners.

Undoubtedly, ownership is affected by the owner's impossibility to dispose of their property freely, which follows from the termination of the functioning of state registers and databases administered by the state. This happened at the beginning of the hostilities and lasted for one month, as was provided by the Decree of the Cabinet of Ministers of Ukraine "Some issues of notary under conditions of martial law." (Some issues of notary under conditions of martial law: Resolution of the Cabinet of Ministers of Ukraine No. 164). However, these measures were fully justified and do not constitute an offense.

Meanwhile, this Decree suspends unfinished notarial actions requested by citizen of the Russian Federation and legal entities determined in this Decree, and if the said persons apply for notarial actions only after the Decree enters into force, the notary refuses to perform them. This restriction applies until the adoption and

entry into force of the Law of Ukraine on the settlement of relations involving persons affiliated with the Russian Federation.

This, of course, not only affects the property rights of legal entities and individuals of the Russian Federation, but is also an infringement into their rights; and it is only a matter of time before these individuals seek their protection.

Monetary settlements, i.e., the use and disposal of personal funds in Ukraine, are also subject to significant restrictions. This is provided for by the "Regulation on the procedure for the introduction of non-cash payments in Ukraine in the national currency during a special period," (Regulation on the procedure for the introduction of non-cash payments in Ukraine in the national currency during a special period, approved by the resolution of the Board of the National Bank of Ukraine No. 577) according to which the National Bank of Ukraine has a right to limit and to suspend non-cash payments in banks registered (or those that have their branches registered) in localities in which martial law has been imposed. There are also possible restrictions on the circulation of cash during the war period, provided for by the Resolution of the National Bank of Ukraine "On approval of the Regulation on the organization of cash circulation and conducting issue and cash operations in the banking system during a special period" from 5 May 2018 №51, („On the approval of the Regulation on the organization of cash turnover and the conduct of issue and cash operations in the banking system during a special period: Resolution of the National Bank of Ukraine" dated 5.05.2018 No.51) in particular regarding cash withdrawals, the obligation to deposit cash in a specific bank.

Situational Violations of Property Rights

If the first group of factors and the consequences of their influence on the right of ownership are allowed by law representing a legal restriction of the scope of the right of ownership, and therefore are not violations, the second group includes violations of the right of ownership itself. Moreover, these violations are either to a greater extent or always caused by military actions and the circumstances accompanying them.

All these circumstances can be combined under the umbrella of "deprivation of property" which occurs for various reasons. This can be both a physical deprivation of a person's property (for example, when it is destroyed) or a legal one (for example, when it is impossible to access it when the rights to this property are reissued to another person according to the laws of the country that seized the territory where the property is located).

In the first case, property damage was caused to the persons referred to as victims in connection with the *loss*, *destruction* or *damage* of property as a result of military actions. These terms are most often used when questions about the protection of property rights arise. Meanwhile, when analyzing these three terms, the following should be noted.

First, property should be understood as movable or immovable things that belong to an owner. This term is used in its narrow sense and should not include property rights and even money and securities. It seems that the methods of protecting the rights to the latter should be determined separately.

Second, none of the three terms is adapted to violations of the ownership of land plots, which can neither be 'lost' nor 'destroyed.' As for 'damage,' this term should probably be consistent with the term 'decrease in value' used in Art. 394 of the Civil Code of Ukraine, (Civil Code of Ukraine: Law No. 435-IV dated January 16, 2003) although this article relates to a different context of the protection of ownership of immovable property.

The term 'loss' is inappropriate for immovable property; it is rather acceptable for movables. Moreover, it is impossible to consider property as 'lost,' if the location of this property cannot be established, and in reference to real estate, it can only be 'lost' in the sense of being destroyed, but no other.

Most likely, 'lost' property should be understood as something the person no longer has control over. 'Destroyed' property is a property which no longer exists or whose restoration is impossible or impractical economically, that is, which is not subject to reconstruction according to the result of a construction examination.

Property is 'damaged' when its qualities have been affected negatively, i.e., when the property has (partially) lost the usability for the intended purpose and therefore its economic value has been lost. However, this property can potentially be restored and become suitable for its intended use again.

Third, in the case when a person loses control over the property that remains in the occupied territory, the person legally remains its owner because these facts are not grounds for terminating one's ownership according to the legislation of the state. According to Art. 11 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" dated April 15, 2014 №1207-VII, (On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine: Law of Ukraine dated April 15, 2014 No. 1207-VII) property rights in the temporarily occupied territory are protected in accordance with the legislation of Ukraine. The state of Ukraine, the Autonomous Republic of Crimea, territorial communities, including the territorial community of the city of Sevastopol, state bodies, local self-government bodies, and other subjects of public law retain ownership and other real rights

to property, including real estate, such as land plots located in the temporarily occupied territory.

At the same time, the ownership of this person is terminated according to the legislation of the other country in all cases or in the cases specified in the legislation. Of course, in this case, it is not merely difficult, but impossible for the Ukrainian owner to protect their right either through vindication or by demanding recognition of their right, or compensation for damages. This situation can persist at least for the duration of the military conflict and as long after its end until such issues are resolved at the interstate level.

It should be added that the Ukrainian owner who has real estate on the territory of the Autonomous Republic of Crimea could carry out state registration of their right to this property under the legislation of the Russian Federation. In this case, the owner does it based on their own free will, but this action contradicts Ukrainian legislation, since in accordance with part 2 and 3 of Art. 6 of the said Law, any bodies and their officials in the temporarily occupied territory as well as their activities are considered illegal if these bodies or officials have been created, elected or appointed in a manner which has not been provided for by Ukrainian law. Therefore, any act (decision, document) issued by the above-mentioned bodies and/or officials is invalid and does not create legal consequences, except for certain documents confirming the fact of birth, death, registration (or dissolution) of marriage. Any deed regarding immovable property, including land plots, made in violation of the requirements of this Law and other laws of Ukraine, is considered invalid from the moment of its execution and does not create legal consequences, except those related to its invalidity (h .6 of Article 11).

And *vice versa*, if the Ukrainian owner has not taken these actions, then according to the legislation adopted by public authorities created on the occupied territories (We will not go into the explanation of the status of these territories under international law or regarding the international status of these entities.) where this property is located, the owner is no longer considered as the one having property rights, and the property becomes communal property. In particular, such a consequence is provided for by the Decree of the Chairman of the DNR "On the identification, accounting and acceptance into municipal ownership of ownerless real estate and derelict property," dated April 28, 2022)

Violation of the owner's rights may be both a result of direct military actions (destruction of property by explosions, shelling, etc.), and of events generated by war, e.g., looting, damage to property by other offenses due to various situations in which conflicts escalate or emotional state changes (by military or territorial defense members in a state of intoxication or for other reasons) or due to unskillful handling weapons, etc.

Nota bene, looting may happen on both sides of warring parties. As literature exemplifies, war was originally perceived as one of the ways of enrichment whereby warriors had an opportunity to acquire the property of conquered peoples in the form of not only military trophies, but also military spoils. (Spesiytsev, 2022, pp. 64-65) This was noted, among others, by G.F. Dormidontov, who considered the seizure of things during the war as a basis for acquiring the right of ownership by *occupatio*. (Dormidontov, 1913, pp. 117-118) It is hardly disputable in regard to military trophies, these, however, do not fall into private ownership (except when private military companies fight and capture trophies). But with regard to military spoils, the situation in modern times should change as compared to ancient and medieval times, and little by little, attempts to settle it have been made. As early as the 19th century, it was provided at the legislative level that the acquisition of military spoil was lawful only in the case of the permission of the headquaters, and otherwise it was a crime. (Duvernoix, 1899, pp. 87-88) However, the proverbial cart little has actually changed: people behave as they used to, as evidenced by the situation in Ukraine. This significantly violates the right to property, which must be sufficiently responded to. Meanwhile, there are no adequate grounds for reacting to it with the use of effective protection yet.

Let us note one more aspect of the violation of the right to private property during hostilities: the discontinuation of contracts concluded before the war, which causes losses to at least one contractual party. This happens both through the withdrawal from the contract and through termination, in particular, because of failure to perform contract obligations due to force majeure. Doubtlessly, there is an objective reason for terminating contractual relations, which causes damage to contracting parties; this is war. The fact is, though, that due to this force majeure circumstance certain losses fall on the owner: a contractual party to which the other party does not provide compensation. However, this particular circumstance is not always sufficient for exemption from responsibility for a failure to perform contractual obligations, since the party that does not perform them on account of the war and thereby causes damage to the other contractual party must prove that the performance of the obligations has become impossible precisely as a result of such an irresistible force as war (Article 614 and Part 1 of Article 616 of the Civil Code of Ukraine). Therefore, the causation link in these cases must be proved by the party whose actions caused damage to its counterparty. Valid reasons include the destruction of the production facilities where the products were manufactured, or the means of transport by which they were to be delivered while their replacement by the services of other carriers would be disadvantageous to the contracting party. Undeniably another reason can be the occupation of the territory where the party to the contract is located with the necessary means of business activity for the performance of the contract.

II. Conceptual Grounds and Legal Norms which Should Be Relied upon when Solving Issues Concerning the Protection of Property Rights during Hostilities

The problem of the protection of property rights whose violation occurred due to military actions and their consequences is complex and multifaceted. Let us name two main reasons, from which others follow as their consequences.

The first is the existence of two spheres of law: private and public, which almost always overlap. This is especially pronounced in the conditions of martial law, when public law is clearly wedged into the legal mechanisms provided for by private law. In particular, civil legislation contains only a provision on requisition, which can be relied on, but this is only one article of the Civil Code of Ukraine, which cannot always be applied since martial law imposes its own specificity on this kind of confiscation of property. The principles of protection and responsibility provided for by the Civil Code of Ukraine will be partially acceptable. However, public law—international, criminal, humanitarian—will also inevitably be applied, which serve as a basis for the introduction of civil legal mechanisms. Therefore, the issues of the proper protection of property rights do not lie only in the sphere of private law.

The second is differences in the legal regulation of property during war, hostilities, and military conflict in comparison to legal models for the exercise and protection of property rights in peacetime. In this regard, it should be noted that many rights of subjects of private law change in wartime. This applies to both personal non-property rights (freedom of speech, information, etc.) and property rights; all of them shrink in scope, the powers of subjects are significantly narrowed, which is attributed to public law. Accordingly, the opportunities of individuals to exercise their rights at their own discretion, at their own will, and in their own interests are reduced. In such times, public interests prevail over private ones. The will of the owner may not be taken into account when using their property and alienating it, and therefore, it may not happen at the discretion of the owner.

Next, we will note the array of legislation containing public law norms which must be taken into account when solving issues of admissibility of the influence of public law regulators on the right of ownership and the legal mechanisms by which it is protected. At the same time, one should rely on the relevant norms of domestic law, international treaties, international humanitarian law, and decisions of the ECHR.

Public Law (International Public Law and International Humanitarian Law)

In the context of this discussion, it is worth noting, first, the importance of determining the ways of the protection of the owners who are in the occupied territory against the state that currently controls this territory and in the state that legally owns these territories, but currently does not control them. Second, the determination of the state's fault in order to indemnify it for damage and pay compensation depends on compliance with the norms of humanitarian law.

International law uses the term "civilian objects" to mean all property that is not military (Article 52 (1) of Additional Protocol 1 to the Geneva Conventions). It is these objects that are protected by the norms of international law and whose violation leads to responsibility, and therefore to the protection of property rights. This may refer to the destruction of civilian objects, regardless of whether it was justified by a military operation. Here, we can refer to the examples of earlier wars, in particular the second world war and the case of a German officer who ordered to burn several mills and to destroy their machinery before the Red Army's offensive, which served as a basis for finding him guilty of a war crime: the destruction of private property unjustified by military necessity, which was ruled in the judgment of the Higher Land Court in Dresden in 1947 (Gromovoi, 2022).

The same approach is seen in more recent events surrounding the military conflict in Turkey: in 2008, the Higher Administrative Court of Bavaria revoked the displaced person status of a Turkish citizen on the basis of a high probability that he had engaged in "…unlawful and arbitrary destruction of property not justified by military necessity, which was a violation of Article 8, Clause 2, Clause a) …of the Rome Statute" during the service in the armed wing of the Workers' Party of Kurdistan (Gromovoi, 2022).

These examples should be taken into account when assessing damage to property owned by private individuals and territorial communities in Ukraine. Possibly, the issue of the proportionality of damage to property used during hostilities for the needs of the people of Ukraine—bridges, buildings, and other infrastructure facilities—should also be considered. Meanwhile, this issue is very complex, and to solve it, one should delve even deeper into the realm of public law and evaluate the validity of approaches to military tactics used during the war. Herein questions about the subjects of compensation may arise, which is of crucial importance for the civil protection of property rights.

Therefore, it is necessary to distinguish the negative impact on the right of private property through forced deprivation of the owner of their property (a) by the enemy state (for example, through spoils, looting, acquisition of trophies); (b) by the native state through requisition, confiscation, looting.

At the same time, it should be taken into account that the confiscation referred to in the legislation of Ukraine differs from the confiscation under Art. 354 of the Civil Code of Ukraine, where confiscation is a consequence of a criminal offense. In general, the issue of any confiscation of property goes beyond the scope of regulation by civil law (Amfiteatrov, 1945, pp. 10-14), including the procedure for further use and alienation of property. It has traditionally been so that the participation of the state in any property relations, including its acquisition of rights to property and its management and vice versa (privatization of state property) is not regulated by civil law, although the Civil Code of Ukraine defines such relations as civil law, and the state as the same owner as private individuals. However, this is a matter for a separate discussion.

Internal Law of the Parties to the Military Conflict in Ukraine

Until September 2020, the issues of the protection of property rights in Ukraine due to damage or destruction were regulated only by a number of special laws. The courts relied on the laws of Ukraine "On Combating Terrorism," "On State of Emergency," "On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories of Donetsk and Luhansk Regions," and the Code of Civil Protection of Ukraine. However, these laws lacked regulation for some issues sometimes happening in practice. In particular, an "emergency situation of a military nature" can have other causes than an armed conflict (for example, explosions at military warehouses). In addition, courts lacked conviction guidance as to the payments to be awarded to the owners.

This issue was resolved in 2020. The Cabinet of Ministers of Ukraine adopted Resolution №767 of September 2 (Resolution of the Cabinet of Ministers of Ukraine No. 767 dated September 2, 2020), which approved the "Procedure for providing and determining the amount of monetary assistance to victims of emergency situations and the amount of monetary compensation to victims, residential buildings (apartments) which were destroyed as a result of a military emergency caused by the armed aggression of the Russian Federation."

However, again only some issues are regulated by this Order. If we are talking about a comprehensive approach to the regulation of legal relations in this area, then Resolution No. 767 of the Cabinet of Ministers of Ukraine does not provide it.

In 2023, Ukraine adopted the Law "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of

hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine" (On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine: Law of Ukraine dated February 23, 2023. No. 2923-IX).[1]. In accordance with this Law, the right to receive compensation have owners of damaged/destroyed real estate objects; construction customers; people who had invested funds in the construction, but before its completion it was destroyed or damaged, the heirs of the specified people (Article 2). The law also provides categories of persons who have a priority right to receive compensation for destroyed real estate objects (Article 9).

In order to resolve issues regarding the provision of compensation to these persons, a commission is created to review issues regarding the provision of compensation, to which appropriate applications are submitted by persons entitled to compensation. Claims for compensation are submitted during martial law and within one year from the date of its termination or cancellation in the territory where the destroyed real estate object was located. These applications are considered by commissions in the order of priority of their receipt, based on the results of which a decision is made to provide compensation for the destroyed object of real estate object or to refuse to provide compensation, which is possible only under the conditions specified in the Law. In addition, this refusal can be appealed in accordance with the established procedure. The decision on payment of compensation made by the commission, approved by the institution specified in the Law, is uploaded to the Register of damaged and destroyed property.

Compensation for the destroyed real estate object will be provided in monetary terms or by financing the purchase of an apartment, other residential premises, a house, etc., which will be built in the future. Sources of financing compensation are defined in Art. 13 of the Law. The amount of compensation for a destroyed real estate object is determined for each recipient of compensation and each destroyed object separately, based on the total area of the destroyed object and the cost of 1 square meter of the area of the it (Part 4 Article 8). At the same time, the recipient

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[1] On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine: Law of Ukraine dated February 23, 2023. No. 2923-IX // https://zakon.rada.gov.ua/go/2923-20.

of compensation is prohibited from alienating real estate objects acquired under this Law for a period of five years (Part 17, Article 8).

An important element of the legal mechanism in this Law is the conclusion of an agreement on the cession to the state/territorial community of the right to demand compensation from the Russian Federation for the destroyed object of immovable property, in the amount of the received compensation. This contract is concluded simultaneously with the provision of monetary compensation to the person for the destroyed real estate object (Part 18, Article 8).

As for the legislation of the other party to the military conflict (the Russian Federation), at the least the provisions of the Federal Constitutional Law "On Martial Law" (Federal constitutional law of 01/30/2002 N 1-FKZ (as amended on 07/01/2017) "On martial law") should be taken into account, whose clauses 3 and 7, part 2 of Article 7 provide for the evacuation of economic, social and cultural objects, as well as the temporary resettlement of residents in safe areas with the mandatory provision of permanent or temporary housing to such residents; seizure of the property necessary for defense needs from organizations and citizens with subsequent payment by the state of the value of the seized property.

It can be assumed that these provisions concern not only citizens of the Russian Federation and their property, as well as the property of legal or municipal entities, but also the property of citizens of Ukraine, as well as legal entities registered in Ukraine and the property of territorial communities of Ukraine. Considering this interpretation of the Russian law to protect the rights of Ukrainian owners will be even more difficult, especially if it is a property used in business activities (equipment, etc.), which will be disassembled and transported to another area and possibly modified.

Ukraine responded adequately to such a threat by adopting the Law "On Amendments to Certain Laws of Ukraine on Optimizing Certain Issues of Compulsory Expropriation and Seizure of Property in the Conditions of the Legal Regime of Martial Law." (On amendments to some laws of Ukraine regarding the optimization of some issues of forced alienation and confiscation of property in the conditions of the legal regime of martial law: Law of Ukraine dated September 6, 2022 No. 2561-IX). The law, in particular, provides that movable property which is used or can be used to ensure the activity of enterprises of the defense-industrial complex of Ukraine and in respect of which there is a risk of interruption of its functioning since this property is located in the territory of an administrative-territorial unit of Ukraine threatened with a temporary occupation since it is located at a distance of no more than 30 kilometers from the area of military (combat) operations or from the temporarily occupied territory may be aliened or seized on the basis of the decision of the National Security and Defense Council of Ukraine. After that, the military

headquarters must ensure the preservation of this property. The law establishes the transfer of this property into state ownership.

What is questionable in this law?

First, it does not specify important features of movable property that can be seized or alienated, except for the indication that it is used or can be used to ensure the activities of enterprises of the defense-industrial complex of Ukraine. Such vague formulations may have negative consequences for owners since they open up an opportunity for abuse of the wording. Second, it does not mention compensation to property owners. Third, it establishes such a basis for turning a property seized from the owner to the state ownership as the Presidential Decree: the Law states that the right of state ownership over the confiscated movable property arises from the date of the entry into force of the decision of the National Security Council of Ukraine on forced alienation or seizure of such property introduced by the decree of the President of Ukraine. So it's time to refer to the theory of legal facts. However, Art. 11 of the Civil Code of Ukraine, which determines legal facts, covers only the grounds for the emergence of civil rights, while the Law covers the grounds for their termination. Instead, state property rights should be regulated in the same way as other civil rights, since all owners are equal (Article 318 of the Civil Code of Ukraine). However, here public principles have an undeniable influence on the private owner by the public owner: the state. Undoubtedly, a legal mechanism introduced by the Law, designed to preserve property, is needed by the state in times of war, but it can have a negative impact on the right to private property. As a result, private owners may find themselves between the hammer and the anvil: the danger of their property being seized by the Russian Federation or by Ukraine.

On November 12, 2019, Russia adopted a federal law on the withdrawal of ratification of the additional protocol to the Geneva Convention on the Protection of Victims of International Armed Conflicts. Thus, the Russian Federation no longer undertakes to refrain from attacking civilian objects. Therefore, if we evaluate the current context for Ukraine, the guarantees of international law may become illusory. Therefore, in a war with Ukraine that causes damage to property owners, it will be very difficult to rely on international legislation, which the Russian Federation does not recognize. In addition, on September 16, 2022, Russia finally withdrew from the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, disputes between citizens of Ukraine and the Russian Federation will no longer be considered in the European Court of Human Rights. (Russia is no longer in the ECHR. What will happen to the cases of Ukraine against the Russian Federation, 2022) Thus, it is impossible to carry out proper and effective protection of the rights of owners on the basis of Ukrainian and international legislation. Nevertheless, other methods of protection should be sought, if the ones

generally accepted in the world turn out to be unacceptable in the situation of military conflict between Ukraine and Russia.

Legal Approaches and Practice of the ECHR Regarding the Place of the State in the Mechanism of Protection of the Private Owner

Since the issue of protection of property rights is directly related to international law, and the reasons for the violation of property rights during war lie outside the boundaries of civil legal relations, while the main circumstance affecting the owner is war, the state is the main subject responsible for protecting property rights. At the same time, attention should be paid to the following important provisions:

First, whether the state controls this or that part of its territory or not, it is not exempt from fulfilling its obligations under the Convention and its Protocols (for example, the decision of the ECHR in the cases "Ilashku and others v. Moldova and Russia," (Рішення ЄСПЛ у справі "Катан та інші…, 2004; "Katan and others against Moldova and Russia", 2012). Second, the state is obliged to introduce appropriate mechanisms for compensation of the value of property, housing, and land if it is not able to ensure the possibility of returning this property to its owner (for example, decisions in the cases "Sargsyan v. Azerbaijan," "Chiragov and others v. Armenia," "Dogan and others against Turkey"[2]).

This approach is evidenced not only by the practice of the ECHR, but also by the Basic Principles and Guidelines concerning the right to legal protection and compensation for victims of gross violations of international norms in the field of human rights and serious violations of international humanitarian law, dated July 25, 2005, adopted by The United Nations Commission on Human Rights (Основні принципи та керівні положення…). The provisions of these principles, which are important for Ukrainian owners, allow them to hope for compensation. At least, this is what is stated in Principle VII, where one of the means of protection for victims of violations of international humanitarian law is defined as the right to receive adequate, real and quick compensation for damage. And while this statement is perceived as declarative, it takes on a more concrete shape in principle IX, according to which states should seek to establish national mechanisms for reparation for victims of violations in the event that the party responsible for the harm caused is unable or unwilling to comply with their obligations.

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[2] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://supreme.court.gov.ua/userfiles/media/Sargsyan_v_Azerb.pdf.

This is exactly the situation in the war between Ukraine and Russia, where the latter shows no desire to restore the violated rights of the owners. Therefore, it is not difficult to predict that the entire burden of solving this problem will fall on Ukraine and it is our state that must decide what legal mechanisms for compensation of damage to implement.

III. Ways to Protect Property Rights

The well-known methods of protection of property rights provided for by the Civil Code of Ukraine (Article 16 and Chapter 29), which are used in peacetime, turn out to be unable to protect owners in war and post-war times effectively. Therefore, it is necessary to focus on the provisions of international humanitarian law, which provide for compensation of damage to the owners as a way of protection, and the forms of such compensation are defined as restitution and compensation along with rehabilitation, satisfaction and guarantees of non-repetition, thanks to which it is possible to satisfy the interests of the owners whose rights have been violated as a result of hostilities. This is provided for in the Basic Principles and Guidelines on the right to legal protection and compensation for victims of gross violations of international norms in the field of human rights and serious violations of international humanitarian law.

International and regional judicial practice shows that the state is accused of violations of human rights and international humanitarian law if it fails to prevent and punish the violations, does not act with due diligence in this respect. This should lead the state to take measures to compensate for the damages it may have caused and to prevent future violations. These measures range from paying compensation to victims and their families and providing guarantees of non-repetition to implementing legal mechanisms to prevent future abuses. (International legal protection of human rights in armed conflicts – 2011 – UN. New York and Geneva)

> ***Restitution*** means restoration of rights or return of property (Lat. *restitutio*: restoration, return)[3]

In civil law, restitution is understood as a consequence of the invalidity of transactions (Article 216 of the Civil Code of Ukraine) (Strelbytska, Sibilov, 1998-2004).

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[3] https://leksika.com.ua/16120724/legal/restitutsiya.

If it is about the restitution of property violated as a result of hostilities, then the approach developed in international law should be applied.

It is proposed to introduce restitution in criminal law as well (Tsylyuryk, 2021, pp. 80-86) to the extent that corresponds to this right before its violation. Therefore, the term 'restitution' is interdisciplinary and its semantic value has its own characteristics in different fields. However, the main thing that characterizes restitution is the restoration of the property status of the victim through giving their property back to them. If it is impossible to give such property back to the owner, then it can only be a question of compensation in the form of transferring the same kind of property to them (for example, a land plot) or reimbursement of the sums for the purchase of the property they were deprived of. In particular, this is allowed under Part 1 of Art. 23 of the Law of Ukraine "On the Legal Regime of Martial Law" (a similar provision is contained in Part 5 of Article 353 of the Civil Code of Ukraine).

In accordance with Part 2 of Article 23 of this Law, if the property that was forcibly expropriated from legal entities and individuals survives after the cancellation of the legal regime of martial law, the former owner or a person authorized by them has the right to demand in court the return of such property on the conditions defined by law. This provision is similar to the provision of Part 6 of Art. 353 of the Civil Code of Ukraine, which however, does not use the term "former owner," but refers to the person to whom the confiscated property belonged.

In both cases, a rather interesting situation arises when a person who is not the owner of the property has the right to demand its return by law – specifically property which the person owned before it was taken by the state due to reasons caused by war. Such a claim of the former owner is not vindictive and is not related to the protection of their violated right, since their ownership was terminated without an offense, on the basis provided by law. If we talk about the claim for the return of property to the owner who was injured during hostilities, then the offense took place, but not due to the fault and not on the part of the state, which nevertheless undertakes to return the property to the owner, if it is possible.

Finally, the third case: when the property was seized from the owner or the owner lost possession over the property as a result of the actions of certain persons not related to the need to use this property for military or other actions objectively important during the martial law. In other words, if an offense was committed by civilians, military personnel of any warring party or some armed groups, the owner can defend his right by filing a vindication claim or a claim for compensation for the damage caused to him.

The above clearly demonstrates the scale and complexity of the problem of restitution. However, it is not properly studied in domestic legal literature on civil law (Spasybo-Fatyeyeva, 2015; Spasybo, 2021).

The difficulties of applying restitution as a remedy of protection of property rights due to violations during the war lie primarily in the fact that its application is possible only if the state authorities exercise their powers in the territory where the property is located. Restitution becomes impossible if the property is located in temporarily occupied territories. That is why in international law, restitution is associated with the signing of a peace treaty or capitulation, although experts insist on regulating restitution at the domestic level (Zakirova). However, the domestic regulation of restitution currently covers only restitution which is not related to the protection of property rights violated by military conflicts.

The application of restitution can be seen in the conclusion of the International Court of Justice, according to which, "Israel is obliged to return the land, gardens, olive groves and other immovable property seized from individuals or legal entities for the construction of a wall in the occupied Palestinian territory. If such restitution turns out to be essentially impossible, Israel is obliged to pay the specified persons compensation for the damage caused. The court considers that Israel is also obliged to pay compensation in accordance with the applicable norms of international law to all individuals or legal entities who suffered material losses in any form as a result of the construction of the wall." (Advisory Opinion of the International Court of Justice on the Legal Consequences of Building a Wall in the Occupied Palestinian Territory, 2004).

Therefore, restitution and compensation go hand in hand.

Compensation is a kind of reimbursement, which is introduced in case returning property in kind or transferring similar property to the person whose ownership was violated during the war is impossible. The following issues arise in the context of compensation: (a) Is compensation possible for all owners, or only for private ones? (b) Is compensation introduced in all cases of destruction or damage to property, or only if they occurred as a direct result of military action? (c) How does indemnification differ from compensation? (d) Should the fault of the tortfeasor be taken into account? (e) What facts must be proved by the owner in order to receive compensation and in what manner? (e) What amount of compensation should be paid to the owner and can they affect its determination? etc.

Each of the above questions is important and it is not easy to answer them. Of course, the person who needs compensation must be the owner of the property, and therefore it is necessary to identify this person and prove that the one has the property right. However, difficulties arise with those individuals who have acquired ownership rights to real estate being under construction, that is, either its construction has not yet been completed, or although it has been completed, the right to it has not yet been registered. Case law fluctuates even in times of peace: previously, the legal position of the Supreme Court in Ukraine came down to the conclusion that

the right to real estate that was built arises only after state registration, and therefore a person who is not the owner of the property cannot defend their right (Resolution of the Supreme Court of Ukraine dated June 24, 2015 and dated November 18, 2015). However, this position was replaced by the opposite one: a person who has invested in the construction of an apartment in a building which is being built has a property right, and therefore is its owner and as such can protect their own right (Resolution of the Grand Chamber of the Supreme Court dated December 14, 2021). Therefore, it is easy to imagine the scale of compensation claims for those who have invested in the construction, but have not yet become the owners of the apartments, as the building or part of it was destroyed during the war.

The provision of compensation to the affected persons may take place in various ways, in particular through: (a) payment of monetary funds; (b) transfer of ownership of immovable property; (c) payment of funds to construction companies as a contribution for the purchase of housing in the form of deposits, interest on the loan, full or partial repayment of the loan, etc. This is provided by the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17].

Payments made during requisition under Art. 353 of the Civil Code of Ukraine also qualify as compensation, although instead of "compensation" they are named "reimbursement" in this provision. The fundamental difference between such requisition and compensation to war-affected owners is that, in the former case, funds are paid to the owner before their property is seized, although this is prompted by events of an extraordinary nature which should be responded to quickly. In the latter case, payments are made not before the confiscation of property, but much later, most likely after the end of hostilities. Nevertheless, Part 1 of Art. 23 of the Law of Ukraine "On the Legal Regime of Martial Law" provides for the subsequent full reimbursement of the value of the property seized from the owner if the previous full reimbursement of its value was not made. That is, this Law allows for different options for the timing of settlements with property owners.

It is also worth noting that this Law uses the term "compensation of damages" and not "compensation of the value" of the property.

The differences between the regulation of the Civil Code of Ukraine, the Law of Ukraine "On the Legal Regime of Martial Law" and Drafts of laws of Ukraine on the restoration of property rights or compensation to war-affected owners lie in the grounds for compensation. They are associated not only with the seizure of property from the owner, but also with its destruction or damage.

Among other things, in the case of requisition under part 1 of Art. 353 of the Civil Code, the owner is paid full compensation for the value of their property, and in the case of compensation to the owners affected by the war, this amount of compensation may not be given, because it depends on the state's ability to pay the funds to all the affected owners, which will be discussed further.

What is common to both types of restoration of the property rights of owners whose property was affected by the war is that they are provided with funds or property that is in the state or communal ownership. This is either an existing property or one that has been built or is being built for this purpose from the legally defined sources.

In talking about compensation, it is also important to determine the order in which it is provided and its amount.

Considering the order in which compensation is to be provided, there are several steps which should be taken to receive the compensation. The first step is that a person whose property suffered from war-related issues applies for such a compensation. This can be done by the submission of an application to the relevant state authorities or registration in certain databases, in particular through the "Diia" platform.

The second necessary step is the recording of the fact of the violation of property rights by the relevant bodies defined in the law—the inspection of the property to determine the degree of its damage or destruction.

The third step is to determine the amount of expenses necessary to repair the property or purchase a similar property to replace the destroyed or damaged one.

Registration of the facts of the violations of property rights must be centralized. It is made in a register specifically created for this purpose. In order to enter data into it, it is not only the owner (or a person authorized by them) who can apply to the relevant state commissions, centers for the provision of administrative services, officials of the social protection body or a notary public, but also the local self-government bodies or the military-civilian administration of the corresponding settlement which have revealed property violations. Keeping a register of damaged or destroyed property will ensure transparency and regularity of compensation to owners.

To establish the degree of violation of property rights (damage or destruction of property) appropriate qualification and objectivity are required. Therefore, this issue should be resolved with the help of experts, which requires an inspection of the property and therefore an access to it. Suitable commissions can do this, but the situation during hostilities is complicated by the impossibility of accessing the property in an occupied territory or in a dangerous area.

Currently, section 15 of the "Procedure for providing and determining the amount of monetary assistance to victims of emergency situations and the amount of

monetary compensation for victims whose residential buildings (apartments) were destroyed as a result of a military emergency caused by the armed aggression of the Russian Federation" provides that if there are restrictions established by an order of the Commander of the Joint Forces regarding the stay or movement of people on the territory where the housing necessary for the survey is located, the survey commission conducts a survey of housing based on the Commander's written permission. In the case of refusal of the Commander of the Joint Forces to grant such a permission, the period for carrying out the survey, determined by the Order, is suspended until the relevant permission is obtained or the established restrictions are lifted. In this regard, people whose property, in particular destroyed housing, is located on the territory of such settlements, may actually be deprived of the opportunity to receive monetary compensation for their destroyed property.

In this case, there is an alternative to the physical inspection of housing: in the event of the impossibility of documenting the facts of damage or destruction of property due to the lack of access to the settlement or part of the settlement where the relevant object is located, the survey commission carries out documentation according to available materials. At the same time, the survey commission can make a decision to confirm the fact of complete destruction of real estate based on aerial photography, satellite map data, and information received at its request from the head of the relevant military administration body. In case it is impossible to make a decision based on available materials, the inspection commission carries out an inspection of the damaged property after obtaining access to the property based on the written permission of the head of the relevant military administration body (in the absence of a threat to human life or health).

Owing to these efforts, databases of the extent to which property has been destroyed or damaged are formed and the necessity or possibility of its reconstruction is assessed (Yaresko, 2022).

The amount of compensation is a vital question that will inevitably arise in practice. If compensation is considered a positive obligation of the state, which itself determines this amount, then the actual value of the damaged or destroyed property is not taken into account. And practically, is only the possibility of the state to provide compensation to the owners in a certain amount. At the same time, this is not consistent with the principle of full reimbursement, which is understood as an effective remedy of protection of violated rights.

The Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation

against Ukraine"[17] provides guidelines for determining the amount of compensation (Part 4 of Article 8). That is, it must be specified and substantiated.

On the other hand, in the case of a tort or even compensation caused by forced seizure of property from a person (repurchase for state needs), the owner may disagree with the proposed amount, conduct examinations, etc. Therefore, the question arises whether it is possible to take the same course in the cases of compensation to owners of damaged/destroyed property during hostilities.

The Basic Principles and Guidelines on the Right to Legal Protection and Compensation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law provide that victims must receive compensation commensurate with the severity of the violations and the damage they suffered from.

The size of reparations can be determined by the International Criminal Court, which can also directly order the convicted person to compensate the victim in an appropriate manner, including restitution, compensation, and rehabilitation (Article 85 of the Rome Statute).

It is probably important for the owners to specify the terms of payment of compensation as an element of protecting their rights. In this case, the relationship regarding the payment of compensation would at least acquire the rank of a legal relationship, the owner would be able to demand payments and the state, in the person of the authorized body, would have to fulfill its duty. Such an arrangement would lead to an effective protection of property rights. However, according to the legal mechanism provided for by the Law "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17], the question of the term is bypassed. It is only about the 10 years during which a person can apply for compensation, as well as the terms of consideration of a person's application for compensation. Moreover, the second deadline can be suspended if the organization to which the applicant is applying does not have funds to finance the purchase of an apartment, other residential premises, etc. and in other cases determined by the Cabinet of Ministers of Ukraine (paragraph 2 of part 12 of Article 8 of the Law). Perhaps it will be regulated in a Resolution of the Cabinet of Ministers of Ukraine, but the principles in this Law do not give reason to think that it will be resolved at the in the Resoltion.

IV. Factors Complicating the Protection of Property Rights and Ways to Address Arising Issues

In addition to the objective difficulties faced by owners on the way to protecting their rights due to the lack of proper legislative regulation and appropriate state institutions, one should also take into account other problems whose impact on this situation cannot be underestimated. These are: (a) proper functioning of judicial bodies, which make the protection of property rights possible; (b) the creation of other bodies for this purpose; (c) resources to form the compensation fund for making payments to the owners; (d) immunity.

The Importance of Judicial Bodies and Other Bodies Created to Restore the Property Rights of Owners whose Property Was Damaged, Seized or Destroyed during the War

The analysis of the status quo concerning lodging of claims by citizens and legal entities of Ukraine for the protection of their rights to the judicial authorities of Ukraine allows to anticipate the following difficulties.

The first one concerns jurisdiction. As a general rule, the protection of property rights by means of a claim for damages takes place in court and these disputes are resolved by courts of general or economic jurisdiction in accordance with the Civil Procedure or Economic Procedure Codes of Ukraine.

Two ways of protecting property rights should be taken into account: private law and public law ways. The former concerns compensation for the damage caused to the owner, and the latter concerns the fulfillment of positive obligation by the state to pay compensation to the owners or to apply restitution. It is clear that the subjectivity of these disputes will cause different positions and discussions in practice.

Second, lodging claims to the state of Ukraine, which is currently in a difficult financial situation and is unlikely to have the means to satisfy these claims, does not make this way of protecting the rights of owners effective. That is, our state is unlikely to be able to fulfill its positive duty in the near future.

Claiming to the state authorities in cases where the owner was harmed by the actions of the Ukrainian military or officials, faces the same problem, since these compensations, even if they are awarded by the court, must be reimbursed by the state.

Third, we should expect an enormous number of owners' claims for compensation to courts, which will inevitably lead to an overload of the courts. Such claims may hardly be called typical and their consideration standard, since these cases must be considered in perspective of their individual situations.

This threat of an extremely long time of a hearing in courts, along with the lack of funds in the state budget to satisfy the owners' demands, makes this method of protecting the owners' rights ineffective. The owners will try to hurry with appeals to the court to have better chances of resolving the cases in their favor, and then hurry to the executors.

Fourth, when the owner determines the amount of the claim, the problem of proving damages will arise, which is important both for the owner and for the state since the latter must verify the existence of these damages, their proper assessment, etc. Without creating a unified approach to this, it can hardly be expected that the claims of the owners will be satisfied.

Fifth, it is necessary to determine the funds for the payment of compensation to the owners and the procedure for their distribution, as well as the institution that should take care of it.

Considering the above issues, the current legal method of protecting the rights of the owners cannot be perceived as optimal. Taking into account the scale of destruction and loss of life, a centralized mechanism for aggregating claims and paying compensation, proving damages, etc. should be made.

A comprehensive approach to the protection of owners through their appeal to the Russian Federation for recovery of moral damages and lost profits is also possible, and compensation for real losses suffered by them as a result of damage and/or destruction of property (housing) will take place through the mechanisms provided for by the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17]. However, even in this case, the problem of determining the amount of the claim and methods of its satisfaction remains open or even deepens due to additional complications. There is little doubt that such claims will be made for significant sums. Thus, the courts will face the problem of justifying the satisfaction of these requirements to a certain extent. In addition to the principles of reasonableness and justice, there is a high probability that the courts may act on patriotic grounds and, when making decisions, not refrain from demanding significant amounts of compensation. This approach raises many legal issues.

In other countries which had a similar experience to Ukraine in overcoming the property consequences of the war, transitional justice (Transitional Justice and Economic, Social and Cultural Rights. – UN, 2014, p. 6) mechanisms were created with the purpose to establish the truth and compensate the victims of the war. Truth-finding commissions are established immediately after the end of the conflict or

shortly thereafter. These commissions help to determine the amount of compensation to owners (For such an analysis of the mechanisms of establishing the truth and reconciliation, see in Instruments for ensuring the rule of law in post-conflict states: Commissions for the establishment of truth (HR/PUB/06/1)). Similar out-of-court mechanisms would collect information through the "Diya" application and in other ways that would allow to respond to owners' claims in a timely manner or to act in accordance with the actual circumstances.

At the international level, the experience of addressing the issues of effective compensation to the owners of their claims results in the creation of international compensation commissions, in particular as an auxiliary body of the UN. Such a commission considered claims and had the right to pay compensation for loss and damage suffered by owners as a result of Iraq's attack on Kuwait and its occupation. It would be worthwhile for the commission to include investigating violations of human rights in its activities.

As for the bodies involved in resolving issues of compensation for owners, according to the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17], these are commissions for considering issues regarding the provision of compensation. The compensation mechanism also involves applying to the relevant centers for the provision of administrative services, officials of the social protection body or a notary public.

Meanwhile, all these actions are performed in order to establish and confirm the person's right to compensation. There is not enough information in the given Law regarding the implementation of the compensation itself and the institutions that are involved in it. It is believed that a mission of this importance for the entire society should be performed by non-state bodies as managers of the fund created to compensate the owners. Taking into account the specific situation with the level of corruption in Ukraine, it would probably be desirable to form this body from persons who enjoy public respect. On the part of the state of Ukraine, it may include a representative of the Ministry of Justice, as well as representatives of the audit union, the bar association, churches, etc.

Sources of Funds to Compensate Owners

Ideally, budget funds should be allocated to pay owners for property damaged and destroyed by the war. However, it is obvious that such funds will not be enough and, among other things, the question arises about the fairness of directing the funds of our state for this purpose, if the war is started by a foreign state. The search for a way out of this situation resulted in the adoption of the Law of Ukraine "On the Basic Principles of Forcible Expropriation of Objects of Property Rights of the Russian Federation and its Residents in Ukraine." (On the Basic Principles of Forcible Expropriation of Objects of Property Rights of the Russian Federation and its Residents in Ukraine: Law of Ukraine No. 2116-IX dated 3.03.2022) According to Art. 1 of this Law, it is allowed to forcibly remove objects of property rights of the Russian Federation and its residents in Ukraine for reasons of public necessity (including cases in which it is urgently required for military needs) in favor of the State of Ukraine on the basis and in the manner established by this Law without any compensation (reimbursement) of their cost. The decision to seize such a property is made out of court; the property becomes state property and is transferred to legal entities with varying degrees of participation in them by the state of Ukraine.

Therefore, such a legal mechanism indicates, first of all, the choice of responding to the initiation of war by the Russian Federation as negative property consequences for the Russian Federation and its residents. Second, as a result of the implementation of the mechanisms of this Law, the state of Ukraine is expected to acquire property that was in the state or private ownership of other persons. Third, it does not directly follow from this Law that the property and funds obtained in this way can be directed to meeting the needs of Ukrainian private owners who suffered losses during the war. Fourth, the question of protecting the property rights of those people whose property was confiscated on the basis of the specified Law of Ukraine may arise.

Regarding some of the aspects outlined above, the following can be pointed out. Despite the fact that the Russian Federation has abstracted itself from international legislation, this legislation is an expression of the rights of any person. Therefore, the issue of its application becomes more acute because changes in the legislation of the Russian Federation, on the one hand, make its legislation introverted and unaffected by international law, and on the other hand, this situation (as always) influences the protection of the rights of citizens of the Russian Federation, their ability to refer to the norms of international law whose application the Russian Federation refused.

However, these norms directly refer to the context of the protection of property rights, according to which every individual and legal entity has the right to respect for their property and no one can be deprived of their property except in the

interests of society and under the conditions provided for by the law and general principles of international law (Article 1 of Protocol 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms).

Examining the Law of Ukraine through the lens of this provision, on the one hand, allows us to see the possibility of confiscation of property from the owners, which is determined by the interests of Ukrainian society (this is noted in the Law of Ukraine, according to which the interests of Ukrainian society can be satisfied outlined the said confiscation of the property of the Russian Federation and its residents). On the other hand, it refers to the seizure of property not of Ukrainian, but of foreign owners, which cannot but be taken into account in the legal analysis of this mechanism. Such doubts are unlikely to be dispelled by Part 2 of Art. 1 of the Protocol 1, according to which the right of the state to ensure the implementation of such laws as it deems necessary to control the use of property in accordance with common interests or to ensure the payment of taxes or other fees or fines is allowed.

Thus, the Ukrainian law provides for the termination of property rights of non-residents through an out-of-court procedure. This needs to be carefully analyzed. After all, along with the impression of the fairness, which it makes, there are opposite feelings. Negative property consequences for the state that started the war are seen as fair, but they should be applied as reparations in the manner determined by international law. The possibility of lobbying changes to the legislation of the G20 countries, which would allow the frozen assets of Russia and Belarus to be used for reparations, was noted. At the same time, examples were given of sending frozen reserves to Afghanistan after the Taliban came to power, as well as the implementation of the "oil for food" program in Iraq. Even more, it is proposed to direct the revenues from Russian oil, which the Russian Federation could receive from sales in Europe, to the reconstruction of Ukraine (Yaresko, 2022).

The funds that will come for compensation to the owners and for the reconstruction of the state of Ukraine must be accumulated by creating a corresponding fund that will operate on the basis of a trust. The management of this trust should be carried out on a public basis, as discussed above.

About Judicial Immunity

The issue of judicial immunity directly concerns the protection of property rights, both Ukrainian and Russian. Of course, being in a state of war waged by the Russian Federation on the territory of Ukraine, we cannot abstract from our emotions, which are completely justified. In addition, these circumstances cannot be assessed as contradicting the principles of justice. At the same time, in any case, we must

remain in the legal sphere and evaluate the actions of the Russian Federation from the standpoint of law.

First of all, for this end, we should rely on Art. 79 of the Law of Ukraine "On Private International Law" (On private international law: Law of Ukraine No. 2709-IV dated 6.23.2005). In accordance with the first part of this Law, the filing of a claim against a foreign state, the involvement of a foreign state in the case as a defendant or a third party, the seizure of property belonging to a foreign state and located on the territory of Ukraine, the use of other means of securing a claim and enforcement of such property in relation to such property may be allowed only with the consent of the competent authorities of the relevant state, unless otherwise provided by an international treaty of Ukraine or the law of Ukraine. Therefore, the given provision does not contain grounds for the seizure of the property of the Russian Federation and the enforcement of it otherwise than with the consent of the Russian Federation itself represented by its competent authorities. This provision is mandatory and does not allow for variations. Therefore, according to the Ukrainian law, the Russian Federation's violation of the norms of international law does not constitute grounds for deprivation of immunity.

At the same time, the Supreme Court expressed a different legal position (Resolution of the Supreme Court dated May 18, 2022) depriving the Russian Federation of judicial immunity based on the following grounds:

First, the Court applied the ECHR's approach to the purpose of granting state immunity in civil proceedings, which is to uphold international law to promote civility and good relations between states through respect for the sovereignty of another state. Since the Russian Federation committed acts of armed aggression against Ukraine, this is a violation of its obligation to respect the sovereignty and territorial integrity of another state, which is enshrined in the UN Charter. Therefore, such actions of the Russian Federation against Ukraine are not the realization of its sovereign rights, which gives grounds not to apply judicial immunity to it.

Second, the Court focused on the right to judicial protection, which must be provided by the state (Article 55 of the Constitution of Ukraine), and therefore to a fair and public consideration of cases in court, which can be limited by applying the judicial immunity of the state only in case if it: 1) pursues a legitimate goal; 2) is proportional to the pursued goal; 3) does not violate the very essence of the right to access to court (Clause 1, Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms).

Third, the Court relied on the principles of customary international law (in particular, as they were applied in the decision of the ECHR in the case „Oleynikov v. Russia") (Decision of the ECHR dated March 14, 2013). According to this approach, if national courts support judicial immunity of the state having no regard

to the provisions they apply, the courts violate the right of the plaintiff to access to justice, even when the judicial immunity is to be applied. In addition, reference was made to Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property (2004) as a ground for the conclusion that the state has no reasons to refer to judicial immunity in cases related to the infliction of damage to health, life and property, if such damage was caused in whole or in part on the territory of the state of the court and if the person who caused the damage was at that time on the territory of the state court.

In legal social networks and at events regarding the discussion of the issue of judicial immunity, other arguments were also expressed to strengthen the position regarding the possibility of not applying judicial immunity: violation by the Russian Federation of the norms and principles of the UN Charter, the Universal Declaration of Human Rights, the Budapest Memorandum, the Helsinki Final Act of the Security Conference and Cooperation in Europe dated August 1, 1975, and the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation.

In particular, paragraph 1 of the Budapest Memorandum stipulates that the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America confirm to Ukraine their obligations in accordance with the principles of the Helsinki Final Act of the Conference on Security and Cooperation in Europe dated August 1, 1975 to respect the independence and sovereignty and existing borders of Ukraine. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except for the purposes of self-defense or in any other way according to the Charter of the United Nations (clause 2 of the Budapest memorandum).

On the other hand, the opposite position on the application of judicial immunity also has solid grounds. In addition to Part 1 of Article 79 of the Law of Ukraine "On Private International Law," to argue this position, they refer to the decision of the UN International Court of Justice from 2012, in which it concluded that the principle of jurisdictional immunity remains valid and cannot be subject to any exceptions to the rights of a person. Although the national courts of Italy have satisfied several claims of citizens who considered themselves victims of Nazi persecution in the second world war, to Germany for compensation of damages. At the same time, the non-application of jurisdictional immunity in relation to Germany by Italian courts was explained by the fact that this principle cannot interfere with the protection of human rights. Attention was also drawn to the fact that the issue of judicial immu-

nity is a field not only of domestic national law, but also of international public law. Therefore, when it comes to the non-application of judicial immunity, the decisions of Ukrainian courts may be perceived differently in international institutions (The legal community discussed the issue of compensation for damages caused by Russia, 2022).

Absolute judicial immunity is usually applied at the international level. Limited judicial immunity is provided for by the European Convention on Judicial Immunities of States of 1972 (European Convention on Judicial Immunities of States, 1972) and contained in the UN Convention on Jurisdictional Immunities of States and Their Property of 2004, which has not entered into force.

In addition to judicial immunity, there are immunities from protective measures and from the execution of court decisions, which should also be taken into account. Consideration of these issues is beyond the scope of this study, but they should be taken into account when applying proper and effective methods of protection of Ukrainian owners affected by the war with the Russian Federation.

The above indicates the significant problems faced by Ukrainian owners in the way of protecting of their rights to property that was damaged during the war with the Russian Federation. Some of them can be solved by Ukraine adopting a package of normative legal acts, while others can only be solved with the adoption of international documents that would introduce means for effective protection. Neither the current Ukrainian legislation nor the legal positions of the Supreme Court provide confidence that the approaches proposed in them are unexceptionable.

Conclusions

Military operations and armed conflicts of various kinds have a negative impact not only on the rights of owners who suffer losses as a result, but also on the legal regulation of property. The rights of the owners are significantly restricted, and the rights of the state represented by the relevant authorities to forcibly seize property from its owners are increasing. At the same time, the obligations of the state to apply appropriate measures to ensure the rights of owners during the war are also increasing. The positive obligation of the state to compensate the owners for the losses they suffered as a result of military actions is also demonstrative.

The owners have the right to apply to the state their claims for the return of their property if it has been preserved and there is a possibility of its return. Otherwise, the owner can count on compensation. The amount of compensation should be determined by the state in internal regulatory legal acts, with the provision of

the procedure for proving damage and destruction of the owners' property, the cost of damages; keeping relevant registers; mechanism of owners' appeals to the state for compensation; order and scope of satisfaction of owners' requirements; sources of compensation payments, etc.

Since the volume of payments to owners whose property was damaged during the war with the Russian Federation is very significant and the funds of the state budget of Ukraine will not be enough for compensation, a universal and unimpeachable legal mechanism for involving the Russian Federation in property liability should be developed with the adoption of international legislation that would regulate reparations and non-application of judicial and other immunities.

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Chapter 10

The Viability of Intellectual Property Law in the War

ABSTRACT

First and foremost, it is the seemingly unshakable institutions that tend to be affected by the evolution of views. This is especially true for those "rules of life" that, for one reason or another, have not worked out as expected or assumed by the society that had established them. What first comes to mind here is, of course, the example of the public international law's flagrant and disgraceful failure in terms of the security assurances given to Ukraine as a state that had given up its nuclear weapons by the world community represented by specific subjects of international law, including the aggressor country, under the Budapest Memorandum of December 5, 1994, which manifested not just the weakness of international public law, but rather its failure or even non-existence.

Meanwhile, if we talk about law, Russia's war against Ukraine spurred the evolution of views not only on such a special legal system as public international law, but also on a number of institutions of civil law, private law. Our article discusses such an undoubtedly important private-law institution as intellectual property law.

The intellectual property rights (exclusive rights) are known to be equated with the right of ownership due to the absolute nature assigned to them. However, the retrospective analysis of the relations arising in the context of compensation for the war damage inevitably makes one doubt their absolute nature, at best, and at worst, the very possibility of an exclusive right as a "right to." The reason for such doubts is, in the first place, it being impossible to exercise the right to protection by forcing third parties to refrain from encroachment on the right (object of the right), and in the case of such an encroachment, by bringing them to justice. Therefore, there is every reason to review the legal nature of the exclusive rights.

Keywords: exclusive right, intellectual property, ownership, scope of exclusive right, absolute rights, war

It so happened that a war has again come to the continent that experienced such catastrophes twice over the past century while undergoing the first and the second world wars. As in any military conflict, the Russian full-scale invasion of Ukraine has required rethinking of an extensive range of issues related to the social, cultural, legal and other fields, thus marking a new stage in the development of society.

It is evident that this evolution of viewpoints is likely to involve primarily well--established and seemingly inviolable institutions. This especially refers to the "rules of life" that have, due to any reasons, turned out different from what was expected by the society that adopted them. In this respect, a most obvious case concerns the area of public international law with a clamant and odious failure in the provision of security assurances to Ukraine as a state that gave up its nuclear weapons capacity, given under the Budapest Memorandum signed on December 5, 1994 by the global community represented by the specific international law entities, including the aggressor country. This fact has brought clear confirmation and understanding that public international law is not merely weak but actually unenforceable and inconsistent.

Meanwhile, it did not take long for the Russian war against Ukraine to facilitate the evolution of opinions in the realm of law. Changes have involved not only the field of public international law, but also a number of institutions of civil law, or private law. Within the context of this study, the focus is on an undoubtedly important civil law institution which is intellectual property law.

It is appropriate to provide some examples of the metamorphoses that have occurred in connection with the above events in the Russian law. For instance, the Resolution of the RF Government dated March 6, 2022 No. 299/2022 introduced changes to the existing rules of compensation for the use of other persons' patents, utility models and industrial designs in the areas where this use is allowed by the state with no consent from the patent owner on the grounds of the national security. According to the amendment, if the rights in question consist of the patents owned by persons having connections with any of the list of unfriendly countries (in practice, those are the states that had imposed sanctions on Russia or its citizens, headed by the USA, the European Union and the UK), the compensation, normally including the royalty, which had already been minimum in Russia, namely 0.5%, was to be reduced to zero and, accordingly, was not subject to payment.

The second regulatory measure, adopted by the Russian parliament on March 8, 2022, according to Federal Law "On Introduction of Amendments to Various Laws" No. 46-FZ, generally authorizes the Russian Government to determine by itself the range of products that are considered vital and essential and are to be exempted from any copyright protection.

Unsurprisingly, the above measures, approved by the Russian Government to restrict intellectual property, caused serious concerns of non-resident companies in

the Russian Federation and intellectual property lawyers (Galli, 2022), since that way, intellectual property right holders appeared to be deprived of their effective remedies. Accordingly, it was absolutely unclear how the Coca-Cola Company had to react to the production of analogue beverages to Coca Cola, Fanta, and Sprite by the Moscow brewery and soft beverage factory Ochakovo for the Russian market,[1] or what actions should be taken by the film copyright holders who cancelled official distribution of their films due to the situation in Ukraine only to find them shown in an unauthorized way in Russian cinemas (V rossijskih kinoteatrah…, 2022). While the situation with traditional property rights is relatively clear, as the owner of a material thing may at least protect the right physically (via self-defence), the situation with the rights to intangible mental property is completely different: self-defence is impossible due to its inherent uselessness, whereas technological means of protection may be effective only in single cases.

Consequently, the essentially declarative identification of rights on the territory of the RF jurisdiction, where the rights are violated, pushes right holders as well as users into the abyss of legal uncertainty, which inherently leads to the doubts of whether intellectual property law may be enforceable and valid as law. From this perspective, there emerges a question, whether it is worth marking intellectual property rights as property or assets if one day these assets and their possession by a specific legal entity may be recognised invalid on somebody's initiative. This paper aims at considering the above legal uncertainty from the standpoint of questioning the intellectual property rights validity.

A Brief Retrospective Overview and Analysis of the Establishment and Development of the Intellectual Property Law

Since its introduction in the legislative system at the level of the regulatory norm, the intellectual property law has been regarded as valid and unquestionable by the legal community. This law seems particularly attractive and appealing to the researcher as it is relatively young (despite the availability of extensive literature and manuscripts, people of antiquity did not recognise copyright which would ensure the author's control of their product), and so we have an opportunity to witness its development and specific legal challenges related to what this law actually is.

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[1] See for example: https://tjournal.ru/news/623277?fbclid=IwAR22K5l4BWB3qOXrsEQd2dN67iFtnIFnWRX9Uv87xZl0AjLSjrptIv3muT4.

It is to be noted that ideological opponents of intellectual property law represented in particular by copyright had already appeared a long time ago. Probably, their most prominent representative in the nineteenth century was Pierre-Joseph Proudhon (1809-1865), who devoted a separate study to this issue entitled *Les Majorats littéraires* (Proudhon, 1865, p. 191) That work was dedicated to the consideration of the bill on literature ownership (1862), which was designed to provide copyright for an unlimited period of time. The French philosopher and economist questioned copyright (literary ownership) from the perspective of political economy, aesthetics, morality, and public law.

First of all, Proudhon challenges the classical statement by Napoleon III to the effect that intellectual work is the property similar to that of land or a house, and, therefore, this property should enjoy the same rights and might not be violated for any other reasons than in the interests of public benefit. Proudhon sought to identify whether the work performed by an artist, a writer, or a composer might generate property similar to land and whether the analogy in that identification was not actually false. His conclusion was that the establishment of literary ownership contradicts all the principles of political economy because it cannot be derived from the concept of a product or the concept of exchange, credit, capital and interest. The service provided by a writer, regarded from the economic and practical viewpoints, makes a definite implication of the existence of service and product exchange agreement between the author and society. Consequently, this exchange points out that due to the consideration paid to the writer for his benefit, a literary work becomes the property of the society (Proudhon, 1865, pp. 186-187). Obviously, Proudhon's approach does not indicate that an artist is not entitled to consideration for their work, since nobody can think of depriving a person, whether a poet or a slave, of his loaf of bread (Proudhon, 1865, p. 18). The only thing Proudhon clearly objects to is author's ownership of the work that has already been publicly released.

Furthermore, Proudhon resorts to arguments related to the field of moral and ethics, and his ideas sound more radicalized here. From the ethical point of view, art is, by nature, as priceless as justice, religion and truth. Poetry, sculpture, painting, and music are, according to Proudhon, devoted to the truth, and they cannot betray or violate it without losing their dignity (Proudhon, 1865, pp. 102-103). Only the unity of reason, law and art create the human freedom, but the question is in the way this emancipation could be implemented if an artist or a writer yields to voluptuousness and flatters vices; if they work for money and care for their own benefits the way tax-farmers or money-lenders do. Venal art, as if a woman of easy virtue, loses its meaning (Proudhon, 1865, pp. 103). As a result, the forms created by an artist to depict religious, ethical and philosophical thoughts are similarly sacred as religion and ethics themselves. In the same way that the judge is bound by the requirements

of justice and the philosopher is bound by those of the truth, the poet, the public speaker and the artist are bound by the requirements of beauty. Their obligation is to guide us to this beauty, because their mission is to enhance us and their work consists in carrying out a critical analysis of human personality, similar to the way philosophy analyses our reason and mind, and law analyses our conscience (Proudhon, 1865, pp. 103-104).

Additionally, Proudhon applies legal arguments. For one thing, the scholar believes that works of art are not for sale by their nature. For another, vesting rights to a creative product in an individual violates collective rights. "Look at a wheat field," Proudhon writes, "can you identify the head that spired first and are you in a position to assume that all the wheat heads spired on the initiative of the first one? The situation with creators (as they are called) is nearly the same, though they are frequently shown as if they were some benefactors of the mankind" (Proudhon, 1865, pp. 148-149) The thinker means that creators managed to see and express something that was already in public thought. They happened to discover a law of nature that was to be discovered sooner or later anyway because the phenomenon had been around all the time. In a certain way, they beautified an object that had long been undergoing idealisation in the collective memory and imagination… Proudhon notes that it is not right to deprive humanity of its achievements and legacy by limiting reason and freedom of science and art. According to him, in addition to its claims for ownership, intellectual property deprives society of its recognised part that is to be owned by it in a work of any content and form.

The aforesaid example of critical attitude to establishing the right to an intellectual (creative) product perfectly illustrates the core idea of the movement in legal thought which provided arguments whether the result of creative activity may be regarded as property, or as an object that may be owned and at the disposal of an individual, since the term "ownership" was rather used as a household term in those considerations.

In any case, this identification clearly points to the attempts to bring the results of creativity to the class of works protected by law, in their content resembling the right of ownership, by means of establishing the respective law. However, it has already been mentioned that the intellectual property law has been generally recognised and it can be currently found in all and any jurisdictions as property items sui generis.

Therewith, it should be stated that from the doctrinal standpoint. the proprietary concept of intellectual property law, despite being dominant at the end of the eighteenth century and the early nineteenth century, has long been perceived as invalid, and the overwhelming majority within the legal community strongly believe in the soundness of the exclusive rights concept, which can be confirmed in as early studies

as those from the turn of the twentieth century, e.g., the works by G.F. Shershenevich (1891, pp. 25-65), A.A. Pilenko (2001, pp. 110-118) etc.

Nonetheless, even today, the legal doctrine of the USA still features discussions on the nature and origins of intellectual property rights. The issue of the kind of right intellectual property belongs to (Merges, 2017) is even worded in the title of a paper by R.P. Merges published by UC Berkeley.

Having said that, it is to be mentioned that in the common law countries, including the USA, the utilitarianism plays a prevailing role. According to the utilitarianism theory supporters, represented, in particular, by Mark A. Lemley and Peter S. Menell, the value of tangible objects and works of art is primarily, if not fully, in their capability to perform tasks or meet the needs of individuals or the society as a whole. The state seeks to protect these tangible and intangible objects (works of art) using a special legal regime. Although purely commercial (proprietary) approach is not always applicable to these works, utilitarian approach has always been within the focus of shaping copyright in the USA (Menell, 2000, p. 156) The regulatory foundations of the approach lie in Section 8 Article 1 of the US Constitution, which provides, among other things, for the power of the US Congress to facilitate the development of sciences and useful trades, thus ensuring exclusive rights to the authors and inventors of works and inventions for a specific period of time. The utilitarian approach proceeds from the premise that intellectual property rights are the products of state regulation and, therefore, their existence always requires grounds, namely, the analysis of their benefits and the regulation quality, as well as the opportunity to provide society with innovations.

However, Merges objects to the utilitarian approach, noting that, in this case, insufficient attention is paid to the private law component in intellectual property relations, since the use of intellectual property and the protection or assignment of intellectual property rights are normally between equal parties, thus being an integral part of civil law (Merges, 2011).

In this respect, having analysed the existing obstacles that prevent regarding intellectual property rights as equivalent to ownership, Merges comes to the conclusion that they are insufficient. Among the features of intellectual property rights, Merges singles out the following: conditionality, i.e., dependence on certain state regulated procedures for the acquisition of rights and their confirmation, which is applicable to patent law and means of personalisation, restricted time, and the range of applicable items. The above limitations weaken the strength or power of intellectual property rights. However, it should be noted that the right of ownership is not unlimited, either.

The idea of borrowing elements of the legal regulation of ownership and their transfer to the intellectual property law within the common law system is thorough-

ly and comprehensively considered by Richard Epstein, who studied the ownership regime to different resources, in particular, legal regulation of land and water resources. The scholar owes his fame to the article *An Outline of Takings* (Epstein, 1986) regarding private property and the power to convert it into the public property. The focus is on the Fifth Amendment to the US Constitution in terms of its provisions of takings, which specify that no private property may be alienated for public use with no fair consideration. Afterwards, Epstein addressed the issues of intellectual property law and applied thereto his conclusions on private property, thus revealing another perspective of the intellectual property law, which was missing in the positions of those experts whose analytic opinions were originally shaped in the domain of intellectual property law. In 2006, at the Summit in Aspen (Colorado, USA), organised by the Progress and Freedom Foundation, Epstein gave a lecture on *The Structural Unity of Real and Intellectual Property*, where he defined four principles, creating the basic framework of understanding property ownership. He stated that these principles may be applied to intellectual property rights with the only distinction being in their transfer, which may be absolute only in relation to assets, but not to intellectual property. In virtually any case and any issue within the intellectual property domain, it is possible to find appropriate analogy in the area of tangible assets ownership (Epstein, 2006, pp. 3-4).

According to Epstein, the *structural unity* between the ownership and the exclusive right to intellectual property must direct legislative and judicial bodies toward the use of the achievements of real rights to develop and improve intellectual property law. The proper understanding of tangible and intangible assets ownership systems proceeds from the common idea to form the system of rights distribution, which will generally raise the value of assets in private property (Epstein, 2010, pp. 522-523).

All the above mentioned contrasts with the so-called Continental approach, which is based on the perception of intellectual property rights as intrinsic, thus promoting the personality of the author and their own interests.

Nevertheless, it is still true that both for the common law and the Continental law countries, intellectual property rights along with ownership rights are perceived as the outcome of the author's personal creative work. In effect, this is the reason determining the proclamation of the exclusive right inviolability at the level of legal norm. For instance, in reference to ownership rights, D.I. Meyer once wrote that even those states that do not highly value the rights of their citizens still declare ownership inviolability because the person's control of a thing is necessary to meet their needs, whereas the willingness to meet them is so inherent in humans that they highly value their available means. Therefore, the right of ownership is commonly recognised as essential and believed to be inviolable (Vytsyn, 1873, p. 731). It is quite

logical to assume that human needs may be met not only by tangible but also by intangible benefits, including the results of creative activities. The point is to meet not merely intangible needs of both the society and the author (right holder), but also, naturally, the material needs of the latter, promoted by the steadily increasing intellectual property commercialisation. For this reason, no invincible obstacles can be found to withhold the inviolability of not only the owner of tangible assets, but also the owner of intangible assets, which serves as the grounds for the independence of intellectual property law along with real and liability law.

The Exclusive Right as the Absolute

The recognition of the exclusive right and its theoretical evidence as an independent kind of property rights was an indisputable milestone in the development of intellectual property right protection. Ernest Roguin characterised author's rights to spiritual (creative) works as the monopoly right, whose essence was understood not as the exclusive right of possessing a well-known thing, but as the right to prevent any other persons from possessing similar or identical items (Roguin, 1889). Defining the term of *monopoly*, Roguin mentioned that according to the conventional word use, the monopoly was something exclusive. Accordingly, it was not an opportunity for the thing to be used by one person, because all absolute rights have this feature. From his standpoint, the difference between the *monopoly* and real right, or interest, consisted in the fact that while the active (positive) and passive (negative) aspects of the real right were equally significant, the former was missing in the monopoly. The monopoly is a general obligation to refrain from taking certain steps and in the legal system, it is in the interim position between the real and liability right.

When criticizing the provisions of Roguin's theory of monopoly rights, G.F. Shershenevich stated that in that case, it is to be recognised that the title to a land plot is also a monopoly in relation to all those who seek to convert their labour into its cultivation (Shershenevych, 1891, p. 63). Owing to this criticism, one can reasonably point out the following:

1. While understanding *monopoly* as something exclusive, belonging to one or few persons, we are to indicate that the monopoly is generally a property of absolute rights and, in this respect, it is indeed "necessary to admit that the title to a land plot is a monopoly."
2. The theory of exclusive rights suggested by G.F. Shershenevich is based on the main features and on the same scheme as the theory of monopoly rights suggested by Roguin. Shershenevich identified some actions, being benefits to the

person who is their doer, if other persons are deterred from taking the same steps. Since the aim of legal defence is rather to provide famous persons with an exclusive opportunity to take well-known actions prohibiting all the others to mimic, the above rights should be called *exclusive*. At the same time, professor Shershenevych put exclusive rights alongside ownership rights to the category of absolute rights, distinguished from each other by the tangibility of their object (Shershenevych, 2005, p. 431).

The standpoint that intellectual property rights are absolute is also dominant in the Ukrainian legal doctrine (Pidopryhora, 2000, p. 14; Spasybo-Fatieieva, 2012, p. 40; Pototskyi, 2007, pp. 81-83). The provision of the absolute nature of intellectual property rights was reflected in the structure of the existing Civil Code of Ukraine. While explaining the role of Book 4 *Intellectual Property Law* in the Civil Code of Ukraine, A.S. Dovhert draws attention to the fact that intellectual property rights are absolute rights, therefore, the respective section must be among those regulating absolute rights (in particular, real rights and personal non-property rights). For that reason, absolute rights to these items are to be regulated along with the regulation of real rights to things and before the liability law, which regulates the turnover of things and intellectual property exclusive rights (Dovhert, 2000, p. 40).

In absolute legal relations, only one right holder is determined, and it is opposed by the indefinite number of passive persons (obligors). In absolute legal relations, the legal bond of the authorised subject is valid equally and identically to all and any person.

The consequence of the specific interpersonal connections in absolute legal relations is the absolute nature of protection, under which absolute right is protected from any violation from any third person. Regardless of the caused property damage, whose indemnification, according to the general rule, requires the fact of the damages and the fault of the wrongdoer, absolute rights are subject to protection per se, in other words, even in case the violation does not infringe property rights. Unlike relative, absolute rights emerge despite the will of third persons, mediate the statics of civil transactions, and their enforcement requires and needs only the will of their right holder. The illegal exercise of absolute rights by any third person or the illegal obstruction in the right holder's exercise of their right are to be prevented, and the law is to be reinforced. A special remedy for absolute rights is represented by filed motions for the recognition of rights.

Consequently, the absolute nature of exclusive right enables to specify a number of its typical features:

– the respective right is correlated to the obligation of all third persons to avoid any actions that would be in conflict with it;
– the obligations of passive subjects are formulated as prohibitions;

– the right may be violated by any person;
– the exclusive right claim may be filed against any person who violates the right;
– the right arises regardless of the will of passive subjects.

It is worth emphasizing again that by means of the above, the exclusive right is essentially given the same status as the right to ownership: one of the basic human rights, which has the internal bond to the guarantee of individual's personal freedom in relation to the subject of the right (thing).

The Content of the Exclusive Right

In compliance with all and any international treaties and agreements on intellectual property, including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and EU Directives, the essentials of the exclusive right are conveyed via the *right to consent*, *the right to consent or prohibit*. The Civil Code of Ukraine also applies the term *the right to prevent* (par.3 p.1 art.440, par.3 p.1 art.464, par.3. p.1 art.474, par.3 p.1 art.487, par.2 p.1 art.490, par.3 p.1 art.495, par.3 p.1 art.503, par.3 p.1 art.506 of the Civil Code of Ukraine). This having been said, providing the legislative framework for the exclusive right, it is the right of a person who has the exclusive right to use the intellectual property item at their own discretion (positive right of use), as well as to give consent and prohibit to use it (negative right of prohibition).

Therefore, it follows that within the scope of exclusive rights, it is possible to point out positive and negative powers. With this in mind, the latter ones are basic (prevailing). To provide the grounds for these statements, it is worth giving several additional arguments related to the specifics of intellectual property items and the history of intellectual right development. First of all, we should attend to the institution of privileges, the precursor of exclusive rights. It is of interest due to two reasons. First, privileges are definitely structured according to the positive model. They were based on the power of a person to use the result of intellectual activity himself. Yet, in terms of their content, exclusive rights differ from them and represent a new stage of development. It intrinsically confirms unacceptability of limiting exclusive rights to the power of personal use. Otherwise, we would still be discussing privileges. Second, it is possible to single out a number of historical preconditions, which determined the *positive nature* of privileges and which are currently non-existent. The factor confirming the issue of first privileges to inventions was shop manufac-

turing and the obligatory principle that became widely spread in the Middle Ages in most European countries. This principle was based on the idea that all competitors, operating in a specific industry, are to have an opportunity to compete using more or less equal tools. Consequently, everyone undertakes to work in the same conditions; no person is allowed to neglect customary manufacturing methods, even to implement improvements or enhancements (v. Pylenko, 1902, pp. 129-174).

Gradually, in the course of strengthening centralized power in the field of economy (early Absolutism epoch in Europe), mercantilist policy was introduced. Rulers sought to expand their control of manufacturing, which implied the need to fight shop-based organisation. In order to appeal and win the support of the public, they proclaimed themselves to be protectors of progressive ideas in industry. Therewith, they commenced to issue privileges to use specific inventions. The situation with author's privileges was somewhat different. Their issue was related to the invention of printing machines. During the early period, the important factor determining the content of privileges was the system of censorship applied in different states. In that field, privileges consisted in the monopoly right to carry out printing production and distribution activities. Those privileges were granted by the government to publishers and book sellers for a certain period of time on condition that those were given the consent from the censorship, which served both as an instrument of political control of the distribution of dangerous theories and as a tool to keep the records of published works.

Today, there are no prohibitions on the introduction of any innovations and new developments in manufacturing, publishing, and other production activities. In order to begin using the result of one's intellectual activity, its creator (developer) does not need to be granted an exclusive right or any privilege. Many inventors of patentable solutions start using them long before being granted a patent, or choose not to apply for a patent at all. It is to be noted that in these circumstances, their activities may not be recognised as illegal. Another thing is that a variety of other persons can use the newly created object in the same way. In this case, due to the intangibility of the object, they will not even have to fight for being granted the actual possession of the object (as would be the case with a tangible item) or take the object from other persons. The exclusive copyright to the object arises from the moment of its creation. However, if, supposedly, those exclusive rights did not exist and they were not guaranteed by the state, then the author and all other interested persons would be able to use the object. In general, the situation is similar with the means of individualization. In order to use a kind of designation to individualise one's products and services or the business as a whole, exclusive rights are not required. Many entrepreneurs decide to register a trademark only when their designation, or brand, has become popular (which, nonetheless, is not the right strategy). The acquisition of exclusive rights to the means of individualization in this case is required primarily

for a possibility to prohibit any other persons to use the specific designation. In these circumstances, however, it is necessary to mention one detail. In the absence of exclusive rights, the opportunity of effective use of designations as means of individualization will be rather limited in time. As soon as the designation starts being used by several agents, consumers will stop linking it with one source of origin when making their consumer choices. The designation will stop distinguishing products (services) of the person from the class of similar ones. In this case, due to the absence of exclusive rights, it will be possible to speak about the use of designation as the means of individualization only relatively. When defining the negative power of prohibition as the key element of the exclusive right, we still admit and recognise that the content of the exclusive right also includes the positive power granted to the person to use the product or service by themselves.

The right holder receives immediate benefits, profits from using the intellectual property item in their activities, from disposing of the exclusive right. The full scope of positive opportunities, which the right holder may exclusively apply to the item, determines the economic foundation of the exclusive right; it allows qualifying the activities performed by a specific person as innovative. In the case of determining exclusive and real rights merely via the negative power, the differences between these rights will disappear. It will be possible to discuss only the unified absolute right, whose content will consist in the right holder's opportunity to prohibit infringement upon the protected item from other persons.

The removal of positive powers from the content of the exclusive right may challenge the inviolability and security of the correspondent legal possibilities of right holders (to use their own item by themselves). First and foremost, it should be noticed that it is impossible to deliberately withdraw the behavioural possibility provided by the legal right. For the field of intellectual property rights, this issue is significant and essential, which may be explained by the totality of the following aspects.

To begin with, the results of intellectual activity, due to being intangible by nature, generally cannot be localized in space. Accordingly, developers may use them for their benefit in different countries. Nevertheless, at the global scale, the level of innovative development of individual states and, consequently, their innovative companies varies greatly. It may be assumed that for protectionist purposes, the states with insufficient level of development may prohibit foreign companies to use their developments in manufacturing specific products, etc. Or, an alternative situation is also possible when even from among national companies, the state *selects* only those that are allowed to use innovations whereas the others are prohibited to do so. Supposing that the exclusive right is merely an opportunity of prohibition to others, it will be necessary to admit that in the above mentioned situations, there will be no restrictions to exclusive rights.

The need to include the positive component in the content of the exclusive right is also confirmed by the legislative logic, whose core is to reveal the exclusive right to a certain item through listing specific powers.

In this regard, the copyright and related rights legislation of the European states normally defines exclusive rights by means of the description of the positive component: as an exclusive opportunity to use the works protected by copyright and related rights in the ways specified by law. For example, according to Article 15 of the Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG), the right holder has the exclusive right to 1) use the work in a tangible form, which, in particular, includes the right of reproduction; the right of distribution; the right of showing; 2) publicise the work in an intangible form, which includes, in particular, the right to public recital, performance and presentation; the right to disclose the work to the general public; the right to transmit; the right to communicate video and audio recordings to the public; the right to broadcast. The subsequent articles discuss the content of these powers.

Pursuant to Article 106 Section 17 of the United State Code, the right holder is granted the exclusive right to use and provide to third persons an opportunity to use the copyright protected work in the ways specified in the article. The closed list specified in this Code includes, among other things, the right of reproduction, processing, and distribution of work copies. Pursuant to the Copyright, Designs and Patents Act 1988, the exclusive right (copyright) is defined as the property right that arises to copyright works (p. 1 art. 1), and it allows the right holder to act in relation to the work in the ways which are marked in Chapter II of the Act as the actions protected by copyright law (art. 2). The closed list of these actions is established in art. 16 of the Act. Overall, it coincides with the list specified in the US legislation.

The clearest manifestation of the positive component can be found in the cases of exclusive rights to the registered designations of places of product origin and geographic indications. The person (subject) whose activity meets statutory requirements is granted the access (it may join) to use the unique designation with the reputation which was earlier registered and used by other persons. In this case, the right holder primarily receives its *positive* power, namely, the opportunity of personal use. Another argument to the benefit of the fact that the content of the exclusive right includes positive powers is in the principle of exhaustion. The right holder is not entitled here to take actions to use and sell the product (a copy of the work or product), in which the result of the intellectual work is implemented (trade mark) after this tangible item was marketed in duly manner by the right holder or by a person authorized by the right holder. In other words, the intellectual property tangible carrier is excluded from the field controlled by the right holder after the first consent for alienation to the buyer. Looking at this institution from another perspective (not

at the moment of the right exhaustion, but over the period of its validity), it becomes clear that the right holder's actions to introduce their work (the use in manufactured products, reproduction in the multitude of work copies, application of trademarks on manufactured goods, etc.) are within the scope of the exclusive rights.

It is worth paying special attention to the disposal of the exclusive right within the aspect under consideration. The right holder may dispose of the exclusive right both by means of its alienation and by means of its *burdening*, for instance, establishing exclusive right derivatives to the intellectual property rights via a license agreement. The availability of the latter opportunity is to a certain extent derived from the negative power: the opportunity to prohibit any third persons to use the work. In the case of the exclusive right disposal under license agreements and commercial concession agreements, the right holder provides limited access to the work to a specific person within the stipulated scope. Otherwise stated, he or she lifts the prohibition to use the work by the specific person in certain ways. However, it should be noted that the power of disposal is not universal by nature. For example, it is not included in the composition of the exclusive right to the corporate name, the name of the goods origin, and the geographical indication. For right holders of corporate names and brands, it is highly limited: they may dispose of the rights to the corporate name only by means of the commercial concession agreement inside the company. It is connected with the specifics of respective intellectual property items and their related interests.

The disposal of a trademark is *justified* in a different way. The access to another person's brand is not a necessary pre-condition to enter the market with a product or a service. Yet, the disposal of the exclusive right to a trademark may be justified from the perspective of the right holder interests (and those of consumers) regarding the market expansion, volumes of production and sales (under a license agreement); and *sales* of a reputable business, etc. Therewith, it is important to understand that the disposal of the exclusive right to trademarks may involve significant risks for consumers. Products (services) of the license holder or a new exclusive right acquirer may appear to be of inadequate quality. At the same time, consumers may be disappointed by the failure of their reasonable expectations (based on the experience of acquiring products or services from the right holder), misinformed of the source and origin of the products and their qualitative characteristics. In order not to allow for violating these public interests, the legislator reasonably imposed certain restrictions on the disposal of the exclusive right to the trademark. For instance, according to the legislator's will, the right holder may normally license the trademark only on condition that the license holder undertakes to ensure the quality conformity of manufactured or sold products it places the licensed trademark on to the quality requirements, established by the licensor.

It is evident that, in this case, we do not discuss the complete prohibition of disposal. First, as discussed before, significant interests are related to the transferability of trademarks. Second, at least in case of licensing, consumers' interests (so that they are not deceived or misinformed and do not get a low-quality product) overlap with the right holder's interests. If the license holder manufactures low-quality products (services) under the brand name, the right holder will suffer reputational losses, since the consumers will attribute these products to it. The brand value will fall. In this case, it is possible to suggest that the right holder will monitor (control) the use of its marks and indications.

It is natural that, at the legal doctrine level, it is also possible to find various approaches to revealing the content of exclusive rights. For example, British lawyer and scholar M. Spence emphases the positive power of the exclusive right, determining it as the right to use the work in any specified way (Spence, 2007, p. 7). However, the author also points to the negative aspect of the exclusive copyright, noting that it is the *right against imitation* by nature.

D.T. Keeling reveals the core of the exclusive right via the positive aspect, too. The scholar notes that every state in the world recognises specific exclusive rights: the right of an inventor to use their invention commercially; the authors' right to publish, market and sell copies of their books; the singer's right to allow the sale of recordings of their performances; the director's right to show their works in cinemas; the entrepreneur's right to protect the reputation of their goods, not granting other users with the right to use the trademark (Keeling, 2004, p. 18).

The approach suggested by H. Smith is worth special attention. The author singles out two strategies that may be implemented in the field of property rights: the strategy of exclusion (prohibition) and the strategy of control. The former implies the establishment of a wide range of work use, where the right holder is entitled to exclude all other persons. This strategy does not provide for fixing any specific uses. It is quite sufficient to generally identify the limits of the right. The strategy of control, in turn, implies specifying individual ways of exercising the right, accessible by the right holder (Smith, 2007, pp. 1742-1822). Smith proceeds from the assumption that the area of absolute property rights (which involve the right of ownership, and exclusive right) manifests the strategies of prohibition (exclusion)rather than that of control. They are based on simple rules, under which obligors are forced to avoid taking actions (keep a distance). Regarding intangible assets, including the results of intellectual activities, the right of exclusion is the right to refuse from providing access to the work, prohibit a wide range of uses. Meanwhile, the possibility of prohibition of using the work to other persons is an indirect mechanism of ensuring various privileges of the right holder as regards the use of the work. Exercising the right of excluding all persons, the intellectual property right holder is entitled to

take a correspondent range of actions and may get either positive or negative effect from the efforts taken. The strategy of exclusion delegates making decisions on the use of the work to the right holder that, like a doorman, is responsible for the access to the intellectual property work and monitors the use of the resource. The strategy of control, in this respect, complements and further develops the basic mode of exclusion. Smith notes that the more uses are united and summarized, the more the strategy of exclusion is represented in a certain area and the more *proprietary* this right is. In this case, patent law and copyright law are significantly different from the standpoint of the implemented strategies. According to him, patent law features the strategy of exclusion rather than that of control in comparison with copyright law. He draws attention to the fact that patent and copyright exclusive rights are defined in different ways. In patent law, the exclusive rights embrace the application, production and sales of the product (use implementation) where the patented work is used. Similar options are defined rather broadly and include various specific uses. However, the exclusive copyright is manifested through specific uses of the work, which is rather typical of the mode of control. Copyright provides the right holder with the powers to reproduce the work, communicate it to the public, distribute its copies, and process it (Smith, 2007, p. 1742).

Summarizing this reasoning, it should be again emphasized that the scope of the exclusive rights includes both the negative power to prohibit all other persons to use the work and the positive powers to use the work by themselves and to dispose of the exclusive right.

In effect, the exclusive right is a more sophisticated and complex phenomenon than a mere totality of powers of prohibition, disposal, and use. The intangible nature of intellectual property items provides an opportunity to build diverse enforcement models using these powers and the participation of a large number of persons involved in the field of items use besides the right holder. Dozens or even hundreds of licenses may be issued by the right holder for one item. However, the opportunities granted to each and every license holder for using the item may vary considerably. The right holder is entitled to *set* various accessible use parameters, such as territorial (for example, the provision of each license holder with the right to use the item only within the territory of a specific region), temporary, content (specific uses), and quantitative (for instance, the number of personal computers on which the software programme may be installed). In this case, the exclusive right should be understood as the right holder entitlement of limited control of the access of other persons to the intellectual property item, its commercial use, which the right holder may exercise by means of different prohibitions and licenses offered to an unlimited number of persons, and which may be disposed of, pursuant to the general rule, by transferring it to another person.

The Ownership Content

Since the absolute nature of ownership as the right does not require any excessive evidence, this approach is recognised as the only valid one in all and any systems of justice. The significance of the right to ownership is hard to overestimate because, as John Locke believed, it was the foundation for establishing the civil society. Ownership, according to Locke, is rather about human life and freedom than about property itself (Locke, 1985, p. 35). Thomas Hobbes stated that it was at the rise of the right to ownership that there occurred a historically vital transition from the natural state of the society to civil society, in other words, to civil laws (Hobbes, 1989, p. 311). For these reasons, it is interesting to identify the way the legislator defines the content of this right.

Under the civil law doctrine, the content of ownership is defined through the owner's powers. Despite the differences in specifying these powers at the statutory level in various systems of justice—at places, these are the right of use and disposal, for example, in France (Art. 544 of the French Civil Code), elsewhere the focus is on the right of disposal, for instance in Germany (§903 of the German Civil Code), while other systems specify the right of use, possession and disposal, like in Ukraine (Art. 317 of the Ukrainian Civil Code)—it may be stated that, considering this content understanding through the lens of positive and negative powers, the law defines exclusively positive powers. This consideration is also confirmed by the fact that it is common for the legislator to include an additional clause running that the right to ownership is exercised by owners at their own discretion, according to their own will, regardless of any third persons' will, in strict compliance with law.

Regarding the negative right, within the context of ownership, the legislator does not specify it for the owner in any respect, merely implying it by means of assigning the passive obligation to an unspecified number of persons to refrain from violating this right.

Therefore, a certain non-correspondence appears in the system of absolute rights as regards the content of the right to ownership and the exclusive right through the opposition of positive powers of the former and negative-and-positive powers of the latter.

It is beyond argument that this non-correspondence merely points to the fact that the right to ownership is presumed as most absolute, in spite of recognising the absolute nature of the exclusive right. Therewith, it is actually provided with a secondary and supporting role in the system of absolute rights, all being due to the negative power of prohibition.

That way the legislator indicates to the exclusive right holder that it is their duty to take care of exercising the prohibition right, thus marking the presumption that

in the absence of prohibition, third person's actions are not to be regarded as violations of their right by the exclusive right holders.

In view of the above, it is quite logical to raise the issue of the means by which the right, in particular, exclusive right, may be present in the legal landscape as the right, especially being presented as an absolute right and be exercisable.

The following are the conditions for the right existence that enable its exercisability. First of all, it is necessary to presume that the right can be exercisable not through physical coercion. Nevertheless, it is worth attending to the fact that the right is highly dependent on the existing threat of physical coercion in the case of the right violation. Thus, it means that the punishment represented by coercion force does not facilitate the right exercisability, but aims to ensure obedience thereto by third persons.

Consequently, the right is primarily exercised due to the law obedience by citizens.

Obeying the law can be observed owing to a number of factors, where the most important one is the willingness of the members of the society to recognise and obey law requirements voluntarily. However, the willingness of each citizen to obey the law depends on its content. In case the law is not acceptable for the society in terms of its content, or it is imposed on the society from outside, or it explicitly and grossly violates public good requirements, then, due to its content, this law will be met with resistance, the willingness to evade or violate it, which makes it unenforceable.

Therefore, the correspondence of the law content to the predominant collective interests and public good, at least in its soft version, is the condition for the vector of precepts of law to be in line with the willingness of the citizens to obey it.

However, if the source of the right establishment is legislator's, or state, interest, it is still to be admitted that in case no guarantees are ensured by the state, including enforcement instruments, this right will stay purely declarative, or, in other words, it will be *dead*.

Returning to the subject matter of the study, it becomes clear that due to the absence of the will of the state, in this case, the Russian Federation, to guarantee the enforcement of intellectual property rights and their exercise by non-residents of the aggressor country (for instance, in the examples given at the beginning of the paper), it appears possible to say that the exclusive right is not effective and exercisable, otherwise, it does not exist as the right, and not only on the territory of Russia, but also on the territory of the country of the right holder origin or in all other countries (in respect of worldwide trademarks). The point is that the holder of the exclusive right is deprived of any possibilities to exercise the duly owned right in terms of its negative power to prohibit unauthorized use of the intellectual property item. In the case of the Russian Federation, this situation is further aggravated by the fact that following the adoption at the statutory level of the respective regulatory documents,

legalising the illegal use, the duly exclusive right holder is also deprived of any rights to legal remedies. Therewith, it should be noted that Russia still holds membership in a number of international conventions related to the regulation of intellectual property rights, e.g., Berne Convention for the Protection of Literary and Artistic Works, Paris Convention for the Protection of Industrial Property, and others.

Conclusion

The aforesaid provides the grounds to conclude that despite the seeming communality of the right to ownership and the exclusive right, whose items are effectively recognised as the items of property sui generis, which, in fact, allows considering the exclusive right nature as absolute, there are still doubts not only in the absoluteness of this right, but also in the validity if the intellectual property right as the *right to* in general.

The above doubts are predominantly based on the invalidity and impossibility to exercise the exclusive right in its negative power or prohibition and/or prevention of unauthorised use of the item followed by holding the violator liable for the wrongdoing.

It is common knowledge that judicial defence can apply only to the right that is considered enforceable. Apparently, the exclusive right may be recognised as the right only in the case of existing guarantees from the state or a commonwealth of states, on the whole. It is to be taken into account that the obligations of rights observance are immanent not only in the country where the violation occurs, but also in the country of the right holder origin. That said, there arise doubts as to the validity of the exclusive right due to the absence of effective legal, social and cultural instruments to enforce the observance of the right.

Further, attention is to be paid to the fact that unlike the owner of title, the exclusive right holder is virtually deprived of the possibilities to exercise the right to self-defence of the civil right from violations and unlawful actions. It is hard to imagine any armed right holder physically protecting their work from unauthorised use, which is only natural, considering the intangible character of exclusive right items. The above confirms the absoluteness "quality" of the exclusive right, different from the right to ownership and worsening it.

Additionally, it is not accident that the issue of indemnification for the damage caused to the exclusive right holders due to the war has never been raised within the framework of claims for contributions and reparations. Yet, from the perspective of

the exclusive right being recognised as the right, there seem to be all due arguments for that purpose.

Thus, sufficient grounds have been collected to at least review the exclusive right nature, challenging its absoluteness. It may as well appear that Proudhon was correct in his assessment and the intellectual property right may be recognised as invalid.

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Chapter 11

Natural and Artificial Real Estate Concerning the Question of National Concepts of the Correlation of Rights

ABSTRACT

The *superficies solo cedit* principle experienced its natural golden age in the period of the Middle Ages in Europe, when land relations had little in common with the private legal sphere and were completely determined by the measure of public legal power arising from land rights. At the same time, this principle has taken root in the national tradition of private law in many European countries. Considering this, it finds strong supporters in the modern civil law doctrine and judicial practice of Ukraine.

The standpoint regarding the need to implement the *superficies solo cedit* principle consistently is becoming more and more widespread, and as a result, only land plots are declared real estate in a purely legal (namely, civil law) sense, while everything that is inseparably connected with the plots is proposed to be considered their constituent part that does not have an independent object existence (principle of the unity of the real estate object).

A moderate position is also expressed, which is based on the existence of two objects of law: a land plot and an artificial real estate built on it, and points to their inseparable factual (physical) connection with each other, which must be taken into account by establishing the same inseparable legal connection of these objects (the principle of the unity of the legal fate of the land plot and the immovable property located on it).

At the same time, the mentioned trends do not take into account the situation that has actually developed regarding this issue in Ukraine over the past 100 years where, both in fact and legally, land plots and buildings on them are different objects of law, in most cases they belong to different persons, and participate in economic turnover according to different rules. So active introduction of the *superficies solo cedit* principle into national legal life under such conditions raises serious doubts.

This article is devoted to an attempt to remove the presented contradiction and offer ways to solve this problem considering the specifics of national legal traditions and world trends in the development of real estate law.

Keywords: property, real estate, *superficies solo cedit* principle, land plots, buildings

1. Introduction

After Ukrainian civil law regained the category of real estate, which not only did not exist during almost the entire Soviet period of the evolution of civil law doctrine and legal practice, but was artificially split into a number of interconnected constructions, researchers and practitioners encounter a lot of complicated problems that are extremely important for legal theory and practice. And in view of the almost seventy-year break in the academic tradition regarding the study of the relevant issues, it is not surprising that difficulties arise here from the very beginning, that is, the very formulation of the content of the phenomenon under study. What is real estate: a plot of land and everything on it, only a plot of land, or a plot of land and the buildings located on it as separate objects? And if the latter is the case, how are the legal regimes of the land plot and artificial real estate built on it related?

The unnatural interruption of the evolutionary path of the development of domestic civil law by the events of 1917 and the subsequent stormy decades when Ukrainian lands fell into the spheres of different civil law systems, not all being systems of **private** law, put domestic civil law in both a vulnerable and an advantageous position at the same time. Vulnerable due to the lack of traditions of real estate law. Advantageous in view of the relative ease of forming of these traditions and truly adequate modern scientific and practical instruments in the field discussed.

The above, however, should not be understood as the author's denial of the importance of historical experience and the durability of the legal tradition. On the contrary, it is a careful study of such experiences in the modern conditions of the development of the domestic civil doctrine, the understanding of the ways of forming real estate concepts adopted in the modern law of the leading countries of the world, in combination with a good knowledge of the peculiarities of the national legal understanding of Ukrainians and the ways of integrating our state into the legal life of the world that are the real set of requirements without which it is impossible to create a theoretically and practically balanced concept of real estate in the national civil law of Ukraine.

It is the historical experience, including the life of Ukrainians in the conditions of most diverse legal systems, that allows us to form a broad panorama of ways to

resolve the issue of the legal regime of artificial real estate built on the land one does not own. This problem, as it turns out, appeared in all more or less developed legal orders.

2. Historical Overview: Ancient Rome

The level of development in Roman private law regarding the division of things into movable and immovable is variously assessed by modern researchers. In some cases, the academic and practical literature almost unconditionally emphasizes the existence of the classification of things into movable and immovable since the days of Roman law (Spasybo-Fateyeva, 2010, p. 53). Other authors belittle the achievements of the Roman private law doctrine in this matter, pointing out that the division of things into movable and immovable does not originate from Roman law at all (Belov, 2011, pp. 295-296). Still others deftly bypass this question with broad statements to the effect that Roman law in general did not attach special importance to this division, and smoothly moving to the traditional Roman classifications of things (Stepanov, 2004, pp. 7-11).

With all the imaginary theoretical nature of this question, it can hardly be left aside, given the pronounced Roman origin of not only the vast majority of civil law constructions, but also a significant number of doctrinal civil concepts, including those that form the core of the modern doctrine of immovable things.

If we turn to primary sources, even as late as Digests Justinian, a rather interesting picture emerges. Movable and immovable things, movable and immovable property are quite often mentioned in Digests.[1]

At the same time, there arise not just a terminological difference, but also the definition of the essential features of the regulation of the relevant relations in relation to movable and immovable things, in particular:

– different signs allowed to conclude the presence or absence of possession of movable and immovable things (D.41.2.3.13; D.41.2.47);
– there were significant features of determining the sequence of realization of pledged property depending on whether this property belonged to movable or immovable things (D.42.1.15.2);

[1] See, e.g.: D.3.3.63; D.5.1.38; D.6.1.1.1; D.6.1.8; D.21.1.1.pr.; D.32.79.1; D.33.2.32.9; D.33.10.2; D.39.5.35.pr.; D.41.2.3.13; D.41.2.30.4; D.41.2.47; D.42.1.15.2; D.43.16.19; D.46.3.48; D.47.2.21.6; D.48.17.5.1; D.50.16.66; D.50.16.93; D.50.16.222; etc.

– only movable property was subject to sale in the event of its being "sealed" when a person was summoned to court, i.e., in modern terminology, in the event of the seizure of the property in order to secure a claim (D.48.17.5.1);
– the concept of "goods" could only be applied to movable things (D.50.16.66);
– a claim for presentation of the thing could only be filed concerning movable things (D.5.1.38; D.6.1.23.6);
– possession in separate parts (pro diviso possession) was only possible concerning immovable things (D.6.1.8);
– only immovable things could be object of investment of money in special cases of the need to ensure their saving (D.26.7.3.2; D.26.7.49).

However, it should be noted that a unified terminology and conceptual apparatus of real estate law was absent in the Roman legal tradition.

Thus in some cases it speaks about *res mobiles* (D.5.1.38; D.50.16.66), and in other cases about *res moventes* (D.33.10.2; D.47.2.21.6), and sometimes these two terms are used together and in parallel, apparently denoting different categories (D.21.1.1.pr). It would seem that this contradiction should be resolved by a fragment from Celsus: "By the words 'movable property' and 'personal property' are meant the same thing, unless it appears that the deceased, by using the expression 'movable' property, only intended to refer to animals because they moved by themselves. This is correct" (D.50.16.93).[2] However, such identification of *res mobiles* and *res moventes* does not explain and does not remove another problem that in most cases in the Digests, *res mobiles* and *res moventes* are opposed not to *res immobiles*, but *soli* or *praedium*, i.e. *land* or *land plot* (D.6.1.1.1; D.7.1.7.pr; D.15.1.7.4; D.24.1.55; D.21.1.1.pr.; D.33.2.32.9; D.50.16.222).

Moreover, along with the generalizing category of "immovable thing" (*res immobiles*) in the Digests, not only the categories of *soli* and *praedium* are extremely often used to denote certain types of natural and artificial real estate or their complexes, but also other concepts, such as *aedes*, *opus*, *domus*, *villa*, *fundus*, *ager*, *locum*, *area*, etc. Furthermore, even Roman lawyers, judging by single fragments of the digests, sometimes had a rather vague idea of the specific content and scope of these concepts.[3]

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[2] CELSUS *libro nono decimo digestorum: "Moventium", item "mobilium" appellatione idem significamus: si tamen apparet defunctum animalia dumtaxat, quia se ipsa moverent, moventia vocasse. Quod verum est.* [Latin texts in this article are quoted in their English version according to the translation by Samuel P. Scott (Cincinnati, 1932), see https://droitromain.univ-grenoble-alpes.fr/Anglica/digest_Scott.htm.]

[3] In the literature, however, the opinion is also expressed that *aedes*, *villa*, *fundus*, *ager*, and *area* are designations of individual parts of the land as the only possible object of real estate under Roman law (Kapustin, 1880, p. 155).

We will give just two illustrative examples.
First, this is Javolen's position (D.50.16.115):

> There is a question as to what difference exists between the possession of a tract of land or of a field. A tract of land includes everything belonging to the soil; a field is a kind of a tract which is adapted to the use of man. Possession, in law, is distinct from the ownership of land; for we call possession everything which we hold, without the ownership of the property belonging to us, or where there is no possibility of its becoming ours. Therefore possession indicates use, and a field means the ownership of the property. A tract of land is the common name for both the things above mentioned; for a tract of land and possession are different forms of the same expression.

> *Quaestio est fundus a possessione vel agro vel praedio quid distet. Fundus est omne, quiquid solo tenetur. Ager est, si species fundi ad usum hominis comparatur. Possessio ab agro iuris proprietate distat: quiquid enim adprehendimus, cuius proprietas ad nos non pertinent aut nec potest pertinere, hoc possessionem appellamus: possessio ergo usus, ager proprietas loci est. Praedium utriusque supra scriptae generale nomen est: nam et ager et possessio huius appellationis species sunt.*

Second, let's refer to a somewhat clearer fragment of Florentin (D.50.16.211):

> By the term 'real property' all buildings and all land are understood; in speaking of buildings in a city, however, we usually call them *sedes*, and in the country *villas*. A site without a building in a city is called *area*, and in the country *ager*, and the latter, when a house is erected upon it, is styled *fundus*.

> *Fundi appellatione omne aedificium et omnis ager continetur. Sed in usu urbana aedificia "sedes", rustica "villae" dicuntur. Locus vero sine aedificio in urbe "area", rure autem "ager" appellatur. Idemque ager cum aedificio "fundus" dicitur.*

Thus, it is hardly justified to categorically deny the role of Roman law in the development and formation of the classification of things into movable and immovable, just as we have little grounds for another extreme judgment that in Roman law, this division was initially carried out with all thoroughness and completeness. Rather, it is the case that Roman jurisprudence laid the foundations for the development of the doctrine of movable and immovable things.

At the same time, practically until the last days of its existence within the sociopolitical system that gave rise to it, Roman private law quite clearly adhered to the ancient approach laid down in the Laws of the XII Tables, according to which the distinction is rather not between movable and immovable things as generalizing categories, but between land plots (which include, as parts, everything that is insepa-

rably connected with them) and all other things (Hvostov, 1907, p. 104; Franciosi, 2004, p. 302).

The *superficies solo cedit* principle ("what is placed on the land follows the land") really appears as a basic principle of classical Roman private law. Its dominant role can be illustrated by the large number of fragments of relevant sources.

The most relevant expression of this rule is to be found, perhaps, in the writings of famous Roman lawyers of the 2nd century AD Gaius and Sextus Pomponius:

– "Where one person erects a building on his own ground out of materials belonging to another, he is understood to be the owner of the building, because everything is accessory to the soil which is built upon it." *Cum in suo loco aliquis aliena material aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit* (Gaius D.41.1.7.10).
– "On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom the ground belongs. If he knew that the land was owned by another, he is understood to have lost the ownership of the materials voluntarily." *Ex diverso si quis in alieno solo sua material aedificaverit, illius fit aedificium, cuius et solum est et, si scit alienum solum esse, sua voluntate amisisse proprietatem materiae intellegitur* (Gaius D.41.1.7.12).
– "We say that houses form part of the surface of land where they have been erected under the terms of a lease; and the ownership of them, in accordance with both civil and natural law, is vested in the proprietor of the soil." *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, cuius et solum* (Gaius D.43.18.2).
– "Also, what anyone builds on our land, even if he builds it for himself, is by natural right ours, since the surface follows the land." *Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit* (Gaius I.2.73).
– "The building, however, is undoubtedly considered a part of the land." *Villa autem sine ulla dubutatione pars fundi habetur* (Pomponius D.33.7.15.2).

Some time later, Domitius Ulpianus and Julius Paulus generally supported the same position:

– ". . . irrespective of natural law, which declares that the surface belongs to the owner of the soil . . ." *…praeter naturali ius, quod superficies ad dominum soli pertinent…* (Ulpianus D.9.2.50).
– "A building can never be acquired by lapse of time separate from the ground on which it stands." *Nunquam superficies sine solo capi longo tempore potest* (Ulpianus D.41.3.26).

– "Contractors who build with their own materials immediately transfer the ownership of the same to those who own the land on which they erect the building." *Redemptores, qui suis caementis aedificant, stacim caementa faciont eorum, in quorum solo aedificant* (Ulpianus D.6.1.39.pr).
– ". . . the right of the soil was held to follow the usufruct." *…ius soli superficiem secutam videri* (Paulus D.20.1.29.2).
– "Likewise, if anyone, while delivering a tract of land, should say that he conveys the soil without the building upon it, this will not prevent the building, which by nature is attached to the soil, from passing with it." *Sic et in tradendo si quis dixerit si solum sine superficie tradere, nihil proficit, quo minus et superficies transeat, quae natura solo cohaeret* (Paulus D.44.7.44.1).

These provisions are quite indicative, but still do not give grounds for asserting, as is sometimes done, that the *superficies solo cedit* rule was always in effect and without exception. In fact, such exceptions have taken place, and their nature and number do not allow to ignore them. These exclusions come to the following:

1) The same Domitius Ulpianus and Julius Paulus, in principle, allowed the emergence and existence of property rights and limited property rights (namely, servitude) separately for a plot of land and a building located on it:
– ". . . when the land belongs to one person, and the surface of it [in this particular case, it concerns a house] to another . . ." *…si solum sit alterius, superficies alterius…* (Ulpianus D.39.2.9.4).
– "Some servitudes are attached to the soil, others to the surface." *Servitutes praediorum alie in solo, alie in superficie consistent* (Paulus D.8.1.3).
2) In one of the fragments, Julius Paulus directly admits the possibility of following the right to the land from the right to the building, although he rather contradictorily indicates the building as part of the land plot:
– "Where a house is given in pledge, the site also is liable, for it is a part of the house; and, on the other hand, the right to the soil follows the building." *Domo pignori data et area eius tenebitur: est enim pars eius. Et contra ius soli sequetur aedificium* (Paulus D.13.7.21).
3) The same Domitius Ulpianus and Julius Paulus repeatedly pointed out also that in certain situations a plot of land can be considered part of a building, and not vice versa (as required by the *superficies solo cedit* principle). The same position can be found in the writings of the 1st-2nd century lawyer Publius Iuventius Celsus:
– "I am of the opinion that the land on which a house stands is a portion of the same; and not merely a support, as the sea is to ships." *Solum partem esse aedium existimo nec alioquin subiacere uti mare navibus* (Celsus D.6.1.49.pr).

– "What would be the case, however, if the land was an accession to the house? Let us see whether, in this instance, the usufruct of the land would not also be extinguished, and we must hold the same opinion, namely, that it would not be extinguished." *Quod tamen si fundus villae fuit accessio? Videamus ne etiam fundi usus fructus extinguatur: et idem dicendum est, ut non extinguatur* (Ulpianus D.7.4.10.pr).
– "Where a building from which water drips from the roof is removed in order that another of the same shape and nature may be erected there, the public welfare requires that the latter should be understood to be the same structure; for, otherwise, if a strict interpretation is made, the building afterwards erected on the ground will be a different one; and therefore when the original building is removed the usufruct will be lost, even though the site of a building is a portion of the same." *Si sublatum sit aedificium, ex quo stillicidium cadit, ut eadem specie et qualitate reponatur, utilitas exigit, ut idem intellegatur: nam alioquin si quid strictius interpretetur, aliud est quod sequenti loco ponitur: et ideo sublato aedificio usus fructus interit, quamvis area pars est aedificii* (Paulus D.8.2.20.2).
– "for the land is a part of the house, and, indeed, the greater part of it…" *pars enim insulae area est et quidem maxima, cui etiam superficies cedit…* (Paulus D.46.3.98.8).

4) One should also not ignore the prescriptions regarding the construction of a cabin (*casa*) on the sea coast, because in this case also the right to land followed the right to a building, although this was explained by the special legal regime of such lands:

– "This right exists to such an extent that those who build there actually become the owners of the land, but only as long as the building stands; otherwise, if it falls down, the place reverts to its former condition by the law of postliminium, so to speak, and if another party builds a house in the same place, the soil becomes his." *In tantum ut et soli domini constituantur qui ibi aedificant, sed quamdui aedificium manet: alioquin aedificio dilapso quasi uire postliminii revertitur locus in pristinam causam, et si alius in eodem loco aedificaverit, eius fiet* (Marcianus D.1.8.6.pr).
– "Whatever anyone builds upon the shore of the sea will belong to him; for the shores of the sea are not public like the property which forms part of the patrimony of the people, but resembles that which was formed in the first place by Nature, and has not yet been subjected to the ownership of anyone. For their condition is not dissimilar to that of fish and wild animals, which, as soon as they are taken, undoubtedly become the property of him under whose control they have been brought." *Quod in litore quis aedificaverit, eius erit: nam litore publica non ita sunt, u tea, quae in patrimonio sunt populi, sed u tea, quae primum a natura prodita sunt et in nullius adhunc dominium pervenerunt: nec dissimilis condicio*

eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fuint (Neratius D.41.1.14.pr).

Finally, one should also take into account the fact that the *superficies solo cedit* principle was not characteristic of Greek (and, in general, Eastern) law, which allowed for the existence of two independent ("horizontal") property rights: the right of the owner of the land and the right of the owner of everything that is on its surface (buildings, plantations, etc.) (Medvedev, 1989, pp. 223-224). In this aspect, the biblical instructions are indicative, according to which it is attributed: "And in all the land of your possession you shall grant redemption of the land" (Leviticus 25.24).

The given examples, of course, cannot refute the fundamental nature of the *superficies solo cedit* principle in Roman private law. Nonetheless, they convincingly prove that its meaning should not be absolutized even in relation to the legal realities of that time, which, by the way, was recognized by researchers of Roman law even in the 19th century (Dernburg, 1860, p. 220).

3. Historical Overview: The Middle Ages up to the Mid-20th Century

The collapse of the Roman Empire and the consequent return of the population to predominantly rural forms of coexistence with the decline of cities suspended the development of civil engineering in Europe for a long time.

However, the gradual development of cities in medieval Europe made lawyers face issues of property rights broadly similar to those of ancient Rome. These issues were solved somewhat differently, though, closer to purely practical needs, although the scale of construction is incomparable with that of the Roman times.

Distinctive is the approach introduced by German law of the Middle Ages, which did not recognize the principle *superficies solo cedit*, allowing the ownership of different persons to the building and land on which the building was located. In general, the building could have a legal life separate from the land in medieval Germany, which was facilitated by the extraordinary branching of the system of property rights of ancient German law (Kasso, 1905, pp. 9-13). In particular, the builder's ownership of the building he built was a specific feature of the ancient Germanic institution of *Erbleihe*, in contrast to the Roman construction of *superficies* (Mitilino, 1914, p. 19).

A similar approach was followed in France, where for the North and Flanders, the law of customs recognized the division of things into movable and immovable (Beaumanoire, *Coutumes de Beauvaisis*, chapter XXIII), but introduced a third kind of things: *catuex*, which also included buildings that were not part of the manor, and according to some customs, all buildings in general (Kasso, 1905, pp. 14-16).

Further romanization of European jurisprudence starting approximately from the 16th century had surprisingly little impact on the question of rights to buildings erected on the land owned by someone else. Thus, the Prussian Landrecht of 1794 (I.9 §§ 327, 329, 331, 332) provided that the building became the property of the owner of the land if it was built without his consent. But if the landowner knew about the construction and did not resist it, then the right was still united, but the *accession* took place in the opposite direction: the land could go to the developer for a fee. A similar rule was established in § 281 of the Code of the Swiss Canton of Lucerne. At last, the German Civil Code (BGB) prohibited the existence of special rights to essential constituent parts of a thing (§ 93 BGB). This idea is very vividly expressed in the Materials for the preparation of the BGB:

"The division of things is predetermined by nature. Only land plots are immovable. Other things are movable. Definitions such as: a thing is movable or immovable depending on whether it can be moved from one place to another without damage to its substance (Prussian Landrecht I.2 § 6, Bavarian Landrecht II.1 § 8, ABGB § 293), cause only various kinds of contradictions" (Mugdan, 1979, p. 22, transl. mine).

It is significant, however, that according to § 95 BGB, an exception was made for buildings in the aspect under consideration:

> Section 95 Merely temporary purpose
> (1) The parts of a plot of land do not include things that are connected with the land only for a temporary purpose. The same applies to a building or other structure that is connected with a plot of land belonging to another by a person exercising a right over that land.

Strangely enough, the key scholarly debate regarding buildings on the land owned by another party was about their belonging to the category of movables or immovables. Most of the German lawyers of the turn of the 20th century (for example, Eck, Endemann, Gierke, Wolff) speak in favor of attributing this kind of buildings to movables. Others, on the contrary, consider buildings on the land owned by someone else to be classic immovable property (Tobias), and some of the supporters of this approach even pointed out the need to recognize the builder's ownership right not only to the building, but also to the land directly under the building (Oertmann) (Kasso, 1905, pp. 20-22[4]).

French law recognized land and buildings on it as immovable property. This approach was based on the provisions of Art. 553 of the French Civil Code, which limits the effect of the *superficies solo cedit* principle, when the existence of a sepa-

[4] https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0284.

rate right to a thing is proven. It is significant, however, that in general, the French doctrine denied the right of ownership of the lessee to the buildings erected by him on the leased plot of land (this position was followed, in particular, by Demolombe, Marcadé, and Guillouard). Some researchers, such as Laurent, allowed the establishment of the lessee's ownership of such buildings, but only as movable things.

However, since the mid-19th century, the Court of Cassation considered the lessee of the land plot to be the owner of the buildings built by him on this plot precisely as real estate for the entire term of the contract, as well as beyond this term, if the lessor refused to increase his property (plot), even if silently. In 1870-80, French courts finally adopted the practice according to which a building cannot be considered a movable thing because it does not lose its essential properties even if it stands on someone else's land. However, here too, only temporary ownership was recognized, determined by the content of the contract; after its expiration, the building turns into a movable thing that is subject to demolition, if there is no reservation in favor of the owner of the land (Kasso, 1905, pp. 27-29).

4. Historical Overview: Ukraine before the 1990s

The features of the regulation of the considered issue in the Ukrainian legal order have long been determined by the problem of political integration of ethnic Ukrainian lands due to the belonging of their individual parts to different states at different times: Poland (including the Polish-Lithuanian Commonwealth), Austria, Russia, and others. Therefore, the problem of the correlation of rights to land and buildings on it was solved in the past to the extent that was allowed in a particular period by the law of the state which governed the relevant territories.

Among the significant historical laws in this aspect, attention may be drawn to the provisions of § 30, section 3 of the Lithuanian Statute of 1588, according to which, in the event of voluntary or forced abandonment by a nobleman of the estate granted to him, he must ". . . go away . . . with all wealth, property and everything acquired by him and expenses and buildings . . .," ". . . with all his possessions and buildings built at his own expense, he will have to go wherever he wants."[5]

In Russian law, a certain tendency to preserve buildings during the redemption of estates (*votchins*) appeared quite early: the one who redeems them must separately

[5] Translation mine based on Статути Великого князівства Литовського: У 3 т. — Том III. Статут Великого князівства Литовського 1588 року: У 2 кн.— Кн. 1 / За ред. С. Ківалова, П. Музиченка, А. Панькова. — Одеса: Юридична література, 2004. — 672 с.

pay for the buildings additionally erected on the land (Article 27 of Chapter XVII of Conventional Code, 1649).

Hereinafter, the civil law that was in force on Ukrainian lands was largely romanized, which is also evident in the norms relevant to the issue under consideration. Thus, § 297 of the Austrian Common Civil Code (ABGB) stated quite clearly: "§ 297. In the same way, those things belong to immovable that are placed on the ground with the intention that they will remain on it permanently, that is: houses and other buildings. . ."[6]

Regarding rights to land and buildings erected on it. § 418 ABGB accepts the decision introduced by the Prussian Landrecht: the building becomes the property of the owner of the land if it is built without his consent; but if the landowner knew about the construction and did not resist it, then the right was still united, but the *accession* took place in the opposite direction: the land could go to the developer for a fee. With the reform of the Austrian land registration,[7] an immovable thing necessarily had to include a certain space of land, which made it impossible to recognize any above-ground or underground building as an independent object.

We can find a somewhat similar approach (but only once, and as an extraordinary power intervention in civil law relations) in Russian imperial law: § 11 of Chapter VIII, §§ 15, 16, 18, 20 of Chapter XXV of the Border Instruction of May 25, 1766 provided that the builder became the owner of the land on which the construction was carried out, but was obliged to pay the value of this land to its owner. However, for the future, the *superficies solo cedit* principle was preferred and it was finally enshrined in Part I, Volume X, "Civil Laws" of the Code of Laws of the Russian Empire, according to which various buildings were recognized as immovable property (Article 384), but at the same time, appeared as ownership of "inhabited lands" (Article 386).

But although the indicated approach of the legislator, which tends towards the consistent implementation of the *superficies solo cedit* principle in real estate law, is conceptually incompatible with the idea of ownership of a building constructed on someone else's land, considerations of elementary justice (as well as economic expediency) quite quickly led to the recognition of persons who built buildings on someone else's land as owners of these buildings, if only the construction was carried out by virtue of some right to this land. Therefore, alienation by the owner of such a building simultaneously caused the transfer to the acquirer of the corresponding right to the land plot, and regardless of the will of the landowner.

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6 Tranlsation mine based on https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622.

7 In accordance with the General Regulations on Land Registers dated 25 July 1871.

This position was formed in the judicial practice of the Senate in 1870-80, despite its clear contradiction to the literal meaning of the provisions of Articles 384, 386 of Part I, Volume X, "Civil Laws" of the Code of Laws of the Russian Empire. Gradually, the same idea penetrated into some legislative acts of the empire—for example, notes to articles 193 (as amended in 1893) and 243 (as amended in 1903) of the Statute on imposts—but mainly in relation to the western provinces. At last, this approach was also supported in the civil law doctrine of that time (Yeliaschevich, 1916, pp. 64-90) and was clearly enshrined in Article 35 of the draft Civil Code of the Russian Empire (Tyutryumov, 2007, pp. 96-97), which, however, given the events of 1917, never appeared as a source of valid civil law.

The very first political and economic measures of the newly installed Soviet government were aimed at destroying the "economic base of the bourgeois-landlord system," which was understood not only as the destruction of landlord land ownership and private ownership of land in general, but also the elimination of private ownership of most buildings in cities. Thus, the decree of December 14, 1917 prohibited transactions with real estate in cities ("in view of the upcoming socialization of urban land"). And by the decree of August 20, 1918 "On the abolition of the right of private ownership of real estate in cities," buildings in cities were nationalized and municipalized (except for the smallest towns, with a population of up to 30,000 people).

The subsequent complete removal of land from civil turnover and the principled abolition by the law of the very division of things into movable and immovable (note to Article 21 of the Civil Code of the Ukrainian SSR of 1922) did not eliminate the turnover of buildings and structures, but significantly limited it. The academic literature of those times clearly emphasized the inextricable connection between the rights to the building and the land plot on which the building is located, because these objects "make a certain unity," due to which the alienation of the building simultaneously entails the transfer of the alienator's rights to the corresponding land plot to the buyer (Braude, 1954, pp. 14-18). Therefore, it is not surprising that although the sale of land was prohibited in the USSR, it actually took place. Because of this, it was even suggested in the literature that when a building is sold, the question of the right to the land plot under it should be decided by the executive committees of local councils in each specific case individually (Alekseev, 1962, p. 221).

But in general, the doctrine of Soviet civil law led to a clear and unambiguous separation of land plots and buildings located on them as independent (albeit interconnected) objects of civil rights, even when both these objects belonged to the same owner: the state.

5. Ukrainian Law at the Time of Independence: The Development of the Idea

The radical reform of property relations in the early 1990s, in particular, the privatization of buildings and structures as part of integral property complexes of state-owned enterprises, had a stunning effect: in a short time, a huge number of owners of individual buildings (primarily in cities) arose due to the ambiguity of the legal regime of land plots these buildings were placed on.

This was supplemented by pendulum-like swings in the establishment of certain approaches to determining the interdependence of land plots and buildings on them at the legislative level. The latter was probably not accidental as it turned out to be not so easy to get rid quickly and completely of the seventy-year-old mentality regarding the inadmissibility of establishing private ownership of land due to slogans like "land is a special kind of property." This obviously affected not only the relevant legislation, but also doctrinal approaches to the issue and the position of judicial practice.

5.1. The Evolution of the Relevant Legislation

The Law of Ukraine "On Property" established only general rules that the object of private property rights may include land plots (Part 1 of Article 13), citizens have the right to acquire land plots or acquire ownership rights to them (Part 2 of Article 15), as well as regarding the right of collective (Article 21) and state (Article 32) land ownership, and protection of land ownership rights (Articles 51, 52).

The issue of the correlation of rights to the land plot and the building on it was regulated by the prescriptions of Art. 28 of the Land Code (LC) of Ukraine of 1990 (entered into force on February 15, 1991), according to which, when the ownership of a building and construction is transferred, the right of ownership or the right to use the land without changing its purpose is transferred along with these objects. That is, the transfer of property right to the land plot to the buyer of artificial real estate located on it has not been discussed at all.

A year later, according to the Law of Ukraine dated March 13, 1992 № 2196-XII (entered into force on May 5, 1992) the Land Code of Ukraine was revised in a new version. The relevant issue was regulated by Article 30, according to which, when the ownership of a building and construction is transferred, the ownership or the right to use the land plot is transferred along with these objects without changing its purpose, unless otherwise stipulated by the contract. At the same time, the right to the land plot was subject to certification by the relevant state act, but the trans-

fer of the right to the land plot to the buyer of the buildings located on it occurred automatically.

Such legal regime of land plots and buildings located on them was in effect until January 1, 2002, when the new Land Code of Ukraine of 2001 entered into force. According to its Article 120 the automatic transfer of the right to a land plot in the case of acquiring ownership of real estate located on it no longer occurred. For this to happen, it was necessary to conclude a separate contract or provide for such a transition in the contract on alienation of the building.

Shortly afterwards, on January 1, 2004, the Civil Code (CC) of Ukraine of 2003 entered into force. According to the original version of its Article 377 (transl. mine):

> Article 377. The right to a land plot upon acquisition of a residential building, building or structure located on it
>
> 1. Is transferred to the person who purchased a residential building, building or structure ownership of the land plot on which they are located, without changing its purpose, in the size established by the contract.
>
>   If the contract on the alienation of a residential building, building or structure does not specify the size of the land plot, ownership of the part of the land plot that is occupied by the residential building, building or structure and the part of the land plot that is necessary for their maintenance is transferred to the buyer.
> 2. If a residential building, building or structure is located on a land plot provided for use, in case of their alienation, the right to use the part of the land plot on which they are located and the part of the plot necessary for their maintenance shall be transferred to the purchaser.

Therefore, the principle of "automatic" transfer of rights to the land plot to the buyer of the building (structure) located on this plot was restored. However, at the same time, the problem of the correlation between the norms of the CC of Ukraine of 2003 and the LC of Ukraine of 2001 became extremely acute, because changes to Article 120 of the latter, which brought it into line with the provisions of Article 377 of the CC of Ukraine, were introduced only by the Law of Ukraine dated April 27, 2007 № 997-V, which entered into force on June 20, 2007.

Because of this, it was generally assumed that the automatic transfer of rights to the land plot to the purchaser of the building (structure) located on this plot did not take place until June 20, 2007, because the provisions of the Civil Code of Ukraine are special in relation to the norms of the CC of Ukraine (Grigor'eva, Pavlovska, 2014, pp. 48-52).

This approach is based to some extent on the provisions of the CC of Ukraine itself. According to its Part 1 of Article 9, its provisions are applied to the regulation of relations that arise in the spheres of the use of natural resources and environmental

protection, as well as to labor and family relations, if they are not regulated by other acts of legislation. Thus, since land is one of the types of natural resources, the norms of the LC of Ukraine should prevail. However, this position is fundamentally wrong.

First of all, it should be noted that Article 9 of the Civil Code of Ukraine enshrines the rule of differentiation, i.e., the principle of *lex specialis derogat generali* (a special law cancels the effect of a general one), which requires an analysis of the normative array and the selection of the norm to be applied according to the rules on the ratio of general and special norms. At the same time, it is important to emphasize that this rule refers to the ratio of norms, and in no case, to normative legal acts (Zvik, Petryshyn, 2009, p. 232), because a normative legal act can contain hundreds and even thousands of norms, each of which can be in one or another relationship with the norm of another normative legal act.

General norms of law are norms that apply to a certain type of relationship, and special ones apply to a class of relationship within a type with the aim of specifying legal regulation in view of the specifics of this class of relationship. Therefore, the concept of general and special norms appears as a reflection of the ratio of two separate, isolated from all others, norms of law, whose subject of regulation is correlated as a whole (for general norms) and a part (for special norms). From the above, it follows, in particular, that in the case of complete identity of the subject area of application of legal norms (which is exactly what we observe on the example of the original editions of Part 1, 2 of Article 377 of the Civil Code of Ukraine of 2003 and Parts 1, 2 of Article 120 of the Land Code of Ukraine of 2001), the ratio of these norms as general and special cannot be discussed at all.

Instead, we should refer to the rule of hierarchy, which is based on the well-known Roman postulate *lex superior derogat legi inferiori* (a higher [in terms of legal force] law cancels the effect of a lower one). The essence of this rule is that normative legal acts containing civil law norms should be applied depending on their legal force, which is determined by the place in the system of acts of civil legislation.

Of course, both the Civil Code of Ukraine and the Land Code of Ukraine are codified legal acts that have the force of the law of Ukraine. However, it does not follow that their legal force is equal.

The Civil Code of Ukraine as a codified law is recognized in its Article 4 as the main act of civil legislation. The essence of this recognition is manifested in the fact that it is due to the main provisions of the CC, established in its section I (Articles 1-23), that the general orderliness of all civil legislation is achieved, and the unity of regulatory principles in its sphere of action is ensured (Sibilyov, 2001, pp. 106-116).

Therefore, the existence of a hierarchy between the Civil Code of Ukraine as a codified law and other laws regulating civil relations should be recognized. This hierarchy is based on the recognition of the Civil Code of Ukraine as the main act

of civil legislation (the horizontal dimension of the hierarchy). In other words, if the norm of the Civil Code of Ukraine and the norm of another law (albeit a codified one) are characterized by the complete identity of the subject area of their application, then the norm of the Civil Code of Ukraine prevails. This approach was reflected in the decision of the Constitutional Court of Ukraine in the case of the constitutional appeal of the citizen Zinaida Hryhorivna Galkina regarding the official interpretation of the provisions of the fourth part of Article 3 of the Law of Ukraine "On preventing the influence of the global financial crisis on the development of the construction industry and housing construction" (the case on the prohibition of termination of contracts investment in housing construction), dated March 13, 2012 № 5-рп/2012.

Taking into account the above, it should be concluded that the rule on the automatic transfer of rights to a land plot to the purchaser of a building (structure) located on this plot was restored in the legislation of Ukraine precisely with the entry into force of the Civil Code of Ukraine of Ukraine, i.e., from January, 1, 2004, and not with the introduction of changes to the original revision of Article 120 of the Land Code of Ukraine, which entered into force on June 20, 2007.

During the next seventeen years, that is, until the second half of 2021, the Ukrainian legislator did not pay great attention to the regulation of the ratio of rights to a land plot and artificial real estate on it. Changes to the key norms of civil legislation regarding this issue (and above all, Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine) were frequent, but at the same time not conceptual, as they had the character of partial modifications and clarifications:

1) By the Law of Ukraine dated November 5, 2009 № 1702-VI, which entered into force on December 10, 2009, Article 377 of the Civil Code of Ukraine was put in a new edition:

> Article 377. The right to a plot of land in case of acquisition of ownership of a residential building, building or structure located on it
>
> 1. Transfers to a person who has acquired the right of ownership of a residential building (except for an apartment building), building or structure, the right of ownership, the right of use of the land plot on which they are located, without changing its purpose in the scope and on the conditions established for the previous landowner (land user).
> 2. The size and cadastral number of the land plot, the right to which is transferred in connection with the transfer of ownership of a residential building, building or structure, are essential terms of the contract that provides for the acquisition of ownership of these objects (except apartment buildings).

2) As usual, with some delay, Article 120 of the Land Code of Ukraine was brought into line with the current wording of Article 377 of the Civil Code of Ukraine (Law of Ukraine dated May 11, 2009 № 1702-VI, which in this part entered into force on January 1, 2010). Article 120 of the Civil Code of Ukraine was also presented in a new edition and contained a certain specification of the relevant norms of the Civil Code of Ukraine regarding the termination of the rights of the previous landowner (land user), regarding joint ownership, regarding the need to divide the plot, etc.
3) By the Law of Ukraine № 2269-VIII dated January 18, 2018, which entered into force on March 7, 2018, Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine were supplemented with an exception from the general rule on the need to indicate in the contract on the alienation of buildings and the construction cadastre number of the corresponding land plots in cases where it is about the sale of state-owned objects through privatization.

However, from July-August 2021, a real legislative hurricane will arise in the sphere of the ratio of rights to a land plot and artificial real estate. Initially, by the Law of Ukraine dated July 15, 2021 № 1657-IX, which entered into force on August 20, 2021, Part 2 of Article 120 of the Land Code of Ukraine was supplemented by a very voluminous second paragraph, whose verbosity was reduced to specifying the provisions of the first paragraph of this Part 2 of Article 120 LC: regarding the transfer of any right to use a land plot to the acquirer, regarding the irrelevance of the landowner's will for such a transfer, regarding the specifics of the transfer of rights to land and the case of acquiring a share in the ownership of a building (structure).

The next (by the date of entry into force) decision of the legislator (Law of Ukraine dated February 2, 2021 № 1174-IX, which entered into force on October 28, 2021) was much more extensive:

1) The long-suffering Article 377 of the Civil Code of Ukraine was again set out in a new version:

> Article 377. Transfer of the right to a land plot in case of acquisition of ownership of an object of immovable property (residential building (except apartment building), other building or construction), an object of unfinished construction located on it
> 1. The right of private ownership is simultaneously transferred to a person who has acquired the right of ownership of an object of immovable property (a residential building (except for an apartment building), another building or structure), an object of unfinished construction, the ownership of which is registered in accordance with the procedure established by law, as well as the right to use a plot of land on which an object of immovable property is located (a residential building (except for an apartment building), another building or structure), an object of unfinished construction, without changing its purpose in the scope and on

the conditions established for the previous owner of such object of immovable property, in the manner and under the conditions specified by the Land Code of Ukraine.

2) No less long-suffering Article 120 of the Land Code of Ukraine was also rewritten in a new version, having, instead of the former six parts of a rather modest volume, thirteen (!) extremely extensive parts, whose essence may actually be reduced to the following:

a) Clarification of the procedure and conditions for the transfer of ownership of a land plot to the buyer of artificial real estate located on it.
b) Clarification of the procedure and conditions for the transfer of the right to use a land plot to the buyer of artificial real estate located on it.
c) Establishing the inadmissibility of the transfer of the right to permanent use of a land plot to persons who, according to the law, cannot acquire it.
d) Detailing the procedure and conditions for the acquisition of land rights by the buyer of artificial real estate located on a plot of state or communal property, with the simultaneous establishment of a privilege for state and communal property in the form of removing them from the scope of the provisions of the Civil Code and the Land Code regarding the following of the right to land the right to a building while maintaining this rule for privately owned lands.

As we can see, as a result of such legislative changes, the role of Article 377 of the Civil Code of Ukraine has actually been reduced to a more or less simple reference norm.

With the above, however, the stormy weather in the matter of legal regulation of rights to land and the things built on it did not abate.

According to the Law of Ukraine dated September 8, 2021 № 1720-IX, which entered into force on December 10, 2021, both Article 377 of the Civil Code of Ukraine and Article 120 of the Land Code of Ukraine were again set forth in new versions. Article 377 of the Civil Code of Ukraine slightly increased in scope, mainly due to the expansion of the rules on the succession of the right to land to the right to a building, and to the acquisition of a share in the right of joint ownership of a building, as well as the establishment of the condition for the simultaneous transfer of ownership of a land plot as a legally essential condition of the contract on alienation of artificial real estate located on such a plot of land.

In turn, the changes in Article 120 of the Land Code of Ukraine, which became even more verbose and swelled to 16 mostly huge parts, are much more extensive. Having generally confirmed the conceptual decisions laid down by the Law of Ukraine dated February 2, 2021 № 1174-IX, the new version of Article 120 of the Land Code of Ukraine additionally regulated *expressis verbis* the issues related to

the transfer of rights to a land plot if a person acquires a building located on this plot not on property rights, and on the right of economic management or operational management,[8] and also expanded and deepened the previously established privilege of public (state and communal) property, even introducing some advantages of state property over communal property.

Finally, the latest (at least for the time being) changes in the legal regulation of relations related to rights to land and artificial real estate placed on it were introduced into Part 9 of Article 120 of the Land Code of Ukraine by the Law of Ukraine dated August 15, 2022 № 2518-X "On guaranteeing property rights to real estate objects that will be built in the future." According to these changes, the regime of following the right to a land plot to the right to a building is also extended to the cases of acquiring a building on the basis of a *special property right*, whose somewhat unclear construction was introduced into the civil law of Ukraine by the aforementioned Law of Ukraine dated August 15, 2022 № 2518-IX.

5.2. Doctrine and Judicial Practice. Prospects

In the civil law doctrine, there has long been a rather heated debate about what exactly should be considered an immovable thing and, accordingly, how the property rights to a land plot and the artificial real estate erected on it are related.

In one of the works published not so long ago on this topic, an attempt is made to generalize the approaches that are used to solve this question conceptually. In particular, it is claimed that two main models of the organization of real estate turnover and structuring of real estate objects are theoretically conceivable. The first is a conventionally "European" approach, which assumes that the immovable property is a land plot, and the building is considered as a component of a land plot or a real right to it. According to the second approach (that may be called "Asian"), the land does not take part in civil turnover at all, because it is all public, and the immovable thing is the building, which is the subject of deeds; as a consequence, the limited property right to the land plot is a feature of the building and follows it. At the same time, the legal regime of real estate in the aspect of establishing rights to a land plot and artificial real estate erected on it, which is rather aptly called "dupli-

[8] It is not an appropriate place to touch upon the question of the legal nature of these rights and the justification of the preservation of these Soviet categories in the law of modern Ukraine. We will only note, therefore, that they are alien to the very concept of the Civil Code of Ukraine, as a result of which they are difficult to include even in the construction of limited property rights.

cation of real estate," is declared a "uniquely Russian" regime of real estate turnover "that has no analogues" (Bevzenko, 2017, pp. 16-18).

Let's ignore the ignorance of the author of the indicated attempt about the fact that such "duplicity" is also clearly established in Ukrainian civil law. After all, for various reasons, in this particular case, this statement can hardly be considered a manifestation of a wounded imperial pride. However, in any case, even a brief historical review of the problem convincingly proves that the consistent implementation of the "European" (according to the terminology of Bevzenko) real estate turnover model is hardly feasible without excessive number of exceptions.

Nevertheless, such an approach, which flourished in the Middle Ages in Europe when the problems of land relations, being entirely and completely determined by the extent of public legal power arising from rights to land, had little in common with the private legal sphere (Yeliaschevich, 2007, pp. 296-303), finds consistent supporters in modern civil law doctrine. In particular, the opinion regarding the need to consistently implement the *superficies solo cedit* principle is becoming more and more common, and only land plots are declared real estate in a purely legal (namely, civil law) sense, while everything that is inseparably connected with them is proposed to be considered as constituent parts of land plots that do not have an independent object existence. This approach was called **the principle of the unity of the real estate object**, according to which, the land plot and everything built on it is considered as one indivisible object of law: an immovable thing as such (Sukhanov, 2008, pp. 6-16; Bevzenko, 2017, pp. 1-80; Khodyko, 2021, pp. 41-61).

Some voice a slightly more moderate opinion which is called **the principle of the unity of the legal fate** of the land plot and the immovable property located on it. This approach fundamentally differs from the principle of the unity of the real estate object, because it is based on the existence of two objects of law: the land plot and the artificial real estate built on it, and points to their inseparable actual (physical) connection with each other, which should be taken into account by establishing the same inseparable legal connection of these objects (Miroshnychenko, Marusenko, 2013, p. 314).

In view of the above, it is not surprising that the same trend is reflected in judicial practice. Even the Grand Chamber of the Supreme Court has managed to confuse these theoretical approaches.

Thus, at the end of 2018, the Grand Chamber of the Supreme Court formulated the legal position according to which the current land and civil legislation of Ukraine imperatively provides for the transfer of the right to a land plot in the event of acquiring ownership of a real estate object, which reflects the principle of the unity of the legal fate of the land plot and the located on it of a building or structure, which, although not directly and generally fixed in the law, nevertheless finds its expression

in the rules of Article 120 of the Land Code of Ukraine, Article 377 of the Civil Code of Ukraine, and other provisions of the legislation.[9]

However, already the following year, the Grand Chamber of the Supreme Court, confirming the specified legal position, noted additionally that Article 381 of the Civil Code of Ukraine provides for the principle of integrity of the real estate object with the land plot on which it is located.[10] How the principle of the unity of the legal fate of two real estate objects correlates with the principle of the unity of a certain real estate object was not explained by the decision of the Grand Chamber of the Supreme Court, unfortunately.

Almost a year later, the Grand Chamber of the Supreme Court finally confused the doctrinal principles of its legal position on the issue under consideration, noting in one of the resolutions that in the absence of a separate civil law agreement regarding the land plot, when the ownership of the real estate object is transferred, as in the case which is being revised, it should be taken into account that the specified norm [in this particular case, it concerned Article 120 of the Land Code of Ukraine] establishes the general principle of the unity of a real estate object built on a land plot with such a plot (the principle of the unity of the legal fate of the land plot and houses and structures located on it). According to this norm, the determination of the legal regime of the land plot was directly dependent on the ownership of the building and structure, and a separate mechanism of legal regulation by the norms of civil legislation of property relations that arose during the conclusion of deeds related to the acquisition of ownership of real estate built on the land plot, and legal regulation of relations with the transfer of rights to a land plot by the norms of land and civil legislation in the event of acquisition of the right of ownership of the specified real estate. Taking into account the principle of the unity of the legal fate of the land plot and the houses and structures located on it, it should be concluded that the land plot follows the immovable property that a person acquires, if another way of transfer of rights to the land plot is not determined by the terms of the contract or the provisions of the law.[11]

Against this background, the subsequent identification by the Grand Chamber of the Supreme Court of the principle of the unity of legal fate with the ancient Roman maxim *superficies solo cedit*, which in fact embodies the principle of the unity

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[9] Resolution of the Grand Chamber of the Supreme Court dated 04.12.2018 in case № 910/18560/16.

[10] Resolution of the Grand Chamber of the Supreme Court dated 16.10.2019 in case № 164/409/17.

[11] Resolution of the Grand Chamber of the Supreme Court dated 16.06.2020 in case № 689/26/17.

of the real estate object, is no longer surprising,[12] although it is unfortunate, because such a fundamentally incorrect view persists and is increasingly rooted in judicial practice.[13]

To what extent is the stated trend of doctrine and judicial practice (leaving aside certain errors of the latter's conceptual apparatus) justified in view of the needs of the development of civil turnover?

Of course, the temptation to build an internally consistent legal structure that corresponds to classical Roman approaches and understanding of the essence of real estate in countries where civil law is built on the pandect principle (Germany, Switzerland) is extremely great. However, it should not be forgotten that no civil law construction is a thing in itself: the development of economic turnover, including its material component, necessarily entails the transformation of established ideas about the content of certain legal categories, and the category of real estate is not an exception.

One can, of course, claim that the separation of the legal fate of buildings and the land on which they are built, as well as the change of the legal fate of the buildings to the fate of the land plot to the diametrically opposite, is a legacy of the Soviet period of the development of domestic civil law, which is characterized not so much by a dominance, as by the exclusivity of state property rights to land (Sukhanov, 2008, p. 12; Stepanov, 2004, pp. 17-19). It can be argued that such "reverse" (relative to the so called "European" model) follow-up is characteristic of the so called "Asian" model, when the legal order does not recognize a land plot as the object of any civil rights at all (if all the land belongs to the Crown, the state or is considered family hereditary inalienable property of the ruling family, etc.) (Bevzenko, 2017, p. 14). However, one cannot fail to recognize that it was the needs of civil turnover (even in the grotesque form it acquired as a result of the practical fulfillment of its characteristics as socialist turnover) that caused the fact that the actual turnover of real estate did not disappear, even if this property was not called "real estate."

All the more reason to doubt the viability of the classical approach of the exclusivity of a land plot as real estate in modern conditions, when objects that have traditionally been integral parts of land plots (buildings), and even parts of such parts (residential and non-residential premises) are increasingly involved in turnover as independent values. In such a situation, the civil law doctrine is called upon to form

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[12] See: Resolutions of the Grand Chamber of the Supreme Court dated 16.02.2021 in case № 910/2861/18, dated 22.06.2021 in case № 200/606/18, dated 31.08.2021 in case № 903/1030 /19.

[13] See from the latest resolutions of the Grand Chamber of the Supreme Court: paragraph 34 of the resolution dated 20.07.2022 in case № 923/196/20 and paragraphs 57, 60 of the resolution dated 20.07.2022 in case № 910/5201/19.

constructions that are not only characterized by doctrinal continuity, but are also fully adequate to the needs of modern civil turnover.

Indeed, the Grand Chamber of the Supreme Court is right in that it explains the prevailing gap in Ukraine between the ownership of land plots and the ownership of buildings located on them as a legacy of Soviet times:

> 38. The Grand Chamber of the Supreme Court draws attention to the fact that the principle of the unity of the legal fate of a land plot and a building or structure located on it has been known since the time of ancient Rome (Lat. *superficies solo cedit* – the thing built follows to the ground). This principle has a fundamental and deep meaning, it is dictated both by the needs of turnover and, in general, by the very nature of things, the inseparability of the real estate object from the land plot on which it is located. Normal economic use of a land plot without the use of real estate objects located on is impossible, as well as the reverse situation: any use of real estate objects is simultaneously the use of the land plot on which these objects are located. Therefore, the real estate object and the land plot on which this object is located should, as a general rule, be considered as a single object of ownership.
> 39. The artificial legal separation of real estate objects from the land plots on which they are located took place during Soviet times for ideological reasons. Under the influence of the ideology of the time, the idea prevailed that individuals can have ownership rights to real estate objects, but not to the land plots on which they are located. Thus, the Constitution of the Ukrainian SSR of 1978 (part two of Article 11) provided that land is the exclusive property of the state.
> 40. As a result of this approach, there is a significant number of real estate objects that are owned by private persons, located on state and communal land, and the land plots under these objects may be unformed. At the same time, the legislator's intention to overcome this artificial legal separation of real estate objects from the land is beyond doubt. Therefore, if the ownership of the real estate object and the land plot on which this object is located belong to the same person, the subsequent alienation of the real estate object separately from the land plot, as well as the land plot separately from the real estate object is not allowed.[14]

However, should we once again try to build an "ideal legal structure" that should make everyone "happy" regardless of their wishes? Isn't it better to leave the existing realities and allow the participants of the civil turnover to decide for themselves whether they want to combine or separate the building and the corresponding land plot in one object? Isn't it more correct to limit ourselves to preventive measures that would preclude the formation of a kind of "neo-feudalism" of public land owners

[14] Resolution of the Grand Chamber of the Supreme Court dated 22.06.2021 in case № 200/606/18, transl. mine.

(actually, state authorities and local self-government bodies), and otherwise rely on the private regulatory potential of real estate market participants? We think that the above presentation regarding the actual content of the *superficies solo cedit* principle in Roman private law will contribute to a balanced approach to further reforms in the relevant sphere of legal and economic life of Ukraine.

Unfortunately, at present, there are serious doubts as to the determination in carrying out the relevant reforms as well as to the real intention of the legislator "to overcome this artificial legal separation of real estate objects from the land" (as indicated by the Supreme Court in the above-mentioned resolution dated June 22, 2021 in case №200/606/18) taking into account the principle of equality of all participants in civil relations, which is fundamental for private law. Suffice it to point out the introduction in October 2021 in Article 120 of the Land Code of Ukraine of an unjustified privilege for state and communal lands in the form of removing them from the scope of the provisions of the Civil Code and Land Code of Ukraine regarding the following of the right to land to the right to a building, while simultaneously preserving this rule for of privately owned land. As the famous British writer George Orwell wrote, "all animals are equal, but some animals are more equal than others…"

In fact, it is unlikely that such a privilege of state ownership will have a future in judicial practice (if only the courts will really adhere to the principle of the rule of law enshrined in Article 8 of the Constitution of Ukraine). There are at least two reasons for this:

– First of all, it is quite obvious that such a privilege does not correspond to the principles of justice, good faith and reasonableness (clause 6 of article 3 of the Civil Code of Ukraine), which, according to the already established practice of the Supreme Court, are norms of direct action and "have a fundamental character and other sources of legal regulation . . . must correspond to the content of the general principles."[15]
– No less obvious is the contradiction of this privileged legal regime to the prescriptions of Part 4 of Article 13 of the Constitution of Ukraine regarding the equality of all subjects of the right to property before the law, because the very essence of such equality lies in the fact that all subjects must be able to exercise their right without granting of any advantage to any of them (Tatsyi (ed.), 2011, p. 104).

For the above reasons, the construction of "duplication of real estate" that has historically developed in Ukraine is not at all a "catastrophe," as sometimes indi-

[15] Resolutions of the Supreme Court dated 25.01.2021 in case № 758/10761/13-ц, dated 18.04.2022 in case №520/1185/16-ц.

cated in the literature (Bevzenko, 2017, p. 18), and one should not try to eliminate it at any cost by correcting the current legislation and judicial practice in such a way as this is done today. On the contrary, the "duplication of real estate" gives modern Ukraine a unique chance: a chance to create and put into practice a flexible concept of the relationship of rights to a land plot and the artificial real estate erected on it, according to which the legal fate of the land plot and the building on it will be determined by the free will of the owners, and not by an ideological (in any sense) the decision of the legislator. The positive consequences of such an approach in the form of removing another barrier on the path of economic initiative of private individuals can hardly be overestimated—provided, of course, that the legislator will form the appropriate system of rights in such a way that it will allow them to be properly strengthened while simultaneously avoiding abuses, and will also respect the rule that in private legal relations, the state is equal with private persons, not the first among equals.

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Chapter 12

System of Human Rights Protection and Judicial Protection in Ukraine during the War and Its Compatibility Problems in the Context of EU Integration

ABSTRACT

In order to ensure the smooth and efficient operation of the judicial system and non-judicial institutions that protect human rights, especially during the period of martial law in Ukraine, the existing legal framework that regulates the activities of the Constitutional Court and the Commissioner for Human Rights in Ukraine is analyzed. The article examines the supremacy of the Constitution as a prerequisite for the judicial system and the protection of human rights. It is emphasized that the Constitution should have a system of internal self-defense, contain the necessary constitutional guarantees of ensuring the rule of law, real distribution of power, recognition, guarantee and protection human rights. The concept of "militant democracy" is studied in connection with Russia's military aggression against Ukraine. The article aims to investigate the functioning of the highest state authorities of Ukraine in the conditions of martial law. The problem of banning political parties and the judicial practice of Ukraine in this area is studied. The article reveals the features of reforming the system of selection of judges of the Constitutional Court of Ukraine and judicial authorities in Ukraine as a condition for Ukraine's membership in the European Union. The article pays special attention to the peculiarities of the administration of justice in the conditions of military aggression.

The article also aims to determine whether the Ombudsman as a non-judicial institution is endowed with sufficient powers, resources and flexibility to achieve its goals under such a specific state of martial law in Ukraine. Interest in the status and powers of the Ukrainian Commissioner for Human Rights is dictated by Russia's military aggression, which is taking place on the territory of Ukraine, since human rights violations committed as a result of the aggression are being investigated by various international organizations and Ukrainian state institutions, including Commissioner of the Verkhovna Rada of Ukraine on human rights. In addition to the legal status of the Commissioner for Human Rights, the article analyzes his/her relations with other state institutions (Parliament of Ukraine, Government of Ukraine, Constitutional Court of Ukraine, etc.), as well as the scope of his/her functions and powers (mandate). Despite the fact that the current Ukrainian legislation, which regulates the powers of the Commissioner, meets European and international standards, there are some factors that indicate that it needs improvement in connection with Ukraine's accession to the European Union.

Keywords: rule of law, the supremacy of the constitution, distribution of power under martial law, militant democracy, prohibition of rights abuse, conditions of Ukraine's membership in the EU, Constitutional Court of Ukraine, judicial system, justice under martial law, Ombudsperson, human rights, the mandate of the Ombudsperson, Ukrainian Parliament Commissioner for Human Rights

1. Constitutional Supremacy as Precondition for the Judiciary System and Protection of Human Rights

The constitution—the supreme law of the country—results in a limitation of state power. Decisions taken by the state must meet the requirements established in the constitution. Constitutional control bodies usually investigate whether the established restrictions have not been violated. But the foundations of the constitutional legal order can also be violated by non-fulfillment of constitutional prescriptions, when what should be regulated according to the constitution is not regulated.

Control of non-performed or poorly performed actions is no less important as a guarantee of the guarantee of eliminating inconsistency from of the legal system, which is based on the constitution. The purpose of constitutional courts is to guarantee the constitutionality of the legal system. This function is carried out through the control of the constitutionality of laws and other legal acts, as well as the implementation of other competences assigned to constitutional courts. Thus, the results of the actions of state bodies are investigated.

Constitutional control, which is carried out by the constitutional courts, is important also in defining gaps in the law, identifying them as shortcoming impor-

tance also by the definition of gaps in the law. For example, a legal gap exists when the current norms adopted by law-making bodies do not contain any provisions that allow the court to decide the case on its merits (Azerbaijan, Hungary). Several constitutional courts (Spain, Belarus) noted that judicial practice recognizes the authority of state bodies to solve problems caused by gaps in the law. In this context, gaps can be eliminated not only by ordinary law-making bodies, but also by the courts themselves in the law-making process; in fact, such an opportunity for courts exists in private law (Lithuania, Turkey), but it is also possible in public law (Switzerland).

The formation and development of constitutional justice is a complex and long process. The effectiveness of the activity of the constitutional court is determined by the constitutional field. The constitution must have a system of internal self-defense, contain the necessary constitutional guarantees of ensuring the rule of law, real distribution of powers, recognition, guarantee and protection

Human rights constitutional reform in the area of justice was necessary and contributes to solving the problem of creating a complete mechanism of this kind. The introduction of the institution of an individual constitutional complaint is justified and complements the mechanism of protection of human and citizen rights and freedoms in Ukraine.

The Constitutional Court of Ukraine takes an active part in the sphere of a bilateral and multilateral format of international cooperation, in particular between bodies of constitutional justice, international organizations, without which it is impossible to imagine the organic development of the institute of constitutional control in the country.

Attention should be paid to cooperation with Europe by the commission "For Democracy through Law" (Venice Commission), membership in the Conference of European Constitutional Court, which allows for information exchange between member courts on issues of their work methods and judicial practice of constitutional control, as well as the exchange of ideas about institutional, structural, and functional issues in the field of constitution justice. During the 86th plenary session, which took place in March 2011, the Venice Commission approved a report on the rule of law (CDL-AD (2011) (Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session, 2011) Thanks to this Report, the main characteristics of the supremacy of law were revealed.

The new generalized report revealed the relationship between legal norms with one, on the one hand, and democracy and human rights, on the other ("Rule of law in the favorable environment").

The main directions of development of the higher legal entities are considered: legality, legal certainty; termination of abuse of full importance; equality before the

law; access to justice. The fundamental condition the supremacy of law depends on is the eradication of corruption and abuse of official position.

In the Report of the Venice Commission, the superiority of the rule of law is a universally binding concept.

"General provision and observance of overprotection of law both at the national and at international levels" was confirmed by member states of the United Nations in a 2005 document. The rule of law, as specified in the preamble and Article 2 of the Agreement on the European Union, is one of the fundamental values that unite the participating states of the EU. In 2014, as part of the program to strengthen the rule of law, European Commission reminds that "the principle of the rule of law is progressively becoming the dominant organizational model of modern constitutional law and international organizations that regulate the exercise of these public powers" (p. 3-4). In the same year, the European Commission adopted the mechanism in order to address the systemic problems of the rule of law in the member states of the EU. This "new EU initiative to strengthen the rule of law" establishes an early warning tool based on "data obtained from available sources and recognized organizations, including the Council of Europe."

According to the United Nations, the rule of law is a universal principle already used by the Organization of American States, namely, the Inter-American Democratic Charter and the African Union. References to the rule of law can also be found in documents adopted by the League of Arab States. At the UN level, following the publication of the Rule of Law Indicators in 2011, the UN General Assembly in 2012 adopted the Declaration of the High-Level Meeting of the General Assembly on of the rule of law at the national and international levels, which recognizes that "the rule of law belongs equally to all states and intergovernmental organizations."

The Preamble of the Statute of the Council of Europe refers to the rule of law as one of the three principles "which lay the foundation for a true democracy," along with personal and political freedom. Article 3 of the Charter recognizes respect for the rule of law as a precondition for the entry of new candidate states into the organization. The rule of law, together with the concepts of human rights and democracy, make up the basic paradigm of values that underlie the Council of Europe.

The report of the Venice Commission emphasizes that especially the countries of the new democracies should pay attention to the fact that the concepts of "government based on laws" or even "law based on laws" are not equivalent to the rule of law, but rather a distorted interpretation the rule of law (paragraph 15 of the Report).

It is also emphasized that, despite the difference in positions, there are general features of the rule of law that cannot be contradicted. These include an accountable and democratic law-making process, legal certainty, prohibition of arbitrariness, access to justice provided by independent and impartial courts (including judicial

review of administrative actions), respect for human rights, and equality before the law. Standards are needed to determine whether the parameters of the rule of law have been implemented. The following will be applicable for legal parameters. In Europe, for example, these are legal assessments regarding the European Court of Human Rights, the Venice Commission, the monitoring bodies of the Council of Europe and other institutional sources. For practice-related parameters, different sources should be used, including institutions such as the European Commission for the Performance of Justice and the European Union Agency for Fundamental Rights.

Apart from the rights, the rule of law concerns also democracy, i.e., the third core value of the Council of Europe. Democracy is related to the participation of people in the decision-making process in society. By establishing the protection of human rights, it becomes possible to protect people from arbitrary and excessive interventions by the state, to provide them with freedoms and privileges, and also to protect human dignity.

The main characteristics of the rule of law are summed up in the following parameters: whether the rule of law is recognized; whether state authorities act on the basis of and in accordance with the law; the relationship between international law and domestic law (the principle of legality in international law); legislative powers of the executive power; legislative process: whether the law enters into force in a transparent, accountable, universal and democratic manner; exceptions in emergency situations: whether the law provides for exceptions in emergency situations; the duty to apply the law: what measures are applied to guarantee the effective implementation of the law by public authorities; private structures that are responsible for public tasks (does the law guarantee that non-state entities fully or partially take on public tasks and functions, subject to the requirement of the rule of law).

The next dimension of the rule of law is legal certainty, which is characterized by the following parameters: availability of legislation, availability of court decisions, predictability of laws, stability and consistency of application of laws, legitimate expectations (public authorities must not only comply with laws, but also fulfill society's expectations), lack of retroactivity (non-retroactivity), whether the principle of "no crime without law and no punishment without law" is applied, whether respect for res juridicata (principle of the inadmissibility of appeal against the final decision) is guaranteed.

The next part of the rule of law is the prevention of abuse (misuse) of power, which implies the presence of legal guarantees against arbitrariness and abuse of power (*detournement de pouvoir*) by public authority. At the same time, the discretionary powers of the executive power, which lead to unlimited power, contradict the rule of law. Therefore, the law should establish the framework of such discretionary

powers in order to protect against arbitrariness. Abuse of discretionary powers should be regulated by a judicial or other independent control body. Appropriate safeguards must be clear and accessible.

The next group of parameters of the rule of law concerns the principle of equality of all before the law and the absence of discrimination. The principle of non-discrimination requires the prohibition of unequal treatment and guarantees equal, effective protection of everyone against discrimination on various grounds.

A separate and important block of indicators is access to justice, which implies independence and impartiality.

In view of all the above , in the modern conditions of reforming the constitutional system, the role of the Constitutional Court of Ukraine as a subject of constitutional control should be increased.

According to Kes Sunstein, as an important component of the supremacy of the constitution, the legitimacy of the activities of constitutional courts should be ensured. As Katarina Sobota rightly writes, "Law-guaranteed judicial protection against injustice on the part of the state means no less than that the state must recognize its own legal wrongdoing."

Democratic rule under martial law is a new challenge of the 21st century. Russia violated the sovereignty, territorial and political integrity and independence of Ukraine. But its armed aggression is also an attack on Ukrainian constitutional order. Ukraine is a constitutionally governed democracy that is waging an existential war for survival. The fight against the brutal attack on the civilian population eclipses all others problems and Ukrainian constitutional law directly or indirectly recognizes the need for exceptional powers during martial law. Obviously, the war for survival shifts power from the parliament to the executive power, and many fundamental principles of democracy must be suspended , even so defining features of democracy as elections.

Some historical observations about how constitutional democracy reacts to war may be made. No form of state organization can cancel out the main thing: the task is survival and collective security. For Ukraine, this means that war determines all internal considerations and that overcoming difficult external relationships is the key to survival; both violate the normal parliamentary prerogatives in a healthy constitutional order. Let us make three observations about the presidency, the role of parliament in wartime, and reasons for hope for Ukrainian warfare.

First, the president is an inspirational leader in the face of unimaginable losses and challenges. There is absolute certainty in the chain of command. Not only should there be clarity about who will be the successor to the presidential post, but also about who, in turn, will be next. Since the aggressor's army still occupies large parts of the country, Ukraine cannot afford such uncertainty. A clear line of "in-

heritance" must be established and high-ranking officials in the line of inheritance should be kept away from Kyiv in case of an emergency.

Second, it is necessary to follow the process of introducing martial law.

But what exactly is the legislative function in wartime? Probably the most important function of the legislature in the conditions of an emergency is to be accessible, that is, it is important for the legislature to function.

The constitutional provisions regarding the Verkhovna Rada of Ukraine, the central institution of the Ukrainian constitutional system, were observed, despite the fact Kyiv suffered an attempted attack. However, the routine activity of the Verkhovna Rada under these extraordinary circumstances was very difficult is.

In Ukraine, there is a semi-presidential system of government, which combines a directly elected president with a serving prime minister approved by the Verkhovna Rada of Ukraine. According to Article 75 of the Constitution of Ukraine (Constitution of Ukraine. The Official Bulletin of the Verkhovna Rada of Ukraine (BVR), 1996, No. 30, Article 141.), sole legislative power belongs to the Verkhovna Rada of Ukraine (see also Article 85(3)). The legislative power of the Verkhovna Rada continues to exist during armed conflict and state of emergency. And in fact, the Verkhovna Rada plays an important role in such situations.

The fundamental constitutional significance is that the legislative power of the Verkhovna Rada continues to exist during times of war and emergency state, that is, even under these circumstances, the Constitution of Ukraine does not delegate legislative powers to the President of Ukraine. According to the chairman of the Verkhovna Rada of Ukraine Ruslan Stefanchuk, from the beginning of the full-scale Russian invasion in Ukraine on February 24, 2022, the Verkhovna Rada held seven plenary sessions and adopted 13 resolutions and 88 laws. In addition, 18 draft laws are currently being read at the first stage.

Besides, the Verkhovna Rada has a constitutionally established quorum in two thirds in accordance with Clause 2 of Article 82 of the Constitution of Ukraine (Ibid.), which is preserved during martial law and emergency, as well as the requirement regarding the adoption of decisions by the Verkhovna Rada exclusively in plenary sessions meetings by voting in accordance with Clause 2 of Article 84 of the Constitution of Ukraine.

At present, four questions are of concern.

First, the Regulations of the Verkhovna Rada of Ukraine do not establish special procedures of the "expedited" legislative process during martial law. In particular, there is no fast-track legislative process for reviewing laws on matters of national security after the declaration of martial law. Instead, there is only one legislative process that is applied both in peacetime and to all legislation during wartime. These difficulties in the process of decision-making under extreme pressure of war must

be immediately resolved to secure continued adherence to the supremacy of rights The legislative process is flexible and can be adapted to wartime circumstances, then the executive will continue to resort to the necessary legislative changes. And vice versa: if the legislative process is cumbersome and slow, the executive will have more incentives to implement executive. But at the same time, a "fast" legislative process must include the "basic structure" or "essential features" of this process in conditions of constitutional democracy.

Second, the Regulations of the Verkhovna Rada of Ukraine do not establish special mechanisms for meetings of its members that take place in different institutional forms and functions. As a legislative body, the Verkhovna Rada must meet in plenary sessions and as parliamentary committees.

In addition, the Verkhovna Rada of Ukraine is an important platform for debate about Ukraine's response to the Russian invasion, in which both pro-government and opposition deputies participate. In addition, the Verkhovna Rada of Ukraine performs an important supervisory or control function through temporary special and investigative commissions. The supervisory function of the Verkhovna Rada does not stop in wartime. On the contrary, as the Russian invasion continues, an intense surveillance is more important than ever. Indeed, the participation in the exercise of control and debate in the parliament confirms the commitment of the Verkhovna Rada of Ukraine to constitutional democracy.

Despite significant security threats, Ukrainian deputies continue their work. The Regulations of the Verkhovna Rada of Ukraine do not specify any alternative approaches for the safe and uninterrupted work of the Verkhovna Rada as the only legislative body in Ukraine.

Third, should there be a procedure for replacing members of the Verkhovna Rada of Ukraine who died during the Russian invasion, for example, as a result of hostilities? Fortunately, this tragedy has not happened so far. Should it happen, though, no parliamentary elections could replace them, since in practice elections cannot be held while martial law is in effect. Should there be a mechanism of appointment of an acting deputy of the Verkhovna Rada of Ukraine, especially in a situation when it is necessary to ensure a quorum? What should be the role of different political parties in this process?

Fourth, it is difficult for the Verkhovna Rada of Ukraine to ensure the transparency of its activity. The Verkhovna Rada is extremely active during the war. However, most of its decisions are made under the guise of secrecy for reasons of national security. National security is at stake in the discussed issues, therefore the debates themselves and the facts of the meetings of the Verkhovna Rada of Ukraine become military targets. The Ukrainian people only received information about these meetings and decisions taken after the fact. How can the regulations of the Verkhovna

Rada of Ukraine be balanced with the national need security and transparency? There is no simple answer to this question.

It is clear that Ukraine's commitment to constitutional democracy and the rule of law must continue, no matter how brazen the attempts to blow this up. For example, on April 28, 2022, Russia launched a missile attack in Kyiv during the visit of UN Secretary General Antonio Guterres, which is nothing more than a blatant rejection of the basic principle, provided for in Article 2 (4) of the United Nations Charter: "Members must refrain in their international relations from threats of force or its application against territorial integrity or political independence of any state" (United Nations Charter, 1945) The continuation of the work of the Verkhovna Rada of Ukraine is a strong confirmation of the political independence of Ukraine.

No country allows one-sidedness of the executive power in key functions of emergency situations: declaring a state of emergency, definition of emergency powers, review of the implementation of emergency powers and determination of the moment of termination of the state of emergency. In modern democracies, France typically requires that the legislative body remains in session during martial law so that the Constitution is not changed by the executive power. According to Article 16 of the current Constitution, France allows to declare a state of siege with the corresponding potential for termination of political rights and civil liberties. At the same time, Article 16 the Constitution of France preserves the political responsibility of the president, requiring the legislature to remain in session during the war state, and protects the power to impeach the president even during official martial law. Ukraine wisely follows this model.

On the other hand, the only historical example of a full presidential model comes from the Weimar Republic. Article 48 of its Constitution, which allowed to announce emergency situations through exceptional presidential actions, combined with Article 25, allowed the president to dissolve the parliament. Not surprisingly, no post-war constitution followed the Weimar model.

Fifth, Ukraine defends itself. This is partly due to the nature of the war. Countries which are no longer prone to the military conflict are more likely to win when forced to defend. This trend also predicts a historical advantage for those countries that tend to fight only when necessary; those on the defensive have a natural advantage over their adversaries, which Sun Tzu recognized a long time ago in *The Art of War*. To the extent that deliberative processes of democracy require citizens who are convinced of the necessity of a defensive battle or the individual advantages of aggressive wars, democracies will be more inclined to wage defensive, than offensive, wars and they will avoid impulsive wars, which are waged by autocracies. But the success can be attributed, at least, to democratic governance. This may seem paradoxical, because the centralization of power, inevitable during the war, should

become a source of weakness for the noisy and fractional division of democratic power. However, historically speaking, democracies tend to do better at war than societies with undemocratic political structures. Political scientists Dan Reiter and Allan S. Stem provide important empirical support for this in their work *Democracies at War*, which demonstrates that democracies are disproportionately successful in conflict situations. One of the highlighted reasons and factors that immediately resonates in Ukraine is democratic laws. This allows for the creation of a wider class of junior military officers with more discretionary powers. On the contrary, long-time autocratic leaders are afraid of coups under the leadership of colonels and juniors ranks of the officer corps.

By now, the war has exposed the weaknesses of the autocratic rule, beginning from corruption that siphoned off or replaced Russian military resources of the military grade with fraudulent goods. In particular, Russian troops did not show flexibility in battle after the campaign on Kyiv was repulsed. Partly, it is the result of their army based on generals loyal to the regime and deprived of intermediate officers who could actually take over the tactical command in battle. Despite the fact that Ukraine was dwarfed in respect of the number of troops and material resources, it survived the onslaught by delegating authority to direct operations at the field level. Therefore, even during the times of extreme stress in wartime, democracy is the only effective help.

Liberal constitutional democracies began to consolidate in the mid-1990s based on three criteria: elections, freedom of speech, and freedom of associations The combination of these three factors contributed to a certain model of relations between citizens and authorities which is based on the assumption that the institutionally organized collective freedom (democracy) should reflect the views of its members within the established boundaries due to the restriction of human rights.

Post-WWII neo-constitutionalism incorporated fundamental rights in constitutional charters. Fundamental rights have provided an embedded form of constitutional freedoms and values.

Freedom of speech often suffers during war. Patriotism sometimes passes into banter, and civil liberties take a backseat to security and order. On April 14, 2022, the Verkhovna Rada of Ukraine adopted a statement on the value of freedom of speech, guarantees of activities of journalists and mass media during martial law. The key tasks of the authorities should include "ensuring the constitutionally established guarantees of freedom of speech, free acquisition, assembly and dissemination of information taking into account the laws of Ukraine restrictions related to martial law."

First of all, the above restrictions apply to the information that contains state secrets, including, in accordance with the Law of Ukraine "On state secret," informa-

tion about the content of strategic and operational plans and others combat control documents, military training and operations, strategic and mobilization deployment of troops, as well as about others most important indicators that characterize the organization, the number, deployment, combat and mobilization readiness, combat and other military training, armament and logistical support of the Armed Forces of Ukraine and other military formations. Such information is classified as a state secret in a special order and with mandatory inclusion in the Compendium of Information, which constitute a state secret.

At the same time, in accordance with Article 21 of the Law of Ukraine "On Information," the information cannot be assigned to "information with limited access" if it concerns facts of violation of human and citizen rights and freedoms or illegal actions of the state authorities, local self-government bodies, and their officials and officials. The condition of limiting access to necessary information is that the harm from the disclosure of this information prevails over public interest in obtaining it.

It should also be noted that, in connection with the war in Ukraine, the study of the concept of "militant democracy" was intensified. The debate about self-defending democracy or the theory of militant democracy is not new. However, the first coherent theories of militant democracy appeared in the 1930s. In view of the rapid rise to power of the Nazi and fascist movements in Western Europe, legal scholars and political scientists began to develop complex theories about how to avert this threat. The origin of the term "militant democracy," at least in the English language, is usually attributed to Karl Loewenstein, a German scholar of Jewish descent who immigrated to the United States in 1933. Although K. Lowenstein was not the only one to publish on this topic at the time, his ideas proved to be very influential and thus he is widely regarded as the "father" of the concept of militant democracy.

According to Loewenstein, the justification for military measures can be found in analogy with the state of emergency during the war, when it is generally recognized that constitutional guarantees are suspended. Similarly, in the context of militant democracy, democracy is at war with fascism (in the modern context, with racism) and European democracies are in a "state of siege." According to Loewenstein, democracy "must meet the requirements of the times, and all possible efforts must be made to save it, even at the risk of violating the basic principles."

The second world war was a tragic experience that led to a growing interest in the concept of militant democracy. The failure of the Weimar Republic was not easily forgotten, and the feeling of "never again" dominated democratic thinking at the time. As a result, after World War II, the concept of militant democracy became a serious part of constitutional thinking, and measures of defensive democracy were incorporated into most European constitutional orders.

In post-war Europe, in recent decades, militant democracy has gradually emerged as a new archetype of statehood. An analysis of how the issue of democratic self-defense is resolved in different countries shows the diversity of models. Militant democracy or self-defending democracy is not a universal template that can be equally applied in any democratic state.

Applying the concept of militant democracy always takes into account the distinctive characteristics of a particular democracy. How the elements of militant democracy are implemented in any legal order depends on the country's history and legal culture. The concept of militant democracy does not presuppose the method of protecting democracy. Protective measures can be provided for in the constitution of the state or derive from administrative or criminal law (or even private law, as in the case of the Dutch provision which is the basis for the declaration illegal political parties).

Some states have readily accepted the rationale of militant democracy. Especially in Germany, the concept of militant democracy strongly influenced the development of the Basic Law, which came into force in 1949. Germany's post-war constitution is replete with militant measures to prevent a return to an anti-democratic regime, including the prohibition of abuse of rights in Article 18 of the Basic Law.

In fact, Germany developed the clearest—and most far-reaching—theory of militant democracy. Therefore, it is often called the cradle of the concept of militant democracy, first of all, because the created doctrinal position of the Federal Constitutional Court of Germany was demonstrated in the practice of other constitutional courts in the process of consideration of similar cases and the practice of the ECtHR. The constitutionalization of the concept of militant democracy transformed the question from whether the state has the right to fight with anti-democratic forces to what form this fight should take.

Since the adoption of the Constitution in 1949, two parties have been banned in Germany. In 1952, the Federal Constitutional Court of Germany declared the activities and program goals of the Socialist Party of the Reich (SPR) unconstitutional. In the context of the Federal Republic of Germany, this refers to the "basic free democratic order," which, in addition to democratic procedures, also includes the protection of fundamental rights and the rule of law. In 2003 and 2017, there was a case pending before the Federal Constitutional Court of Germany regarding the anti-constitutional activities of the National Democratic Party (NDP). In 2003, the Federal Constitutional Court dismissed the case on procedural grounds. In 2017, the court found the submissions regarding the banning of the People's Democratic Party not sufficiently proven in the court's view that the party lacked the means to achieve its unconstitutional goals. The clear and widespread implementation of the concept of militant democracy in Germany is exceptional.

Many European states have adopted legislative provisions aimed at protecting the democratic structure, but sometimes without directly recognizing the concept of militant (defensive) democracy as the main constitutional principle. Subsequently, although interest in militant democracy waned for a time after the 1970s, the concept was revived after the fall of the Iron Curtain in 1989 and the collapse of the Soviet Union, when the concept of militant democracy became of interest for the new democracies in Central and Eastern Europe. In light of transitional justice and under the mantle of the Council of Europe, these states faced the problem of securing democracy in the future.

After the collapse of the Soviet Union, many of these Eastern and Central European states banned communist ideology in a manner similar to the ban on neo-Nazism in Western Europe. According to the militant narrative, many of these new democracies took steps to protect themselves from both communism and fascism, for example by banning parties, or sometimes even symbols, associated with these totalitarian movements.

In addition, in the years after the war, the concept of militant democracy also entered the international arena. At that time, various international documents on human rights were developed on the basis of the UN and the Council of Europe, such as the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), as well as International Covenants, respectively, on civil and political rights and economic, social and cultural rights (1966). All these treaties shared the ambition of the time to create stable democracies that would not be swept away by the next anti-democratic wave. Elements of protected democracy, in particular provisions on abuse of rights, are therefore present in all these treaties.

The traditional focus of militant democracy has been on the prohibition of political parties whose programs and activities disregard fundamental democratic principles or are openly aimed at their destruction. Banning a former ruling party may be particularly justified in periods of transition and consolidation, but may not automatically extend to stable democracies. Arguably, this paradigm of banning political parties may be particularly relevant in the context of transitional justice. The concept of "militant democracy" emphasizes three elements: value orientation, preventive protection of democracy, and readiness for protection.

Banning the party. The court could make a decision on the specified issues, among other things, when members of a banned party appealed against the ban. In particular, the practice of the ECtHR in considering cases on the banning of political parties should be classified into the following categories: first, cases that concerned the banning of political parties that promoted the ideas of secession or granting autonomy to certain national minorities (for example, United Communist Party of Turkey and Others v. Turkey, 1998); (United Communist Party of Turkey and Others v. Turkey,

No. 19392/92, ECtHR (Grand Chamber), 30 January 1998) second, cases related to the banning of parties whose activities were based on religious fundamentalism; third, cases related to the banning of political parties that used violent methods or were affiliated with terrorist organizations); fourth, the cases related to the banning of political parties whose activities promoted totalitarian ideology (for example, KPD v. Germany, 1957) A separate category includes a number of cases that were under consideration by the ECtHR related to the prohibition or termination of the activities of political parties for procedural reasons (for example, Republican Party of Russia v. Russia, 2011) during the consideration of these cases, the following were applied: Art. 11 (freedom of association and assembly, the framework of this freedom), Art. 17 (prohibition of abuse of rights) of the Convention on the Protection of Human Rights and Fundamental Freedoms (Convention for the Protection of Human Rights and Fundamental Freedoms, 1953) (European Convention) and Art. 30 of the Universal Declaration of Human Rights. The latter was introduced as a means of countering the totalitarian movement, which is designed to destroy democracy.

For the first time, the ECHR considered the issue of banning a party in 1957. It concerned the Communist Party of Germany under Article 17 of the European Convention, which stated that no one can use the rights guaranteed by the Convention in order to cancel other rights. The Commission did not consider it necessary to consider the case regarding the violation of Art. 9, 10 and 11 of the Convention and supported the ban of the party for the reasons that the dictatorship of the proletariat, which the communist doctrine professes, is incompatible with the Convention because it involves the destruction of most of the rights and freedoms guaranteed by it. Therefore, the declaration of a dictatorship is incompatible with the European Convention, even when constitutional methods are used to introduce it. In 2009, the ECtHR upheld the decision of the Spanish Supreme Court to ban the separatist Batasuna parties.

Second, the ECtHR uses a three-pronged test to determine whether the interference was required by law, had a legitimate purpose (in other words, introduced to protect a legitimate interest), and was necessary in a democratic society.

In Ukraine, from 2014 to 2022, the activities of 13 political parties were banned. Until 2014, the domestic legal system had had the experience of dissolving political parties only on procedural grounds. Ukrainian courts did not use the three-fold test during the consideration of cases. Some components of the test were usually considered separately and fragmentarily. In addition, the court completely ignored the question of the need for intervention in a democratic society, one of the mandatory criteria that the ECtHR calls, using a three-pronged test. The legality of this interference with the freedom of association through the suspension of the party's activity in the specified case is considered highly controversial.

Since 2014, a number of administrative trials have been held in our country regarding the banning of pro-Russian parties whose leaders and members helped in the annexation of the Crimean Autonomous Republic. And since 2015, administrative courts have issued a decision to terminate the activities of parties that professed communist ideology or used communist symbols in violation of the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols." (Law of Ukraine on April 9, 2015 № 317-VIII) The specified anti-communist law of July 16, 2019 was recognized as constitutional.

On July 16, 2019, the Constitutional Court of Ukraine issued a decision in the case based on the constitutional petition of 46 People's Deputies of Ukraine, who submitted their petition to the Constitutional Court of Ukraine (hereinafter referred to as the Constitutional Court) regarding the conformity of the Law of Ukraine "On Condemnation of Communist and National Socialist of (Nazi) totalitarian regimes in Ukraine and the prohibition of propaganda of their symbols" with the Constitution of Ukraine (its constitutionality) (Decision of the Constitutional Court of Ukraine on July 16, 2019 № 9-p/2019). CCU noted that the communist regime denied and limited human rights and made the democratic organization of state power impossible. A political party whose founding, programmatic and other official documents contain objections to the fundamentals of the constitutional system of Ukraine, the right of the Ukrainian people to their own independent state, calls for the liquidation of the independent Ukrainian state; a violation of its territorial integrity or any other goal that does not correspond to the democratic essence of the content of the Constitution of Ukraine cannot be legitimate, and there is no legal basis for its legalization in Ukraine. Such illegal armed formations use the symbols of the communist regime to oppose Ukrainian state symbols and the idea of Ukrainian statehood and to discredit the idea of democracy. They pose a real threat to human rights, the state sovereignty of Ukraine and its territorial integrity. Therefore, the ban on the use of these symbols and the propaganda of totalitarian regimes has a legitimate goal, which is to prevent a return to the undemocratic functioning of public power, to prevent violations of fundamental human rights.

This decision of the CCU was based on the concept of "militant democracy," but the Constitutional Court of Ukraine did not use this concept in all of its decisions. Thus, the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 139 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of the decrees of the Presidium of the Verkhovna Rada of Ukraine "On the temporary suspension of the activity of the Communist Party of Ukraine" and "On the banning of the activity of the Communist Party of Ukraine" (the case on the decrees of the Presidium of the Verkhovna

Rada of Ukraine regarding the Communist Party of Ukraine, registered on July 22, 1991) dated December 27, 2001. On August 30, 1991, the Presidium of the Verkhovna Rada of Ukraine issued Decree No. 1468-XII "On the Prohibition of the Activities of the Communist Party of Ukraine." Referring to the conclusions of the Temporary Commission, according to which it was recognized that the leadership of the Communist Party of Ukraine "by its actions supported the coup d'état and thereby contributed to its implementation on the territory of Ukraine," the Presidium of the Verkhovna Rada of Ukraine banned the activity of the Communist Party of Ukraine on the basis of Part 2 of Art. 7 of the Constitution (Basic Law) of the Ukrainian SSR of 1978, according to which the creation and activity of parties aimed at changing the constitutional system through violence and in any illegal form of the territorial integrity of the state, as well as undermining its security, inciting national and religious enmity, is forbidden. The CCU recognized as unconstitutional Decree of the Presidium of the Verkhovna Rada of Ukraine "On the Temporary Suspension of the Activities of the Communist Party of Ukraine" dated August 26, 1991 No. 1435–XII, and Decree of the Presidium of the Verkhovna Rada of Ukraine "On the Prohibition of the Activities of the Communist Party of Ukraine" dated August 30, 1991 No. 1468–XII.

If we talk about the shortcomings of this decision, first of all, it should be noted that the Constitutional Court of Ukraine actually ignored the issue of the coup d'état of August 1991, because no legal assessment was given to the coup attempt. The decision stated only that there were no results of the investigation by the General Prosecutor's Office of Ukraine into the possible involvement of the leadership of the Communist Party of Ukraine in the events of August 19–21, 1991. The Constitutional Court of Ukraine also indicated that the programmatic goals of the Communist Party of Ukraine did not contradict the Constitution, but at the same time, it did not consider extensively any program document of the party.

In our opinion, the problem that arose in 2015 and has continued to this day, regarding the ban on the activity of the Communist Party of Ukraine, originates precisely from the time this decision was issued by the Constitutional Court of Ukraine. We also believe that the CCU acted against democracy, although it could and should have applied the amendments of the European Court of Human Rights regarding the issue of banning the activities of political parties.

However, it is worth noting that not only the Constitutional Court of Ukraine created the basis for the current problems with the Communist Party of Ukraine; legislators played an equally important role in this.

On September 5, 2022, the Administrative Court of Cassation as part of the Supreme Court of Ukraine rejected the appeal of the pro-Russian political party "Op-

position Platform—For Life" (OPZZH) and, thus, finally banned its activities in our country.

The Committee of the Verkhovna Rada on State Building and Local Self-Government recommends to the deputies to adopt in the first reading the government draft law No. 7476 (Проект Закону про внесення змін до деяких законодавчих актів України щодо визначення правових наслідків ухвалення судом рішення про заборону політичної партії для статусу депутатів місцевих рад) on amendments to some laws of Ukraine regarding the consequences of the court's decision to ban a political party for the status of deputies of local councils, which provides for the termination of the powers of deputies of local councils chosen from the political power since the announcement of the decision to ban it. During the committee meeting, some of the deputies proposed to develop an alternative draft law based on the four registered ones, but in the end, the majority of the deputies recommended supporting the government draft, and the rest to be included in the agenda and rejected as a result of the review.

The government draft law proposes to supplement Article 5 of the Law "On the status of deputies of local councils" with the following new clause: "The powers of a deputy of a local council are terminated prematurely without a decision of the relevant council in the event that a court decision banning the activity of a political party from which the local organization was nominated and the relevant person was elected as a deputy of the local council, as well as the entry of the deputy of the local council into the deputy faction of the local organization of a political party whose activity is prohibited by a court decision that has entered into force."

We fully agree with the opinion of Yu.G. Barabasha, who noted that when the Constitution was adopted, the parliament potentially had a chance to put an end to this problem once and for all in the matter of banning communist ideology like, for example, their Polish colleagues did in Article 13 of their Constitution which clearly prohibited three ideologies: Nazism, Fascism, and Communism). However, it is quite clear that this was unlikely given the presence in the Verkhovna Rada of Ukraine of approximately one hundred people's deputies representing the same Communist Party (and, therefore, the existence of a serious demand in society for this ideological movement).

Summarizing all of the above, we can come to the conclusion that the concept of militant democracy is just beginning to be implemented in Ukraine, which is extremely necessary in connection with the events currently taking place in the country.

2. Reforming the System of Selection of Judges of the Constitutional Court of Ukraine and Judicial Governance Bodies in Ukraine as a Sondition for Ukraine's Membership in the European Union

On June 17, 2022, the ECommission presented its opinion on Ukraine's application for EU membership and recommended the Council to grant this country candidate status, recognizing that certain steps should be taken in a number of areas. On June 23, 2022, the EU granted candidate status to Ukraine and Moldova. Ukraine received the status of a candidate country for joining the EU in accordance with Article 49 of the Treaty on the European Union, which states that all European countries that meet the criteria can become members.

The EU requirements to Ukraine: adopt legislation on the procedure for selecting judges of the Constitutional Court, which should include a pre-selection process based on an assessment of integrity and professional skills; complete integrity checks of candidates for membership of the High Council of Justice and selection of candidates for the High Qualification Commission of Judges of Ukraine; strengthen the fight against corruption, in particular among top officials; complete the selection and appoint a new director of NABU and a prosecutor of the SAP; ensure compliance of anti-money laundering legislation with the standards of the Financial Action Task Force (FATF); adopt a comprehensive strategic plan for reforming the law enforcement sector; implement the law on oligarchs; bring the mass media legislation into line with the European audiovisual legislation; complete legislative reforms for national minorities.

Implementation of the seven recommendations that Ukraine received along with the candidate status does not mean the automatic start of negotiations. Ukraine will need to work on building a consensus within the EU to start negotiations.

The process of negotiations is called "negotiations," but it is actually the process of introducing European norms, rules, directives and regulations in Ukraine, their transfer into the system of Ukrainian legislation. Each further step in this process of EU enlargement requires the unanimous consent of all member states. And there are many such steps in this process. On June 23, the European Council published seven recommendations on various areas of reform, on which Ukraine should carry out further efforts. The European Commission presented seven recommendations for the implementation of the necessary reforms.

Having signed the association agreement and seeking to pave the way for membership in the European Union, Ukraine has begun the process of adapting legislation to EU law, including constitutional legislation.

At the same time, it is worth noting that at the end of the 1980s, the countries of Central and Eastern Europe voluntarily initiated programs to adapt their politi-

cal, economic and legal systems to the European community. It was a unilateral initiative, without any legal obligations under international law. Even before the Association Agreements, Hungary and Slovenia introduced procedures for examining the draft law for its compliance with EU legislation. Therefore, a question arises about which methods can be used for the effective implementation of adaptation and how the sources of European Union law can influence the choice of adaptation method.

The Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine have determined a list of priority bills in the fields of European and Euro-Atlantic integration for 2022 and a list of EU legal acts that must be implemented in accordance with the 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, bills that are under consideration in the committees of the Verkhovna Rada of Ukraine and need to be checked for compliance with the EU acquis, in particular, we are talking about European integration bills that coincide with the list of bills in the fields of European and Euro-Atlantic integration for 2022, which are defined by the Government as priority. Issues in the field of constitutional regulation include:

– Draft Media Law—Directive 2010/13/EU of the European Parliament and of the Council on audiovisual media services of March 10, 2010, as amended by Directive (EU) 2018/1808 of November 14, 2018;
– Draft Law of Ukraine on Amendments to the Law of Ukraine "On Immigration"—to comply with Article 16 "Cooperation in the field of migration, asylum and border management" of Chapter III "Justice, Freedom and Security" 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;
– The Draft Law on Amendments to the Law of Ukraine "On the Security Service of Ukraine" regarding the improvement of the organizational and legal basis of the Security Service of Ukraine's activities—to comply with the Association Agreement Chapter III "Justice, Freedom, Security" strengthening political and security convergence and efficiency; the effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, etc. (Articles 4, 6, 7; 14, 22, 23);
– Draft Law on Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of the Convention on Choice of Court Agreements—to comply with the Convention on Choice of Court Agreements dated June 30, 2005, Article 14 "Rule of Law and Respect for Human Rights and Fundamental Freedoms" of the Agreement on association between Ukraine, on the one hand,

and the European Union, the European Atomic Energy Community and their member states, on the other hand;

– Draft Law of Ukraine "On the procedure for resolving issues of the administrative and territorial system of Ukraine"—the subject of legal regulation of the draft act is covered by the Regulation of the European Parliament and the Council (EC) No. 1059/2003 of May 26, 2003 on establishing a common classification of territorial units for statistics (NUTS);
– Draft Law of Ukraine "On child-friendly justice" is covered by Article 14 of Chapter III "Justice, Freedom, Security" 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.

However, the matter of the competitive selection of judges of the Constitutional Court of Ukraine remains a key issue, as this is a requirement of trust to the Constitutional Court of Ukraine and the depoliticization of its activity as a body that ensures the supremacy of the Constitution of Ukraine.

The issues submitted to the Constitutional Court of Ukraine are at the highest level: where law and politics meet. These are problems related to the organization and functioning of state authorities or the standards production system; or even to decide on what is called a "social choice" of enormous importance to individuals. In addition, the decisions of the constitutional courts often call into question the acts of the highest authorities of the state, in particular, the laws of the parliament, which are considered to be the expression of the general will.

The Constitutional Court of Ukraine did not stop exercising its constitutional functions under the conditions of martial law. The Court is holding meetings and a number of decisions have already been made, in particular, regarding the enhanced protection of military personnel, the exercise of the right to judicial protection, the presumption of innocence, and the individualization of legal responsibility. The Constitutional Court of Ukraine cited statistical data on the acts adopted by the Court during this period, the total number of which is 204 acts.

And today, the body of constitutional jurisdiction is an element of the system of checks and balances, the appropriate balance between the branches of government, and regulates that they remain within law. It is for this that the Court is given constitutional powers and can recognize laws of the parliament and presidential decrees as inconsistent with the provisions of the Basic Law.

Due to objective reasons, the employees of the Court Secretariat ensure the fulfillment of the assigned tasks remotely or in the administrative building of the Court. In particular, they continue to prepare materials for holding Court sessions, receive and process constitutional complaints, requests for public information, and appeals received by the Constitutional Court of Ukraine, etc.

Since the beginning of the year, the Court has received 71 constitutional complaints. According to the results of their preliminary inspection, 34 constitutional complaints were distributed to judge-rapporteurs. 36 complaints that did not meet the requirements of the Law of Ukraine "On the Constitutional Court of Ukraine" were returned to the subjects of the right to constitutional complaints. One constitutional complaint is being processed at the Court's Secretariat.

Over the past few years, the Constitutional Court of Ukraine has been diligently destroying its reputation and authority. These "merits" include, for example, the looting of some important assets of the anti-corruption reform, which caused the constitutional crisis of 2020, the inhibition of judicial reform, in particular the launch of mechanisms to clean the High Council of Justice and the Supreme Court of unscrupulous judges, constant resistance to the involvement of international experts as to the reform of the Court itself as well as other bodies responsible for judicial appointments, independence and discipline. That is why, in order to further serve the rule of law, the CCU must be significantly improved.

The Venice Commission has repeatedly expressed its comments and suggestions regarding justice reforms, in particular the functioning of the CCU (for example, in the conclusions CDL-AD(2016)034 (Opinion on the draft Law on the Constitutional Court, adopted by the Venice Commission at its 109th Plenary Session, 2016) dated 12.12.2016, CDL-PI(2020)019 (Urgent opinion on the Reform of the Constitutional Court of Ukraine issued pursuant to Article 14a of the Venice Commission's Rules of Procedure, 2020) dated 10.12.2020, CDL-AD(2021)006 (Opinion on the draft law on Constitutional Procedure (draft law no. 4533) and alternative draft law on the procedure for consideration of cases and execution of judgements of the Constitutional Court (draft law no. 4533-1) adopted by the Venice Commission at its 126th Plenary Session, 2021) dated 03.22.2021. The absolute majority of the recommendations of the commission in the specified conclusions were ignored by parliamentarians of Ukraine, but this time disregarding the instructions of the Venice Commission ""For Democracy through Law" may cost much, because one of the conditions of the European Commission is "Adoption and implementation of legislation on the procedure for selecting judges of the Constitutional Court, including the appointment of judges of the Constitutional Court of Ukraine based on an assessment of their integrity and professional skills, as recommended by the Venice Commission."

Amendments to the Constitution of 2016 introduced a new principle of competitive selection of judges, which, however, still requires finalization. In the currently established procedure, behind the facade of the independent appointment of judges by three different entities, the absence of a real competition that would guarantee the integrity of the candidates is hidden. Thus, the congress of judges, the parliament and the president can, at their own discretion, set competitive procedures for

their quotas of judges, involve or not involve independent commissions, even set different selection criteria, since the Constitution uses only vague concepts of "high moral qualities" and "recognized level of [legal] competence." Therefore, the risk of the influence of political motives has not disappeared, and the verification of the candidates' integrity may be hidden from society, which raises doubts about the appropriateness of the results of the competition in general.

In June 2022, the Supreme Court proposed a reform mechanism for the selection of judges of the Constitutional Court, which is required as part of the judicial reform from Ukraine as a candidate for EU membership. According to V. Knyazev, it concerns the requirement that candidates for the position of judge of the Constitutional Court undergo a preliminary integrity check before they are appointed to the position. He noted that today the Ethical Council has been created with the participation of Ukrainian judges and international anti-corruption experts, which is already functioning for the purpose of evaluating candidates for membership of the High Council of Justice.

"It was created on a democratic basis, it is already working, it has to check 60 candidates and it copes with it quickly. So checking 10 more candidates for the position of judge of the CCU will not be a big additional burden for it, especially since it is already financed, working, and all this can be done within a month or two," said the head of the Supreme Court.

At the same time, as Knyazev notes, the congress of judges, which should, among other things, elect two judges of the CCU from the judicial community, was scheduled for mid-July this year. And since there is a requirement that these candidates must be pre-screened for integrity, in his opinion, it will be necessary to postpone the date of the congress of judges to quickly resolve at the legislative level the issues of screening candidates for the position of a judge of the CCU. "In the future, the congress of judges will choose two judges of the Constitutional Court from among the list of honest candidates to fill these vacancies," said the head of the Supreme Court.

The European Commission's recommendation to grant Ukraine the status of a candidate for the EU was a kind of advance for which we are expected to complete only seven steps. The main among them are requirements designed to become the foundation for the reconstruction of an independent judicial system in the state. In fact, the establishment of a clearly defined procedure for the selection of judges at the heart of the constitutional system of the state, the constitutional court, should not be a demand from abroad, but a self-evident step. Likewise, the end of the epic with judicial governance should be the instinct of a state with the rule of law, not a forced measure.

Credibility in constitutional justice appears to suffer when one component is overrepresented or even exclusively represented. Furthermore, a constitutional ju-

risdiction consisting of "pure" lawyers, that is, those who had no other activity in the political or trade union spheres, would certainly not be fully accepted. Conversely, if "politicians" were too dominant, there would also be a compositional dispute.

The constitutional experience of constitutional judges is different. In fact, only a practitioner with extensive experience as a judge, barrister, civil servant, professor or politician can be appointed. Most countries look for a combination of these five groups to bring different experiences of constitutional review.

The real sanction of the legitimacy of constitutional justice is given or provided by public opinion. It is public opinion that, after all, accepts or rejects the institution regarding its jurisprudence and its activities in the state. The composition of the jurisdiction will be criticized if this is not satisfied. However, public opinion is certainly sensitive to the appointment of prominent figures to constitutional bodies, and the recent American example of the highly sensitive confirmation of Justice Thomas shows that attention should be paid to the reaction of public opinion.

In 2021, the start of a competition for the selection of candidates for the post of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine was announced. The competitive commission for the selection of candidates for the post of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine was established by the Decree of the President of Ukraine No. 167 of April 20, 2021. Its personnel was approved by the Decree of the President of Ukraine No. 365 of August 17, 2021, in accordance with the Law of Ukraine "On the Constitutional Court of Ukraine" and its decision (Protocol No. 1 of August 20, 2021) announced the beginning of the competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine.

The procedure and conditions for conducting a competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine are determined by the Law of Ukraine "On the Constitutional Court of Ukraine" and the "Regulation on holding a competition for the selection of candidates for the position of judge of the Constitutional Court of Ukraine for persons appointed by the President of Ukraine," approved by the Decree of the President of Ukraine of August 17, 2021 No. 365.

The requirements for a judge of the Constitutional Court of Ukraine are determined by the Constitution of Ukraine and the Law of Ukraine "On the Constitutional Court of Ukraine."

Despite serious reservations about the legality and timing of the competition, expressed by individual members of the Competition Commission in separate opinions, the competition was announced on August 23, 2021. The conclusion of the Venice Commission, adopted in 2020 at the request of President V. Zelensky

after the constitutional crisis, states that the appointment of judges should take place only after competitive selection. This should stop the practice of political dependence of judges, which is the main source of problems in the CCU. The Venice Commission twice emphasized the need to introduce a competitive procedure, but four judges of the Constitutional Court have already been appointed contrary to this recommendation.

On July 28, 2022, the Verkhovna Rada of Ukraine appointed a judge of the Constitutional Court contrary to the Constitution of Ukraine because the People's Deputy did not submit his parliamentary mandate before the election, which is a clear violation of Part 3 of Article 11 of the Law of Ukraine "On the Constitutional Court of Ukraine." According to the norm of this article: "A judge of the Constitutional Court must meet the criterion of political neutrality. A judge may not belong to political parties or professional unions, publicly show support for them, or participate in any political activity. In particular, a person may not be appointed a judge of the Constitutional Court who, on the day of appointment:

1) is a member or holds a position in a political party, other organization that has political goals or participates in political activities;
2) is elected to an elected position in a state authority or local self-government body, has a representative mandate;
3) participates in the organization or financing of political campaigning or other political activities.

A judge of the Constitutional Court cannot combine their position with any position in a body of state power or a body of local self-government, a body of professional legal self-government, with the status of a people's deputy of Ukraine, a deputy of the Verkhovna Rada of the Autonomous Republic of Crimea, oblast, district, city, district in a city, village council, with another representative mandate, with advocacy, with entrepreneurial activity, hold any other paid positions, perform any other paid work or receive other remuneration, with the exception of carrying out teaching, scientific or creative activities and receiving remuneration for them, and also cannot be a member of the governing body or supervisory board of a legal entity whose purpose is to obtain profit."

The voting results indicate a gross violation of the procedure for appointing judges of the Constitutional Court of Ukraine by the Parliament of Ukraine.

It should be noted that the judge from the parliament was appointed to the post of judge of the Constitutional Court of Ukraine S. Shevchuk, who was dismissed from his post on May 14, 2019 due to gross procedural violations. S. Shevchuk appealed to the Kyiv District Administrative Court, by whose decision he was reinstated, but the Acting Chairman of the Constitutional Court of Ukraine, O. Tupytskyi, who is currently wanted internationally, refused to comply with this court decision.

S. Shevchuk appealed to the European Court of Human Rights with application No. 474/21 (Application no. 474/21 Stanislav Volodymyrovych Shevchuk against Ukraine lodged on 28 December 2020 communicated on 22 November 2021). The applicant complains under Article 6 § 1 of the Convention that the CCU was not an "independent and impartial court established by law" because (i) the CCU did not follow the rules when considering the issue of the applicant's dismissal, in particular, there was no decision of the plenary session of the CCU to authorize the permanent commission of the CCU to consider the disciplinary case, and the applicant was not properly informed about this proceeding; (ii) some of the CCU judges who sought disciplinary proceedings against the applicant or were witnesses in relation to the disciplinary charges participated later in the CCU proceedings. Referring to paragraph 1 of Article 6, the applicant claims that the commission on the regulations of the CCU and the plenary session of the CCU did not ensure equality of the parties since the applicant was not given the opportunity to defend himself personally or through his lawyer and to refute the disciplinary charges. The applicant also complains under Article 6 § 1 and Article 13 that the national administrative courts violated his right of access to a court, as they refused to exercise their jurisdiction to review the decision of the SSC to dismiss the applicant. The applicant complains that his dismissal violated Article 8, as it had a serious impact on his private life, and Article 10, as it was a measure of retaliation in response to public comments he made in March 2019 concerning the election of the President of Ukraine.

Therefore, the new judge was appointed by the Parliament of Ukraine to the position of the judge of the Constitutional Court of Ukraine, regarding whom the legal dispute had not been resolved.

On August 12, 2022, the People's Deputies of Ukraine registered the draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for Selecting Candidates for the Position of Judge of the Constitutional Court of Ukraine on Competitive Basis" No. 7662, which provides for amendments to the Law of Ukraine "On the Regulations of the Supreme of the Council of Ukraine," the Law of Ukraine "On the Constitutional Court of Ukraine," and other normative legal acts. The main novelty proposed by the People's Deputies is the creation of an Advisory Group of Experts which includes: 1) one person appointed by the President of Ukraine; 2) one person designated by the Verkhovna Rada of Ukraine; 3) one person determined by the Congress of Judges of Ukraine; 4) one person designated by the Venice Commission "For Democracy through Law"; 5) two persons designated by international and foreign organizations who, in accordance with international or interstate agreements, have provided Ukraine with international technical assistance in the field of constitutional reform and/or rule of law, and/or human rights protection, and/or prevention and anti-corruption.

The draft law defines the procedure for conducting a competition for the position of judge of the Constitutional Court of Ukraine by constitutional subjects of appointment, however, the holding of a competition by the President of Ukraine in accordance with Article 102 of the draft law remains unchanged, in particular, "Selection of candidates for the position of judge of the Constitutional Court on a competitive basis for persons appointed by the President of Ukraine is carried out by the competitive commission created by the President of Ukraine. The composition of the competitive commission created by the President of Ukraine is formed from the number of lawyers with a recognized level of competence who do not participate in the competitive selection for the position of judge of the Constitutional Court." Therefore, the President of Ukraine delegates his candidate to participate in the work of the Advisory Group of Experts on conducting the competition by the Parliament and the Congress of Judges of Ukraine, but this body does not participate in the competition conducted by the President of Ukraine. Moreover, the question of forming a rating of candidates remains unresolved, which, as practice shows, is not taken into account when appointing judges.

Thus, in order to implement the recommendations of the Venice Commission, while not violating the Constitution of Ukraine, it is possible to create a single body for vetting candidates for the position of judge of the CCU, which would include international and public experts, which would ensure a transparent vetting of candidates, as well as the selection of candidates according to the same criteria: in addition to formal ones based on age and seniority also on clear criteria of moral qualities and level of competence. Further, according to the assessment of such a body, a single list of candidates who have passed the check would be sent to the powerful subjects for their own appointment to positions. However, as we can see, this did not find support in the draft law on amendments to the Law of Ukraine "On the Constitutional Court of Ukraine."

Particular attention should be paid to the peculiarities of the administration of justice in conditions of military aggression. In connection with the full-scale invasion of the Russian Federation on the territory of Ukraine, the conduct of active hostilities and the temporary occupation of certain territories, a number of courts in the Donetsk, Zhytomyr, Zaporizhzhya, Kyiv, Luhansk, Mykolaiv, Sumy, Chernihiv, Kharkiv, and Kherson regions have suspended their activities. As a result, by the relevant orders of the Chairman of the Supreme Court "On changing the territorial jurisdiction of court cases under martial law," taking into account the impossibility of courts to administer justice during martial law, the territorial jurisdiction of court cases considered in these courts was changed.

The implementation of such powers by the Chairman of the Supreme Court became possible thanks to the legislative changes to the seventh part of Article 147

of the Law of Ukraine "On the Judicial System and the Status of Judges" adopted at the beginning of March 2022. This article in its current version stipulates that in the event of the impossibility of justice by the court for objective reasons during a state of war or emergency, in connection with a natural disaster, military operations, measures to combat terrorism or other extraordinary circumstances, it is possible to change the territorial jurisdiction of court cases considered in such a court, by a decision of the High Council of Justice, which is adopted at the request of the Chairman of the Supreme Court, by transferring it to the court that is closest territorially to the court that cannot administer justice, or to another specified court. In the event that the High Council of Justice is unable to exercise such authority, it is exercised by order of the Chairman of the Supreme Court. The corresponding decision is also the basis for the transfer of all cases pending before the court whose territorial jurisdiction is changing.

If the period from the end of February to mid-April 2022 was marked by permanent changes in the territorial jurisdiction of many courts that found themselves in the occupied territory or were in the immediate zone of hostilities, then starting from April 21, the Supreme Court adopted an order to restore the territorial jurisdiction of court cases.

According to the recommendations of the Council of Judges of Ukraine dated March 2, 2022, judges are recommended to postpone the consideration of cases (with the exception of urgent court proceedings) and to remove them from consideration if possible, to take into account the fact that many participants in court proceedings do not always have the opportunity to submit an application for postponement of the consideration cases due to involvement in the operation of critical infrastructure, joining the ranks of the Armed Forces of Ukraine, territorial defense, volunteer military formations, and other forms of countering armed aggression against Ukraine, or cannot appear in court due to danger to life.

Cases that are not urgent are recommended to be considered only with the written consent of all participants in the court proceedings.

At the same time, courts are increasingly actively using the possibility of holding hearings remotely, in the mode of video conferences. This is not surprising, since the negative consequences of military aggression against Ukraine, fuel shortages and disruption of transport connections between cities make it much more difficult for the participants in the process to move to other regions of Ukraine.

The temporary suspension of the work of the Unified State Register of Court Decisions, as well as the compromised functionality of the website of the judiciary "Status of Cases" due to the military aggression of the Russian Federation significantly affected the ability to receive information about the progress of court cases and court decisions.

Now the participants in court proceedings have to do the same as they did 8-10 years ago: look for the court phone number in available sources, call the reference or office of the court (recordkeeping department) and find out information about the case there, or look for the phone number of the assistant or secretary of the court session to get the necessary information on the case. You can also inform by phone that you have sent a petition signed by the KEP by e-mail and ask to check whether it has not gone to spam.

Along with this, although the "Electronic Court" system is positioned as one of the effective methods of remote judicial proceedings and was created to replace offline court sessions, its use is not always easy. One of the examples—in addition to the usual network problems when the system "freezes" for various reasons—can also be a situation when the parties to the proceedings are given access to the case materials in electronic form, but for various technical reasons, the litigant cannot get acquainted with them. As a result, it is necessary to postpone the consideration of the case so that everyone has the opportunity to get acquainted with its materials. And even in such cases, judges go to meet the parties and send scanned copies of cases and individual materials to the e-mail address specified by the disputant.

The Ukrainian judicial system continues to function and decently overcome the difficulties caused by the war. The uninterrupted functioning of the system is ensured by the Supreme Court by changing the territorial jurisdiction. Access to justice can be ensured either by direct participation in court sessions or by video conferencing. At the same time, it can be stated that judges show more understanding to litigants who, for various reasons caused by martial law, cannot attend court sessions and prepare procedural documents on time. This is expressed in the fact that court sessions are postponed, and the deadlines for submitting procedural documents are extended.

Implementation of continuous and proper justice in force majeure conditions requires certain legislative changes and additions, primarily of a procedural nature, in particular, regulation of the remote form of work. The fact is that judges continue to consider cases and make court decisions, and the VRP has already received complaints about the remote form of work of judges with a request to bring them to disciplinary responsibility.

In an extreme situation in Ukraine due to the state of war, in order to protect both the parties to the court case and the judges, special tools must also be created. For example, a judge can be in a safe place if he alone makes a court decision and there is an opportunity to sign it with an electronic signature. In the case of consultations and meetings with colleagues, judges can be at home and connect to a video conference through secure communication systems. In the case of an oral hearing, according to the speaker, only one of the judges (perhaps the presiding judge) should be in court to ensure openness and publicity of the judicial process.

The working group under the Committee of the Verkhovna Rada of Ukraine on legal policy, which includes judges and lawyers, representatives of the State Judicial Administration of Ukraine, and the Ministry of Digital Transformation of Ukraine, prepared a draft law in March 2022 which provided for the simplification of judicial proceedings. The judges proposed to use written proceedings more widely without notifying the parties, without holding a court session, to notify the participants of the case by all means of communication known to the court: by regular mail, e-mail, through social networks, text messages, as well as by phone. In addition, there was a proposal to ensure the possibility and obligation of notification of the participants in the court case through the "Action" system.

In the first version of the draft law, remote working outside the court premises for judges and court staff was also proposed, but later it was decided to submit this issue in a separate draft law, since the initiative was not supported by the majority of the members of the Committee of the Verkhovna Rada of Ukraine on Legal Policy.

Unfortunately, draft law No. 7316 on amendments to the procedural codes regarding judicial proceedings under conditions of martial law or state of emergency did not receive the required number of votes in the Verkhovna Rada of Ukraine. The working group will continue to work on it, improve it and propose it as a new draft law.

Taking into account the fact that in the conditions of military aggression against Ukraine, personal participation in the court session can be dangerous for the participants in the case, participation in the court session outside the court premises in the mode of video conference is actively practiced. Jurisprudence shows that the courts mostly grant the petitions of the participants in the case to participate in the court session in the mode of video conference outside the court premises if the appropriate technical possibility is available.

So, for example, the Grand Chamber of the Supreme Court, considering a cassation appeal, noted in its decision dated June 7, 2022 in case No. 910/10006/19 that in view of the conditions and environment under which justice must be administered and the need to observe the principles of equality all participants in the legal process before the law and the court; transparency and openness of the judicial process; adversarial nature of the parties and reasonable terms of consideration of the case, applying to the court with a request for consideration of the case in the mode of video conference will allow to investigate and evaluate the arguments of the cassation appeal without violating the specified principles of judicial procedure and at the same time guarantee, and not expose the visitors of the court session to threats to, their life, health and safety, which may arise in the conditions of military aggression against Ukraine.

However, taking into account that many courts do not always have the opportunity to hold sessions in the video conference mode, the participant in the court

process should clarify the relevant information in court in advance. In addition, the availability of the appropriate technical capability in the court may be indicated in the decision to open proceedings in the case.

Thus, the martial law in Ukraine resulted in adjustments to the process of consideration of court cases. However, even under martial law, a person's constitutional right to judicial protection cannot be limited. Therefore, the measures that are currently implemented in the judicial system are aimed at ensuring the possibility of considering court cases and not endangering the life and health of the participants in the judicial process.

3. The Legal Framework and Practical Issues of Implementing Activities of the Ombudsperson during the State of Martial Law in Ukraine[1]

To enable smooth and efficient work of the Ukrainian Parliament Commissioner for Human Rights (Ombudsperson), especially during the state of martial law in the country, the existing regulatory and legal framework governing the activities of the Ombudsperson in Ukraine should be analysed clearly, precisely, and comprehensively. This section seeks to identify if the Ombudsperson is provided with enough powers, resources, and flexibility to achieve his/her goals in this specific state.

The interest to the status and mandate of the Ukrainian Ombudsperson is dictated by the military aggression of Russia taking place on the territory of Ukraine, since the human rights violations committed because of the aggression are investigated by various international organizations and Ukrainian state institutions, including the Ukrainian Parliament Commissioner for Human Rights. Besides the legal status of the Ukrainian Ombudsperson, this section analyses his/her relations with other state institutions: Verkhovna Rada (the Ukrainian Parliament), the Cabinet of Ministers (the Ukrainian government), the Constitutional Court of Ukraine, other courts, etc., together with the scope of the Ombudsperson's functions and powers (mandate). It should be emphasized that in the recent years, the legal evaluation of the status of the Ombudsman in constitutional and administrative jurisprudence has received attention in Europe since the Ombudsperson's mandate is evaluated in the interconnections with the fundamental rights such as an individual's right of effective legal protection (Resolution of Constitutional Court of the Republic

[1] In this analysis, the terms "Ompudsperson in Ukraine" or "Ukrainian Parliament Commissioner for Human Rights", "Ombudsman" or "the Commissioner" are used.

of Lithuania, 2011; Resolution of the Constitutional Tribunal of the Republic of Poland, 2021). Notwithstanding the fact that the existing Ukrainian law governing the mandate of the Commissioner follows European and international standards, some factors indicate that it needs to be improved.

I. Status of the Commissioner in the State Institution Landscape

As an independent and constitutionally defined body, the Parliamentary Commissioner for Human Rights in Ukraine holds an important place in the institutional structure of national authorities. The activities of the Commissioner are a constituent part of the national system for protection of human rights and are important in the light of the Russian aggression on the territory of Ukraine. The Commissioner is an integral part of the system of constitutional rights and freedoms that includes the judiciary, the President of Ukraine, the Verkhovna Rada of Ukraine, and supranational judicial authorities. It can be maintained that the establishment of the Commissioner institution on the constitutional level and a wide mandate given to them contributes significantly to the development of democratic accountability of state authorities.

The Commissioner is not a part of or under a direct control of any public authorities. Even though he has strong ties with the Parliament, he operates autonomously from the legislator as well as executive government, and the courts.

The legal norms defining the status—among others, rules for appointment, cessation, and accountability of the Commissioner, his competence and relationship with other state institutions—are established in several sections of the Constitution of Ukraine: Section II "Human and Citizens' Rights, Freedoms and Duties," Section IV "Verkhovna Rada of Ukraine," and Section XII "Constitutional Court."

The constitutional norms, which are set out in Section II "Human and Citizens' Rights, Freedoms and Duties," establish a strong mandate for the Commissioner in the sphere of the protection of human rights. In this regard, two points should be made.

First, pursuant to Article 55(2) of the Law of the Commissioner, everyone has the right to appeal for the protection of his or her rights to the Ukrainian Parliament Commissioner for Human Rights (Ombudsmen). In this case, the name of the ombudsman clearly reflects his mandate. The Commissioner has an express human rights protection role. The legal context of that provision must also not be overlooked. The fact that the constitutional provisions are laid down in the section of the Constitution which is aimed at establishing certain catalogue of human rights might be seen as an extension of constitutional rights.

Second, in the Constitution, the Commissioner is provided with a similar institutional background to that occupied by the courts. In this regard, the position of legal norms regarding the status of the Commissioner in the text of the Constitution should be noted. These norms are introduced immediately after legal provisions establishing that everyone shall be guaranteed the right to challenge in court the decisions, actions, or inactivity of State power, local self-government bodies, officials, and officers (Article 55(1) of the Constitution). Thus, under the Constitution it is for the courts and the Commissioner to protect human rights and freedoms.

Section IV of the Constitution extends the mandate of the Commissioner further. The Commissioner is not only vested with the responsibility to protect human rights and freedoms but is also under a duty to observe the situation regarding the implementation of the human rights in general. More precisely, pursuant to Article 101, the Ukrainian Parliament Commissioner for Human Rights shall conduct the parliamentary control over *observance* and protection of human and citizens' constitutional rights and freedoms.

This section of the Constitution also clearly defines the relationship between the Commissioner and legislative branch of the government. As provided for under Article 85(17), it is for the Verkhovna Rada of Ukraine to appoint and remove from the office the Ukrainian Parliament Commissioner for Human Rights; and to hear the Commissioner's annual reports on the situation in the sphere of observance and protection of human rights and freedoms in Ukraine.

Lastly, Section XII of the Constitution further strengthens the position of the Commissioner in the institutional landscape. Article 150(1) of the Constitution expressly entitles the Commissioner to apply to the Constitutional Court regarding the questions of constitutionality of certain legal acts. It is important to underline that constitutionality issues shall also be considered upon request from the President of Ukraine, a group of no less than forty-five people's deputies of Ukraine, the Supreme Court of Ukraine, or the Verkhovna Rada of the Autonomous Republic of Crimea. Thus, in this regard, the Commissioner holds a very strong position that can be compared to the one occupied by key state institutions.

The constitutional provisions are accompanied by legal norms laid down in the Law of the Commissioner. The norms set out in this Law provide for a more detailed description on the Commissioner's status and his exact role and purpose. It further stresses that the Commissioner is independent from the government or any other body or person. Statutory independence is formalised under Article 20 of the Law of the Commissioner. As far as the relationship with other state institutions is concerned, one shall particularly note Article 4(2) of the Law of the Commissioner which provides that the Commissioner supplements legal remedies for violation of constitutional human rights and freedoms. It neither repeals them nor results in

reviewing the competence of state bodies which ensure protection and restoration of violated rights and freedoms.

In summary, the explicit recognition for the Commissioner in the Constitution ensures that the activities of the Commissioner come with increased protection. After all, the more complicated it is to amend the legal basis for the activities of the Commissioner, the more likely that the Commissioner will continue to operate on a permanent basis. It also serves to ensure that the findings of the Commissioner regarding the activities of public authorities are taken as seriously as judicial protection.

Under this heading, special mention shall also be made on the questions regarding Commissioner's activities in wartime, because it deals with the access to public information and personal data protection. Dualism of the Commissioner's functions (first, as a national institution for human rights protection and additionally as a controller in the spheres of personal data protection and access to public information) makes it somewhat difficult to describe the position of the Commissioner within the institutional background of Ukrainian public authorities with a sufficient legal certainty.

II. Guarantees of the Commissioner

It may be argued that the legal framework offers every requisite guarantee of independence to the Commissioner.

First of all, it should be stressed that the status of the Commissioner is established in the Constitution of Ukraine. Thus, independence of the Commissioner is enhanced through constitutional recognition. Further, the Commissioner is granted formal independence underpinned by the legislative connection. The Commissioner is separate from the law-making bodies and the executive branch. It is an important and necessary condition of impartiality and effectiveness.

The legal notions regarding the guarantees of the Commissioner are contained in a few articles of the Law (mainly set out in Article 4, Article 20, and Chapter III).

Certain institutional separation of the Commissioner's office from the legislator is reflected by the legal norms laid down in Article 4 of the Law. It is provided that the powers of the Commissioner shall not be suspended, restricted in case of termination of the Verkhovna Rada of Ukraine or its dissolution, the introduction of martial law or the state of emergency in Ukraine or in its certain areas. Likewise, legal provisions are set out in the Law on the Legal State of Emergency and the Law on the Legal Regime of the State of War.

As regards the independence from the executive, one should refer to Article 4 and Article 20 of the Law of the Commissioner. As provided for under Article 4(2) of the Law, the Commissioner performs his duties independently from any state authorities or their officials. This guarantee is further supported by more elaborate legal regulation laid down in Article 20. Pursuant to Article 20(1), any interference in the work of the Commissioner by the public authorities, local governments, public associations, enterprises, institutions, and organizations irrespective of ownership and their officials is prohibited. In addition to this, the Commissioner is not obliged to provide any explanations on details of the cases under consideration (Article 20(2) of the Law of the Commissioner).

For the Commissioner to be able to implement his functions effectively, it is necessary for him to be assisted by the competent administration. In this regard, Article 10 of the Law establishes that the activities of the Commissioner shall be secured by the Secretariat (detailed in a separate paragraph below). The structure of the Secretariat, distribution of duties and other organization matters fall into the discretion of the Commissioner. In addition to this, the Commissioner is entitled to appoint Representatives (for further details, refer to Article 11 of the Law).

The above-mentioned guarantee of administrative nature is closely connected with financial independence. The activity of the Commissioner is funded from the state budget of Ukraine and is annually envisaged in a separate line. The Commissioner develops, submits for approval by the Verkhovna Rada of Ukraine and performs its estimate of costs (Article 12 of the Law of the Commissioner). A point of criticism is that once approved, the budget usually is not revised despite existing legal regulation on the issue.

Finally, the guaranties of individual kind shall be discussed, as they are provided for under Article 20 of the Law of the Commissioner.

First, the protective immunity of the Commissioner has been established and maintained regarding criminal and administrative liability. Under Article 20(3) of the Law, in performing his duties, the Commissioner cannot be, without the consent of the Parliament, held criminally liable, subject to administrative punishment imposed by the court, detained, arrested, subjected to search and personal examination. The criminal proceedings against the Commissioner may be instituted only by the Prosecutor General of Ukraine.

Second, the Law establishes certain social and health protection guarantees setting out that the state provides the insurance in the event of death, trauma, disability, or illness developed during performance of official duties.

Third, additional guarantees regarding the expiration of the term of the Commissioner are also worthy of special mention. According to Article 20(4), upon the expiration of the term, the Commissioner retains the right to return to his previous

post or be appointed to an equivalent one. Nevertheless, there arise certain concerns for implementation of this guarantee in practice.

In this context, it is of importance to point out that the Law of the Commissioner is silent on the rank of the Commissioner vis-à-vis other state officials. The status of the Commissioner is not linked to other high-level officials in terms of remuneration, allowances, or pension. In addition to this, the Law of the Commissioner does not provide for an immunity established for the Office that would extend to the inviolability of the institution's possessions, documents, and premises.

Guarantees of independence of the Commissioner are also manifested in various legal provisions of the Law, especially regarding the appointment, re-election, and cessation of the office procedures. Each of them shall be discussed below in more detail.

Appointment

The Commissioner is appointed for the term of five years by the parliament. Article 85(17) of the Constitution establishes that the Commissioner is appointed and removed from the office by the Verkhovna Rada of Ukraine. The same legal notions are provided by the Law of the Commissioner.

The parliament has also been given an active role in the selection procedure for the position of the Commissioner. As described by Article 6(1) of the Law of the Commissioner, candidates may be nominated by the Chairman of the Verkhovna Rada of Ukraine or one-fourth of People's Deputies of Ukraine. There is no limit as to the number of candidates and more than two candidates may take part in the election procedure.

The Law of the Commissioner grants rather wide opportunities to stand as a candidate in the procedure for the Commissioner's appointment. The Commissioner shall be chosen from among persons who are citizens of Ukraine and who have been residing in Ukraine for the last five years and who will have attained the age of 40 on the day of election. In addition to this, candidates shall have good command of the state language, high moral qualities, and experience in human rights protection (Article 5(2) of the Law of the Commissioner). It should also be pointed out that in 2012 certain restrictions relating to good repute of candidates were introduced to the Law of the Commissioner. Current legal regulation requires the candidates to provide an assets and income declaration. The candidates must also be checked in light of the framework for preventing and counteracting corruption. In 2012, the Law of the Commissioner also established a direct prohibition to stand as a candidate for

individuals who have a criminal record which is not expired or who have been given an administrative punishment for corruption over the past year.

The Commissioner is elected by the absolute and not the qualified majority of parliament members' votes (Article 6(4) of the Law of the Commissioner). Following the line of arguments also presented by competent international organisations (e.g., Council of Europe. Recommendation 1615 (2003); Venice Commission's 'Compilation of the Ombudsman Institution', 2011; Transparency International Report on National Integrity System Assessment Ukraine, 2015) it is desirable to review the Law in a way which ensures that the Commissioner has full support of the parliament.

Re-election

The Commissioner is eligible for reappointment. The Law of the Commissioner does not establish any prohibition for the outgoing Commissioner to be nominated again, even though there is no legal notion setting out that the Commissioner shall be eligible for reappointment. In this regard, one can also point out that the first Commissioner of Ukraine, Nina Karpachova, remained in the office for three consecutive terms (in 1998, 2003, and 2007).

Cessation of the Commissioner's Duties

Article 85(17) of the Constitution of Ukraine and, accordingly, Article 9(6) of the Law of the Commissioner establish that it is for the Verkhovna Rada of Ukraine to adopt a decision regarding the cessation of the Commissioner's duties. Further conditions for the cessation of the Commissioner's duties are laid down in the Law of the Commissioner. The Commissioner shall cease to exercise his duties either at the end of his term of office or on his resignation or dismissal.

The first grounds, set out in Article 9(1) of the Law, concern the termination of authority. These cases include: (1) the resignation, (2) conviction with definitive judgment, (3) legal declaration of missing or presumed dead, (4) the start of the authority of newly elected Commissioner, and (5) the death.

The second group of grounds for the cessation of the Commissioner's duties concerns the dismissal from the post (see Article 9(2) of the Law). Accordingly, the Commissioner may be dismissed from the post in the following cases: (1) violation of the oath, (2) failure to meet the restrictions applied to the Commissioner' status, (3) the loss of nationality, (4) inability to continue in his present duties for certain medical reasons.

Out of all these grounds, it is worthy to address a violation of the oath separately. Pursuant to Article 7 of the Law, the Commissioner swears to protect human rights and freedoms honestly and scrupulously, conscientiously perform duties, honour Constitution and law, and be guided by justice and personal conscience. He also commits to acting in independent and unbiased manner, serving human rights. This ground is vague and potentially very wide. This is even more so since the legal framework does not provide for impeachment procedure or establishment of competent investigation commissions at the parliament.

The application of Article 9(2)(2) setting out that the Commissioner shall be dismissed in case he starts activities incompatible with the duties of Commissioner is also subject to separate mention. As provided for under Article 8(1) of the Law, the Commissioner shall not have representative mandate, hold any other positions at state authorities or perform any other paid or unpaid work, except teaching, scholarly or any other creative activities. The Commissioner also shall not be a member of any political party. It should be pointed out that the application of Article 9(2)(2) is only triggered where the Commissioner fails to meet the requirements within ten days once the incompatibility is discovered (see Article 8(6) of the Law).

In this context, it is interesting to note that the failure to continue to be eligible for the post the Commissioner may result in different legal consequences. For example, in the case when the Commissioner no longer holds the citizenship of Ukraine, a decision on his dismissal shall be adopted. Meanwhile, a conviction with definitive judgment shall result in termination of the authority. In regard to this, it can be maintained that there is room for improving the coherency of the existing legal regulation.

There are no legal notions that would aim to directly regulate the situation where, save in the event of the dismissal, the Commissioner's mandate comes to an end, however, the new Commissioner has yet to be appointed. Nevertheless, the systemic reading of the legal norms may lend some support for the temporary solution of the situation. In this regard, one can note that the Law of the Commissioner does not establish explicitly that the authority of the Commissioner terminates when the term of the office expires. This may be interpreted as entitling the outgoing Commissioner to perform the duties until the newly elected Commissioner takes the oath; this is especially so where Article 6(2)(3) is read in conjunction with Article 9(4).

Even though this interpretation of the law covers the case when the office of the Commissioner expires, the same cannot be said with certainty regarding the resignation of the Commissioner. As provided for under Article 9(1)(1), the resignation is a ground to terminate the authority. Accordingly, once the authority of the Commissioner has been terminated, Article 6 of the Law of the Commissioner requires that the candidates shall be nominated within twenty days. The voting at the parliament

takes place in another twenty days at the latest. However, where there is no agreement in the parliament, which shall be expressed by the majority of votes, the candidates shall be nominated again. Thus, it cannot be excluded that the application of current legal regulation could result in legal uncertainty.

In addition, after the start of the full-scale invasion, the Law on the Legal Regime of Martial Law (Закон України Про правовий режим воєнного стану) was amended regarding the functioning of local self-government during the period of martial law. Article 11 of the Law on the Legal Regime of Martial Law now specifies that "during the period of martial law, the President of Ukraine may make a decision to remove an official from his/her position, the appointment and dismissal of whom are within his powers, and assign duties to another person for the corresponding period. A person who is entrusted with the performance of the duties under this part must meet the requirements established by law for occupying the relevant position, considering the provisions of this law." With the package of amendments, the wartime legislators also expanded their powers to dismiss the Commissioner for Human Rights or ministers. It is assumed that during the period of martial law, the Verkhovna Rada (the Ukrainian parliament) may express no confidence in officials it appoints (except for officials whose appointment and dismissal are carried out by the Verkhovna Rada of Ukraine at the request of the President of Ukraine or the Cabinet of Ministers of Ukraine).

The issue of expressing no confidence can be initiated by the Chairman of the Verkhovna Rada of Ukraine or at least one-fourth of the People's Deputies of Ukraine from the constitutional composition of the Verkhovna Rada. Such an issue is considered at the plenary session of the Verkhovna Rada immediately in accordance with the Regulations of the Verkhovna Rada of Ukraine, without considering the procedures provided for by special laws determining the legal status of the relevant officials. The decision to express no confidence is considered adopted if most of the constitutional members of the Verkhovna Rada voted for it. The expression of no confidence by the parliament results in the dismissal of an official from his position. Thus, based on the procedure specified above, the Ukrainian parliament dismissed the previous Commissioner for Human Rights, L. Denisova, and appointed D. Lubinets to this position.

III. Mandate of the Commissioner in General

The Office of the Commissioner has been established as an independent constitutional body charged with the duties to observe and protect human rights. To this end, over the years the Commissioner's Office has grown in competence and

has been assigned legal powers, among others, within legislative, executive, and judicial spheres.

From a historical point of view, it should be mentioned that the Law of the Commissioner was adopted on December 23, 1997 and entered into force on January 15, 1998. Over the years, there have been several amendments to the Law which essentially extended the Commissioner's mandate. In 2008, it was established that the Commissioner has the right to exercise control over the ensuring equal rights and opportunities for women and men. In 2012, the Law was supplemented with the legal notions setting out that the Commissioner has the right to submit proposals for improvement of the legislation and the activities of institutions working in the sphere of the protection of human rights. In the same year, the Law was also supplemented by Article 19-1 which laid down the legal notions regarding the performance of functions of national preventive mechanism by the Commissioner. In this regard, the Commissioner is entrusted with functions of national preventive mechanism pursuant to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In addition to this, Article 13 of the Law of the Commissioner was amended on several other occasions in 2014. The mandate was expanded by establishing that the Commissioner is entrusted with the function to observe the implementation of the right to access to public information. Independent of his participation in the court proceedings, the Commissioner was also given the power to initiate the review of court judgments. It was also established that the Commissioner has the right to exercise other authorities set out in the law.

In the legislative area, the Commissioner's input is given on future and existing legislation since the fact whether legislation regarding human rights is sound and effective is a theme commanding Commissioner's constant attention. Indeed, the Commissioner has been given different legal instruments to be used prior to legislation being drafted and those to be used in response to existing legislation. Without doubt, the evolved and strengthened role of the Commissioner shall result in the development of a more structured relationship with the legislative bodies.

The core function of the Commissioner continues to be protection of individuals from unfair actions of the state. The law has no exceptions and extends the jurisdiction of the Commissioner to the legal relationships between private individuals and state authorities, bodies of local self-government, any other institutions irrespective of their form of ownership, and their employees. To this end, the Commissioner has the right to consider individual complaints and issue authoritative opinions and recommendations. Where appropriate, the Commissioner may assist in facilitating access to available legal and judicial remedies. Over the years, as reflected by annual reports, the Commissioner has investigated many issues including social welfare

pension claims, serious misbehaviour in prisons, protection of mentally ill persons, etc. Nevertheless, moving from specific and individual concerns towards solutions on systemic problems within public administration shall be of no less importance.

Lastly, the Commissioner's mandate on the protection of human rights also includes additional or secondary duties such as personal data protection and access to information. Further, protection of the right to private life or the right to access to information is supported by coercive measures and sanctions. Under these circumstances, these functions of the Commissioner require further consultations since the legal framework and practical experience in implementing it seem to suggest at first that this role may overshadow the other functions of investigating maladministration and preventing human rights violations. Creation of separate state institution, so-called the Information Commissioner having double powers in fields of personal data protection and access to information, could be an alternative solution to the problem (The Commissioner has launched a public consultation on the creation of the institute of the Information Commissioner).

IV. Mandate of the Commissioner in a Protection of Human Rights Investigating Individual Complaints

Within the current legal framework and the conditions laid down therein, the task of the Commissioner is to start an objective investigation into the behaviour of the state authority in the sphere of human rights protection. The field of investigation covers all administrative actions, including inaction or delays.

The Commissioner is sufficiently freely accessible to natural or legal persons. Pursuant to Article 2(2) and Article 17(1) of the Law of the Commissioner, any citizen, foreigner, stateless persons or their representatives, as well as a legal person may refer a complaint to the Commissioner in respect of an instance of human rights violations in the activities of state authorities. The Law of the Commissioner sets out single limitation applied for lodging individual complaints. Pursuant to Article 17(2), complaints shall be submitted within the period of one year after disclosure of human rights violations. In the case of exceptional circumstances, this time limit may be extended by the Commissioner but should not exceed two years. The Law of the Commissioner sets out in no other conditions under which a complaint may be referred to the Commissioner. However, one should note that certain requirements to individual complaints are laid down in the Law on Citizens' Appeals.

Additionally, the investigation may also be started on Commissioner's own motion (as foreseen under Article 16(3) of the Law of the Commissioner). The same

article establishes that the relevant information regarding possible human rights violations may also be submitted by People's Deputies of Ukraine. The investigations ex officio are usually directed at the systemic problems in the sphere of the protection of human rights. The Commissioner addresses the international human rights norms and refers to the case-law of the European Court of Human Rights in the resolution of individual complaints or constitutional submissions.

The Commissioner has been given strong powers of investigation. There are no indications that the legal regulation lacks any guarantees for a full access to all the elements required for the performance of his duties. The powers of investigation include access to classified information or documents; legal duty of the state authorities to supply the Commissioner with any information at his request; the right to invite officials, civil servants, and private persons to obtain oral and written explanations on circumstances under review, and other powers provided under Article 13 and Article 22 of the Law of the Commissioner. Thus, in considering individual complaints or performing investigation on his own motion, the Commissioner's activities are inquisitorial in nature, i.e., he can review documents, access all kind of information, request explanations from the state bodies concerned. He can, therefore, adopt a decision based on information that may not be available to the person who lodges the complaint.

The Law of the Commissioner does not provide any special rules or procedures to be followed where the Commissioner receives individual complaint or performs investigation on his own initiative. As it is established in Article 17(1) of the Law, in performance of his investigative duties the Commissioner follows the procedures laid down in the Law on Citizens' Appeals. The Law on Citizens' Appeals sets out the requirements to individual complaints, grounds for refusing to consider complaints, procedural rights of private individuals, time limits for consideration of individual complaints, duties of the competent authority in considering complaints and other fundamental aspects of administrative procedure. The rules set out in the Law on Citizens' Appeals are not entirely compatible with the proper and efficient implementation of Commissioner's functions. For example, the Law on Citizens' Appeals establishes that individual concerned shall be given the opportunity to appear in person during administrative procedures. However, due to its ambiguity, in practice this norm is regarded only as declarative. Another example concerns the scope of the application of the Law on Citizens' Appeals, i.e., the Law is aimed at regulating legal relationships between natural persons and public authorities. Meanwhile, legal persons do not fall within the scope of application. This is contrary to the Law of the Commissioner, which does not establish any distinction of this kind. Even though more than one draft law aimed at improving the Law on Citizens' Appeals has been introduced, none of them has been efficiently considered.

In addition to the abovementioned examples, it should also be noted that the application of the Law on Citizens' Appeals is not fully coherent. For instance, the Commissioner applies legal provisions of the Law on Citizens' Appeals to declare anonymous complaints, as well as complaints repeatedly lodged by the same persons and raising the same issues, inadmissible. At the same time, there is still a degree of uncertainty whether legal provisions of the Law on Citizens' Appeals should be disregarded when they become concurrent regarding the legal regime established in the Law of the Commissioner.

A point of criticism is also that the Law of the Commissioner does not provide for any principles of law related to the administrative procedure carried out by the Commissioner. The legal regulation is not entirely clear regarding what composes review criteria employed by the Commissioner, e.g., if this checklist is similar or wider to the ones used by courts. It is not quite clear at this point what the resolution of individual complaints by the Commissioner is targeted at, i.e., whether the Commissioner assesses the conduct of state authority in regard of their illegality, procedural unfairness, manifest errors, or all of these components together. In addition to this, it is not certain whether the Commissioner applies duty of care or good governance criteria since the legal regulation does not expressly provide for any legal principles aimed at establishing legal imperative of good administration.

Upon conclusion of the investigation, the Commissioner presumably draws up a decision, in which he opens a case on human rights violations. However, the criteria for choosing the matters in which to start the case are not clearly represented. One should also note that not all investigations end up in opening the case. Frequently, the Commissioner may adopt a document in which he explains what legal measures the individual concerned should take up, transfers the complaint to competent state authority or refuses to consider the complaint. However, the Law of the Commissioner fails to set out particular grounds for each of the above decisions.

Having in mind strong investigative powers vested to the Commissioner, the outcome of the investigation may reveal a wide spectrum of unlawful conduct. However, there are no legal provisions regarding additional measures, or in some cases duties, that could be made of use by the Commissioner, e.g., if appropriate, informing state institution concerned about the actions of the civil servants that may call into question the disciplinary responsibility; informing the Verkhovna Rada, which shall make appropriate representations; or informing competent bodies about the facts calling into question the application of criminal law.

V. Main Functions of the Ombudsperson in Ukraine During the Martial Law

Currently, the primary function of the Commissioner remains within the sphere of implementation of human rights, mainly it concerns the objective examination of individual complaints. With this aim, the Commissioner responds to the established violations of human rights and ensures that public service activities are carried out properly, fairly and per legal acts. In this respect, the legislative framework governing the work of the Commissioner, adopted in 1997 and amended in 2012 and 2014, allowed for wider powers of investigation in the sphere of particular human rights, for instance, regarding the protection of data and access to public information.

On the 24th of February 2022, the full-scale invasion of the troops of the Russian Federation into the territory of Ukraine began, which shocked the world with its cruelty and disregard for the norms of international humanitarian law.

The shelling of the entire territory of Ukraine and the subsequent temporary occupation of certain areas opened another phase of the international armed conflict, which began in February 2014 with the invasion of Russian troops and the temporary occupation of the Autonomous Republic of Crimea and the city of Sevastopol, complemented by the temporary occupation of parts of the Donetsk and Luhansk regions.

The full-scale Russian invasion of Ukraine caused an unprecedented humanitarian crisis throughout the country (Звіт про повернення в Україні…, 2022, p. 11). The decree of the President of Ukraine dated February 24, 2022 No. 64/2022 "On the introduction of martial law in Ukraine" introduced martial law in the country, whose term was subsequently extended.

As a consequence of the Russian aggression, there is a significant number of injured civilians: killed and wounded as well as people who were forced to leave their places of permanent residence and either became internally displaced persons or received temporary protection in other countries. It is estimated that around $100 billion worth of property was destroyed and damaged, about half of which accounts for damage to residential buildings. As a result, the social, economic, cultural, and other rights of millions of Ukrainians have been violated.

In December 2022, the new Commissioner prepared a Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 24 to October 31, 2022. The challenge for the preparation of the Report was the absence of national legislation defining the circle of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine. It does not cover all categories but focuses on the most numerous. Therefore, the Report actualizes the need to regulate the issue of the legislative definition of victims of the armed aggression

of the Russian Federation against Ukraine, and this task is to be resolved by the parliament in 2023. Additionally, the special report covers certain aspects of observing the rights and freedoms of civilians who suffered as a result of armed aggression and offers measures aimed at ensuring compliance with their rights under European and international standards. It highlights the situation with observance and violations of international humanitarian law and international human rights law committed on the territory of Ukraine within its internationally recognized borders, which occurred in the context of a full-scale armed invasion of the territory of Ukraine (Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 24 to October 31, 2022).

The long-term, permanent complication of the situation, the increase in the number of shelling throughout the territory of Ukraine, and the destruction of houses and infrastructure result, first of all, in the displacement of a significant part of the Ukrainian population both within the country and abroad. The number of internally displaced persons (IDPs) in Ukraine is greater than the population of many countries of the world, including European ones (for example, the population of Montenegro is 647,000 people, and Estonia is 1,265,000 people) According to the Ministry of Social Policy, from the 24th of February to the 20th of October 2022, 3,439,070 IDPs were registered, and as of November 11, 2022, the number of IDPs amounted to 4,846,189. However, considering the fact that, for various reasons, not all IDPs have been registered after changing their place of residence, the number of such persons may be even higher. Therefore, the Unified Information Database on IDPs, which is formed and managed by the Ministry of Social Policy, potentially contains underestimated indicators regarding the real number of IDPs in Ukraine.

As it emerges from the Annual reviews of the Activities of the Ombudsperson, the investigation of individual complaints has constituted the largest part of the Commissioner's workload for a few years now[2] and after the full-scale invasion, this workload increased because of the crimes of armed aggression as well as the protection of the rights of internally displaced persons.

The Commissioner receives numerous complaints of the IDPs regarding the refusal to accept their applications for appointment and payment of financial assistance based on applications made by the 30th of April 2022 using the mobile application of the "Diia" Portal.

For instance, Yuriy S. addressed the Commissioner with the following issue. After moving to the city of Dnipro on the 30th of April 2022, he registered through the "Diia" Portal as an IDP. Taking into account that his accommodation allowance was

[2] http://www.ombudsman.gov.ua/ua/page/applicant/statistics/.

not paid for a long time, he turned to USZN (Department of Social Protection of the Population) of the Shevchenkiv district council in the city of Dnipro. However, the applicant was informed there that the register of IDPs in the Unified Information Database of IDPs has no indication of his stay, therefore, he would be granted housing assistance only from the moment of applying to the administration.

After making changes to the Procedure for providing accommodation assistance to IDPs, approved by the Resolution of the Cabinet of Ministers of Ukraine dated March 20, 2022, No. 332 regarding the possibility of granting IDPs accommodation assistance during the period when they were entitled to it, Yuriy S. appealed to the department again and provided information stored on the phone that confirmed the fact that he had submitted the application using the "Diia" Portal and the screenshot of the message. However, the employees of the department did not consider the information provided by the applicant, citing that the notification did not include the immediate date of the application, and they did not have appropriate measures to provide accommodation assistance.

Given this, the Commissioner sent the requests to the Ministry of Digital Transformation of Ukraine to confirm the date of submission of Yuriy S.'s application through the "Diia" Portal and to the Ministry of Social Policy to provide relevant methodological recommendations to the USZN employees regarding the practical application of the changes made to the Procedure. Due to the assistance of the Commissioner, the information about the submission of the application by Yuriy S. through the means of the "Diia" Portal on April 30, 2022 was confirmed, and the department was instructed to take measures for the appointment and payment of assistance to the applicant for the previous period (Special Report on the observance of the rights of persons who suffered as a result of the armed aggression of the Russian Federation against Ukraine in the period from February 2022).

The burden of the social protection administration, which currently deals mostly with the problems of IDPs, their registration and assistance, and the involvement of charitable organizations and volunteers, has increased significantly. On the ground, separate queues are formed for IDPs and local residents of the community. At the same time, the number of employees of social security agencies has not increased.

It must be mentioned that many IDPs have lost their old jobs and have not found new ones in their new places of residence, therefore state social assistance may be the only source of livelihood for many of them. The largest number of appeals received by the Commissioner regard issues of social benefits, non-receipt of them despite the rules established by the above-mentioned Government resolution, or delays in the payment of cash assistance to IDPs.

In particular, since the beginning of 2022, the Commissioner received appeals reporting 2,087 violations of the rights of IDPs, namely: 852 rights to social protection,

214 to appeals, 70 to housing, 75 to freedom of movement, 64 to pension provision, 38 for education, 34 for child protection, 32 for renewal of documents, 32 for health care, and 564 other requests for help in exercising rights.

In the exercise of his primary function as a defender of the people, the Commissioner also holds certain executive and legal representation, and in some cases, public prosecuting powers. The Commissioner may not only recommend for the state authority to take up certain remedies regarding the aggrieved individual, but he is also entitled to initiate the imposition of administrative fines. In addition, the Commissioner plays a role in representing vulnerable members of society before the courts. As regards civil rights and freedoms, the right to judicial protection should be singled out separately, which includes the following areas of activity of the commissioner: monitoring of procedural rights in criminal proceedings; monitoring of procedural rights in civil and administrative proceedings; monitoring of the rights of persons in places of detention; monitoring the observance of the rights of Ukrainian citizens held in places of detention abroad and in temporarily occupied territories.

In accordance with the second part of Article 4 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine on Human Rights," the Commissioner's activities complement the existing means of protecting the constitutional rights and freedoms of a person and a citizen, do not cancel them and do not entail a review of the competence of state bodies that ensure the protection and restoration of violated rights and freedoms.

According to Articles 124, 126, 129 of the Constitution of Ukraine, justice in Ukraine is carried out exclusively by courts.-According to the fourth part of Article 17 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights," the Commissioner does not consider those appeals that are considered by the courts.

In addition to the abovementioned functions, the activity of the Commissioner for Human Rights in the field of personal rights and freedoms consists of protecting personal data, preventing and countering corruption, preventing and countering domestic violence, gender-based violence and human trafficking.

Regarding the protection of personal data in the conditions of martial law, it is necessary to analyse the limitations of human rights and the legal grounds for the processing of personal data by state bodies.

According to the first and second parts of Article 32 of the Constitution of Ukraine, no one can be subjected to interference in their personal and family life, except for the cases stipulated by the Constitution of Ukraine. It is not allowed to collect, store, use and distribute confidential information about a person without their consent, except in cases specified by law and only in the interests of national security, economic well-being, and human rights.

At the same time, Article 64 of the Constitution of Ukraine stipulates that in conditions of war or state of emergency, separate restrictions on rights and freedoms may be established, specifying the period of validity of these restrictions. According to paragraph 3 of the Decree on martial law, in connection with the introduction of martial law in Ukraine, the constitutional rights and freedoms of a person and a citizen, provided for by Article 32 of the Constitution of Ukraine, may be temporarily limited during the period of the legal regime of martial law.

This is consistent with the provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which state authorities may not interfere with the exercise of the right to respect for private and family life, except when the interference is carried out in accordance with the law and is necessary in a democratic society in the interests of national and public security or economic well-being of the country, to prevent riots or crimes, to protect health or morals, or to protect the rights and freedoms of others. Also, in accordance with Article 15 of this Convention, in times of war or other public danger threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention, only to the extent required by the urgency of the situation, and provided that such measures are not inconsistent with its other obligations under international law.

Article 9 of the Convention on the Protection of Individuals in Connection with Automated Processing of Personal Data provides that deviations from the provisions of Articles 5 (Data quality), 6 (Special categories of data), and 8 (Additional guarantees for the data subject) of this Convention are allowed when such a deviation is provided for by the legislation of the Party and is a necessary measure in a democratic society aimed at:

a) protection of state and public security, financial interests of the state or the fight against criminal offenses;
b) protection of the data subject or the rights and freedoms of other people.

In connection with the introduction of amendments to the Law of Ukraine "On the Protection of Personal Data" of January 1, 2014, control over compliance with the legislation on the protection of personal data within the limits of the powers provided by law has been entrusted to the Commissioner for Human Rights.

The control consists in establishing compliance of the personal data processing with the requirements of the Constitution of Ukraine, the Law of Ukraine "On the Protection of Personal Data," the Standard Procedure for the Processing of Personal Data, as well as current international agreements of Ukraine in the field of personal data protection, whose binding consent has been granted by the Verkhovna Rada of Ukraine.

Control by the Commissioner in the field of personal data protection is carried out by conducting inspections of individuals, individual entrepreneurs, enterprises, institutions, and organizations of all forms of ownership, state authorities, and local self-government bodies that are owners and/or managers of personal data. Inspections can be scheduled, unscheduled, on-site, and non-visit.

The procedure for carrying out checks is established by the Procedure for the implementation by the Commissioner of control over compliance with the legislation on the protection of personal data, approved by the order of the Commissioner No. 1/02-14 dated January 8, 2014.

According to the results of the inspections, acts of verification of compliance with the requirements of the legislation on the protection of personal data are drawn up, based on which, in the event of violations, an order is drawn up to eliminate them, or a protocol on administrative proceedings is drawn up. The Law of Ukraine "On the Protection of Personal Data," which regulates legal relations in the area of the protection and processing of personal data, also contains provisions related to the limitation of its effect. Article 25 of this Law provides that the limitation of the effect of Articles 6 (General requirements for processing personal data), 7 (Special requirements for processing personal data), and 8 (Rights of the subject of personal data) of this Law may be carried out in cases provided for by law, to the extent necessary in a democratic society in the interests of national security, economic well-being or protection of the rights and freedoms of personal data subjects or other persons.

It is commonly known that the processing of personal data must be based on purpose and legal grounds.

The purpose of processing personal data must be formulated in laws, other normative legal acts, regulations, constituent or other documents that regulate the activities of the owner of personal data and comply with the legislation on the protection of personal data.

In accordance with Article 11 of the Law of Ukraine "On the Protection of Personal Data," the grounds for processing personal data are:

1) consent of the subject of personal data to the processing of his personal data;
2) permission to process personal data granted to the owner of personal data in accordance with the law exclusively for the exercise of his powers;
3) conclusion and execution of a transaction to which the subject of personal data is a party or which was concluded for the benefit of the subject of personal data or for the implementation of measures preceding the conclusion of the transaction at the request of the subject of personal data;
4) protection of vital interests of the subject of personal data;
5) the need to fulfill the obligation of the owner of personal data, which is provided by law;

6) the need to protect the legitimate interests of the owner of personal data or a third party to whom personal data is transferred, except in cases where the needs to protect the fundamental rights and freedoms of the subject of personal data in connection with the processing of his data prevail over such interests.

It must be mentioned that the consent of the subject of personal data is only one of the six legal grounds for the processing of personal data provided for in Article 11 of the Law of Ukraine "On the Protection of Personal Data." In the presence of the grounds specified in clauses 2-6 of the first part of Article 11 of this Law, processing of personal data is carried out without the consent of the subject of personal data.

According to the Law of Ukraine "On the Legal Regime of Martial Law," martial law provides for the granting to the relevant bodies of state power, military command, military administrations and local self-government bodies of the powers necessary to avert a threat, repulse armed aggression and ensure national security, eliminate threats to the state independence of Ukraine and its territorial integrity.

At the same time, in accordance with the second part of Article 19 of the Constitution of Ukraine, state authorities and local self-government bodies and their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine.

In this case, the grounds for processing (collection, registration, accumulation, storage, adaptation, modification, renewal, use, dissemination, depersonalization, destruction, etc.) of personal data by relevant state bodies and local self-government bodies are points 2 and 5 of part one of Article 11 of the Law of Ukraine "On the protection of personal data," namely:

– permission to process personal data granted to the owner of personal data in accordance with the law exclusively for the exercise of his powers;
– the need to fulfill the obligation of the owner of personal data, which is provided by law.

In addition, Article 7 of the Law of Ukraine "On the Protection of Personal Data" prohibits the processing of personal data about racial or ethnic origin, political, religious or ideological beliefs, membership in political parties and trade unions, criminal convictions, as well as data relating to health, sexual life, biometric or genetic data. It does not apply if the processing of personal data, in particular, relates to court verdicts, the performance of tasks of operational-investigative or counter-intelligence activities, the fight against terrorism and is carried out by a state body within the limits of its powers defined by law.

Thus, in the conditions of martial law imposed in Ukraine, protection of personal data from accidental loss or destruction, illegal processing, including illegal destruction or access to personal data, protection of state information resources, IT systems of critical infrastructure objects, state registers, which contain personal

data, are extremely important. Processing of personal data must be carried out taking into account the above provisions of the legislation of Ukraine. Such processing must be proportionate and carried out for specific and legitimate purposes.

Among the legal grounds for the processing of personal data which are defined in the first part of Article 11 of the Law of Ukraine "On the Protection of Personal Data," in this case it is necessary to highlight: the consent of the subject of personal data to the processing of his personal data (clause 1); conclusion and execution of a transaction to which the subject of personal data is a party or which was concluded for the benefit of the subject of personal data or for the implementation of measures that precede the conclusion of the transaction at the request of the subject of personal data (clause 3); protection of the vital interests of the subject of personal data (clause 4).

In its essence, such a basis for the processing of personal data as the protection of the vital interests of the subject of personal data can be applied in exceptional cases, provided that the person is objectively unable to give their consent to the processing of personal data (for example, being unconscious) combined with the need to provide them with assistance to protect their vital interests. If the processing of personal data is necessary to protect the vital interests of the subject of personal data, it is possible to process personal data without their consent until the time when this consent becomes possible.

The consent of the subject of personal data is a voluntary expression of the will of a natural person (provided that they are informed) regarding the granting of permission for the processing of their personal data in accordance with the formulated purpose of their processing, expressed in writing or in a form that makes it possible to conclude that consent has been given. In the field of e-commerce, the consent of the subject of personal data can be given during registration in the information and communication system of the subject of e-commerce by marking the consent to the processing of their personal data in accordance with the formulated purpose of their processing, provided that such a system does not create opportunities for processing personal data until the moment of ticking.

Taking into account the above, the consent to the processing of personal data has voluntariness, which means the absence of direct or indirect coercion when providing it; awareness, which means that before giving consent, the subject must receive reliable information about by whom and for what purpose his personal data will be processed, to whom exactly the data will be transferred, and also about the rights defined by the Law; the consent can be given in any form, which means that the conditions of the consent to the processing of personal data can be set out in the form of a single written document made available to the subject personal data in the language signed by him personally or his the legal representative, in electronic form by

marking about giving consent, or even verbally. At the same time, the given consent should not raise doubts about its unequivocalness and the owner must be able to confirm its availability during the entire time of processing of their personal data.

At the same time, it is necessary to take into account the proportionality of the volume of personal data of the subject. Only those data whose processing is necessary to achieve the goal should be processed. If it is necessary to process personal data in order to provide targeted charitable assistance, much depends on the criteria by which material or other charitable/humanitarian aid is provided (category of the subject, state of health, financial support, family status, number of children, etc.). Therefore, it is worth responsibly approaching the issue of legal relations and ensuring the protection of personal data.

Separate attention should be paid to protecting personal data from cybercriminals. According to numerous reports in the mass media, citizens of Ukraine are constantly exposed to hacker attacks by hostile cybercriminals. E-mails and messages in messengers are supposedly sent from government bodies, banks, security services, etc., with recommendations to follow the specified links. After downloading the attached file, attackers can gain access to personal data contained on the user's electronic device (phone book contacts, personal computer files, etc.).

During the implementation of the parliamentary control of the Ombudsman on compliance with the legislation on the protection of personal data, facts of fraudulent actions under the guise of payment of financial aid to Ukrainians during martial law have been discovered.

Such a type of fraud as "phishing on the Internet," which consists in the theft of personal data with the help of fake websites, remains an urgent problem in the conditions of martial law. The essence of phishing is that the deceived person provides information about themselves voluntarily. At the same time, the attacker usurps the role of an authorized person of a state body or charitable foundation, etc.

Under the guise of providing government payments, criminals also extort money from citizens by sending messages. Citizens of Ukraine who are on the temporarily occupied territories should carefully secure their personal data. The Center for Countering Disinformation at the National Security and Defense Council of Ukraine reported on new insidious actions of the occupier which consist in the collection of personal data of citizens (under the pretext of a "population census" or during the distribution of "humanitarian aid") for their further persecution and intimidation. This primarily concerns military personnel and their families, as well as public activists, journalists, and cultural figures.

An important aspect of ensuring the observance of human and citizen rights and freedoms in the conditions of armed aggression is the coordination of the efforts of the relevant state authorities and the establishment of cooperation between the

state institutions that take care of issues of human rights protection and response to humanitarian challenges in wartime. Carefully monitoring the observance of human and citizen rights and promptly responding to cases of violations of national and international law, the Human Rights Commissioner of the Verkhovna Rada of Ukraine established appropriate interaction with state authorities, national security and law enforcement agencies for the victory of Ukraine with its unconditional component being the implementation of constitutional rights of citizens of Ukraine.

Taking into account the above, the employees of the Commissioner's Secretariat have the authority, in case of violations of citizens' rights, to make trips, in particular to the places of crimes, torture, places of illegal detention, etc. At the same time, the employees of the Commissioner's office provide methodical and practical recommendations, in particular of a legal and procedural nature, provide a "road map" of the course of action for the affected civilians, military personnel, police officers, rank-and-file and senior officers, and other categories of persons whose rights have been violated in the course of the armed aggression, in order to improve them. The information obtained during joint work on the discovered facts of violation of the rights of citizens by the aggressor state, within the limits of the powers defined by the Law, is also summarized for the further delivery to the relevant international institutions with the aim of forming an evidentiary base for bringing specific persons or organizations of the occupying country to justice.

Guided by Article 101 of the Constitution of Ukraine, Articles 13, 22 of the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights," in order to establish appropriate cooperation, the Ombudsman, proposed the organization of joint work in the interests of Ukrainian citizens and the acceleration of the process of restoring their rights in each region of Ukraine. The contact persons of the Secretariat of the Commissioner, determined for the organization of joint work, are: the Representative of the Commissioner for Human Rights in the system of bodies of the security and defense sector, a member of the Coordinating Staff for the Treatment of Prisoners of War, and the Director of the Department for Monitoring the Observance of Rights in the Defense Sector and the Rights of Veterans and Servicemen, Prisoners of War and their family members of the Commissioner's Secretariat.

In order to build the capacities of the Human Rights Commissioner of the Verkhovna Rada of Ukraine and ensure the possibility of helping people who daily face the negative impact of the armed aggression of the Russian Federation against Ukraine, the Department of Monitoring the Compliance with the Rights of Citizens Victims of Armed Aggression has been established in the Secretariat of the Human Rights Commissioner of the Verkhovna Rada of Ukraine. The main purpose of the activity of this Department is to review he violation of the rights of the following

categories of citizens: internally displaced persons and citizens who suffered as a result of the temporary occupation and armed aggression against Ukraine; citizens injured as a result of the armed aggression against Ukraine; forcibly deported persons and displaced persons outside the territory of Ukraine; citizens in the temporarily occupied territories.

VI. Accountability of the Commissioner

The duty to make an annual statement to the legislature on the activities of the office is, first of all, established by Article 85(17) of the Constitution. It is for the Verkhovna Rada of Ukraine to hear the Commissioner's annual reports on the current situation of the observance and protection of human rights and freedoms in Ukraine and adopt a resolution based on annual and special reports prepared by the Commissioner. The commissioner reports to the parliament under martial law are the annual reports and the Special Report on the armed aggression against Ukraine.

The time limit for the submission of annual report and its content are addressed in detail in the Law of the Commissioner. According to Article 18(1), the annual report shall be submitted during the first quarter of the following year. Under general rule, the Commissioner shall report on the situation regarding the observance and protection of human rights. The report shall encompass several aspects as determined by legal provisions set out in Article 18(1) and (2) of the Law, among others, information on human rights violations by state authorities, the shortcomings in the legislation, information what measures were taken by the Commissioner in regard to the determined breaches, results of inspections, conclusions, and recommendations.

As it is apparent from the Commissioner's annual reports, they, indeed, encompass a wide range of topics. The annual report covers all the activity areas and addresses every single sphere of the Commissioner's mandate individually. It also provides a certain compilation of statistics. Nevertheless, some take the view that single annual review per year is not enough to provide the society with adequate and up to date insights on general human rights situation in Ukraine, especially having regard to the peculiarities of the country.

In addition to the annual reports, the Commissioner may issue special reports. Whereas submitting annual report once per year is mandatory, special reports are published when necessary and focus on separate issues regarding the observance of human rights in Ukraine. To date, the Commissioner has published special reports on the implementation of the national preventive mechanism, monitoring places of captivity in Ukraine, application of the Criminal Procedure Code and other issues (v: http://www.ombudsman.gov.ua/ua/page/secretariat/docs/presentations/). Two

parallel problems can be seen in this context: the imperfection of legal norms themselves, which provide for such responsibility; informing about such responsibility on the part of state representatives.

According to the Office of the High Commissioner for Human Rights, from February 24 to October 30, 2022, this body recorded 16,295 casualties among the civilian population in the country, of which 6,430 were killed and 9,865 were wounded. Of them, 8,996 victims in the Donetsk and Luhansk regions (3,833 dead and 5,163 wounded), specifically, 7,103 victims (3,404 dead and 3,699 wounded) in the territory controlled by Ukraine; 1,893 victims (429 dead and 1,464 wounded) in the territory controlled by the armed formations of the Russian Federation and armed formations associated with them. In other regions of Ukraine, which were under the control of Ukraine at the time of the losses, there were 7,299 victims (2,597 dead and 4,702 wounded).

According to the Office of the Prosecutor General of Ukraine, as of October 24, 2022, these numbers increased. The crimes committed by the Russian Federation resulted in the death of 7,938 civilians (including 430 children) and the wounding of 10,897 civilians (including 820 children). Thus, more than 1,250 children have been injured in Ukraine since February 24, 2022. The most affected children are in Donetsk oblast (417), in Kharkiv oblast (259), Kyiv oblast (116), Mykolaiv oblast (77), Zaporizhia oblast (69), Chernihiv oblast (68), Luhansk oblast (64), Khersonska oblast (57), Dnipropetrovsk (31) as of October 21, 2022. As of October 13, 239 children are considered missing.

According to the Office of the Prosecutor General, since the beginning of the full-scale military aggression of the Russian Federation against Ukraine, the law enforcement agencies of Ukraine have registered 1,553 criminal violations under Article 438 of the Criminal Code, which include attacks on the life and health of persons committed by servicemen and/or representatives of other military forces formations of the Russian Federation. Keeping a separate state register of dead and wounded civilians is not provided for by any law. Therefore, according to the Commissioner, it is unnecessary to create such a register.

This accounting of victims will serve the purpose of compensating the victims of armed aggression against Ukraine, and will be necessary for international and national reparation mechanisms, as well as for establishing the truth within the framework of post-conflict transitional justice. In addition, since the collected data will reflect certain "patterns of harm" and, with access to a larger volume of information, "patterns of criminal behaviour," the collection of data and maintenance of the register will contribute to more productive work of law enforcement agencies.

Since the beginning of full-scale military operations of the Russian Federation against Ukraine, there has been a massive deployment of military equipment and

military units near civilian objects in densely populated areas. In any case, such actions are a violation of the obligation to apply passive precautions. However, if this arrangement is made deliberately to provide protection from an attack by the opposing side, such actions constitute a war crime: the use of civilians as "human shields."

VII. Apparatus of the Commissioner

Activities of the Commissioner are supported by the Secretariat (Article 10 of the Law of the Commissioner). The structure of the Secretariat, distribution of duties, and other aspects concerning organization of the Office are regulated by the Regulations approved by the Commissioner. These provisions ensure that the Commissioner has certain discretion and flexibly to decide on the organization of work of the Secretariat.

In addition, the Commissioner has a right to appoint Representatives. The organization of the activity and scope of authority of Representatives are also regulated by the Regulations approved by the Commissioner (Article 11 of the Law of the Commissioner).

The current legal regulation allows for a wide discretion of the Commissioner in establishing working patterns in internal organization. There is only a single mandatory requirement established in the Law of the Commissioner as organizational arrangements are concerned. Pursuant to Article 19-1(7), a separate structural unit for the prevention of torture and other cruel, inhuman, or degrading treatment or punishment shall be established in the Secretariat of the Commissioner.

In their work, the Commissioner's Office may also be assisted by a board of advisors, experts, and representatives of civil society (Article 10(3) of the Law). The board contributes to establishing strategical aims of the Commissioner's office and monitoring their implementation.

In this context, it should be mentioned that there is a very close cooperation (also described as 'synergy') between the Commissioner's Office and representatives of the NGO's. The Office of the Commissioner is open and proactive in terms of launching projects on human rights protection in collaboration with the NGO's. However, the status of the latter is not established in the legal regulation. In this regard, one can note possible concerns regarding the obligation not to divulge any private information or any document submitted to the Commissioner, in particular, sensitive data.

As to the powers given to the personnel of the Apparatus, one should note that the Law of the Commissioner does not lay down precise legal provisions regarding the officials and servants of the Commissioner's office who assists him. The legal regulation requires a certain "tuning" since legal provisions of the Law formally

establishes the powers to the Commissioner alone and technically disregards that in implementing these powers the Commissioner is assisted by personnel.

VIII. Mandate of the Commissioner in a Protection of Human Rights and Interest before Courts

As an independent constitutional body, which guarantees objectivity and confidentiality, the Office of the Commissioner is entitled to examine individual complaints, recommend redress, facilitate access to judicial redress, and suggest overall improvements on the general human rights situation. In cases where entrusted by the law, it also performs additional functions, e.g., initiates the imposition of administrative liability.

The Right to Challenge Normative Acts

The Commissioner's mandate regarding the relationship with the Constitutional Court is a wide one. It is manifested through the wording of several legal provisions prescribed by the Constitution itself, the Law on Constitutional Court, and the Law of the Commissioner. As already mentioned, most importantly, the Commissioner is granted a direct access to the Constitutional Court.

First, as provided for under Article 150(1)(1) of the Constitution and Articles 13(3) and 15 of the Law of the Commissioner, the Commissioner has the right to apply to the Constitutional Court with regard to conformity of the laws of Ukraine and other legal acts issued by the Verkhovna Rada of Ukraine, acts issued by the President of Ukraine, acts issued by the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea concerning human and citizens' rights and freedoms with the Constitution of Ukraine. The Law of the Commissioner establishes that, to this end, the Commissioner refers a constitutional submission.

Second, the Commissioner is entitled to apply to the Constitutional Court of Ukraine regarding the official interpretation of the Constitution of Ukraine and the laws of Ukraine (see Article 150(1)(2) and 150(2) of the Constitution).

Currently, this is the most used tool for human rights protection in a more generic and systemic way. The Commissioner is very active in employing this power: from 2000 to 2022 (data until 1 February) (Information provided by the Constitutional Court of Ukraine) the Commissioner applied to the Constitutional Court with 40 applications and requests (30 applications regarding the constitutionality

of the legal regulation and 10 requests for official interpretation of the Constitution); this activeness increased since 2014 (23 applications and requests provided). The subject matter of the applications ranged from the rights of people with disabilities to the rights related to good administration (e.g., publicity of managing of governmental affairs).

Around a half of all applications and requests were regarded inadmissible by the Constitutional Court (including 11 out of 23 submitted since 2014). However, the Constitutional Court adopted final decisions in 13 cases initiated by the Commissioner (10 on constitutionality of a legal regulation, 1 official interpretation of the Constitution, 2 on both constitutionality and interpretation of the Constitution), among them, the decisions of 2016 regarding the forcible hospitalisation of mentally disabled persons and the freedom of public religious assemblies, which can be regarded landmark cases concerning the application of European human rights standards in the respective spheres.

Due to a rather high proportion of the applications by the Commissioner to the Constitutional Court which are considered inadmissible by the latter, it is worth considering the introduction of measures that could ensure a better quality of applications.

It should be pointed out that the legal regulation does not lay down any general criteria for cases when the constitutional submission shall be made and the Commissioner in this regard enjoys a wide margin of discretion . There are also no legal provisions linking the legal remedy at issue with the procedures of monitoring of human rights protection or investigations based on individual complaints.

In addition, neither the Constitution, nor the Law on the Constitutional Court (including the draft Law implementing the recent amendments to the Constitution related to the Constitutional Court) provides any precise time limit for the settlement of the constitutional justice cases by the Constitutional Court. No order of priority for hearing the cases is established, either. That sometimes can impede the effective settlement of problematic human rights issues identified by the Commissioner. Considering recent practical experience acquired with the placing of constitutional submissions, it was also noted that the current legal framework lacks certainty with regard to time limits for consideration of constitutional submissions and, where unconstitutionality is found, revision of the existing legal regulation. It was strongly suggested that legal uncertainty in this sphere may render the referrals to the Constitutional Court inefficient.

Under this heading, it should also be mentioned that the Commissioner may also be asked, where necessary, to provide expert opinions concerning issues in the field of human rights by the Constitutional Court itself even in the cases which were not initiated by the Commissioner.

It is equally important to point out that the Law of the Commissioner is silent on the control of normative administrative acts, i.e., normative acts, which do not fall into the competence of the Constitutional Court. The Commissioner has the right to challenge these acts before administrative courts in accordance with the usual procedures laid down in the Code on Administrative Proceedings.

Right to Apply to Courts

Under law, the Commissioner is entrusted certain jurisdiction within the sphere of administration of justice. In this respect, the mandate of the Commissioner, as defined by the legal acts, is related not only to the monitoring of general situation regarding human rights protection but also to proactive intervention in cases of violations of human rights.

Currently, the Commissioner provides a significant contribution in situations where judicial proceedings against public authorities are too complicated for vulnerable people. It should be also noted that, under general rule, the Commissioner may not intervene in cases pending before courts. Concurrence between the investigation by the Commissioner and legal protection before the judiciary is clearly regulated by Article 4(2) and Article 17(4) of the Law. Essentially, these provisions prescribe that the Commissioner is only entitled to investigate prior to or after judicial proceedings.

In light of the abovementioned point, it is noteworthy that general rules precluding the Commissioner to start investigations which are parallel to judicial proceedings do not mean that the Commissioner is not allowed to get involved in judicial proceedings in general. On the contrary, the Law of the Commissioner provides for several ways to entertain his jurisdiction over the judicial activities.

First, as foreseen under Article 13(10)(1) of the Law and legal acts on judicial proceedings (Article 45(1) of the Civil Procedure Code and Article 60(1) of the Code on Administrative Proceedings), the Commissioner is entitled to apply to courts to protect human rights and freedoms of socially disadvantaged persons. In implementing this function, the Commissioner essentially acts as a legal representative. In this regard, it should be noted that in Ukraine, the government has implemented free legal aid reform to help more people get necessary legal assistance and support the most vulnerable. However, this reform has not had adequate impact on the activities of the Commissioner regarding the appeals to courts. As shown by the annual reports on the Activities of the Commissioner, issues regarding the administration of justice comprise one of the largest parts of the Commissioner's workload. It can be maintained that the Commissioner implements the power to apply to courts as a legal representative irrespective of his own investigation since the existing legal

framework does not formally link the Commissioner's power to submit petitions on behalf of disadvantaged individual with administrative procedure carried out by the Commissioner on the basis of individual complaints. Under current legal regulation the Commissioner exercises discretion to decide whether to make use of the appeal to courts power.

Second, in accordance with Article 13(10)(2) of the Law of the Commissioner, the Commissioner is also entitled to intervene into any judicial proceedings that are initiated by other persons at any stage of the proceedings. As the law currently stands, Commissioner's mandate is not limited to the supervision of judicial proceedings of undue delay or evident abuse of authority. Essentially, the Commissioner has jurisdiction over any human rights violations in judicial proceedings. At the same time, it should be noted that the acts on judicial proceedings may establish certain procedural limitations as to the right to apply to court. For example, as set out in Article 324 of the Civil Procedural Code, only the parties and other persons involved in the case, as well as those who did not participate in the case, but if the court decided the matter of their rights, freedoms or obligations have the right to appeal in cassation proceedings.

Third, according to Article 13(10)(3) of the Law of the Commissioner, the Commissioner has the right to initiate the reopening (review) of judicial decisions irrespective of his participation in the judicial proceedings. The latter power was introduced relatively recently, in 2014. The legal framework does not formally limit the implementation of this power to exceptional circumstances. There are no formal criteria for determining the type of judicial disputes that attract the Commissioner's attention. Under general rule, the Commissioner has the right to get involved in any litigation concerning human rights issues.

Fourth, in monitoring the human rights protection in the sphere of administration of justice, the Commissioner is entitled to attend court hearings at all instances, including court hearings that are not public, subject to the consent of the private person concerned (see Article 13(9) of the Law of the Commissioner). In this respect, the law does not limit the monitoring function to implementation of the right to fair procedure or administrative aspects of court proceedings but also it is generally possible for the Commissioner to observe any aspect of human rights protection (and, where necessary, as have been mentioned above, intervene in the cases that are before courts). Nevertheless, there is no methodology for choosing particular court hearings to attend and the choice is essentially made in a rather random and subjective manner.

Further, the monitoring function of the Commissioner is supplemented by the power to supervise the implementation of judicial decisions as foreseen under Article 13(12) of the Law of the Commissioner.

The fifth point regarding the Commissioner's mandate vis-à-vis courts concerns a horizontal role. The Commissioner has informal possibility to appear as *amicus curiae* in judicial proceedings involving human rights violations. The expert knowledge of the Commissioner is particularly relevant when cases concern the non-discrimination principle.

Lastly, the Commissioner's mandate extends to cover the judiciary itself since the law defines the Commissioner's role in disciplinary matters. As for holding judges accountable, according to the Constitution of Ukraine and the Law on the Judicial System and Status of Judges, only High Council of Justice of Ukraine and the High Qualification Commission of Judges of Ukraine are entitled to assess the actions of judges or their inaction. The High Qualifications Commission of Judges of Ukraine shall function in two chambers: the qualifications chamber, and the disciplinary chamber. According to Article 102(2)(4) of the Law on the Judicial System and Status of Judges,[3] the Commissioner appoints one member of the Disciplinary Chamber from among persons who are not judges. In this context, it should be pointed out that the right of the Commissioner to submit information for a disciplinary proceeding regarding the actions of judges of the Supreme Court of Ukraine and higher specialized courts has been recently excluded based on the Law № 192-VIII of February 12, 2015.[4]

IX. Mandate of the Commissioner Issuing Recommendations

The legal framework is quite ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and, for instance, how it correlates with the Commissioner's right to apply to courts. Presumably, the decision to open a case on human rights violation, adopted under Article 17(3)(1) of the Law of the Commissioner, may predominantly lead to issuing acts of response, i.e., a constitutional submission or a regular submission. As provided for under Article 15(3), a submission is a document submitted to the state authority concerned and adopted for the purpose of taking, within a period of one-month, relevant measures aimed at the elimination of revealed acts of human rights violations. A submission is not formally binding and is understood as a 'proposal' to a particular state authority, as the wording of Article 22(1)(3) of the Law suggests. In other words, a submission is an authoritative opinion rendered by the Commis-

[3] http://zakon2.rada.gov.ua/laws/show/2453-17.

[4] http://zakon2.rada.gov.ua/laws/show/22/98-%D0%B2%D1%80.

sioner as to whether the state authority concerned acted in a fair, adequate manner and in accordance with the law.

Notably, even though the submission is not binding, it should be certainly authoritative. The Commissioner's ability to secure results, therefore, depends upon the quality of the arguments made, the moral authority inherent in his Office, and the implementation of so-called mediator's function. In addition, the Commissioner might be quite resourceful in approaching the press and spend considerable time and energy to make his opinions public.

It should also be borne in mind that the Commissioner may ensure that his opinions are authoritative by issuing recommendations aimed at improving the situation within a particular sphere of human rights protection in annual or special reports (in this regard, see Article 18 of the Law of the Commissioner). Recommendations of this kind are often related to amendments to the law or recommendations for changes in administrative practice and policy. Thus, where the Commissioner makes a recommendation, he shall aim at having a structural impact.

There is no legal regulation by statute regarding the possibility of appeal with the administrative court against administrative decisions to derogate from the Commissioner's submission. Nevertheless, as provided under Article 22(2) of the Law of the Commissioner, any refusal of state authorities to cooperate shall incur liability in accordance with effective legislation.

X. Mandate of the Commissioner Initiating Administrtive Liability

The current legal framework (specifically, legal provisions of the Administrative Code of Offences) establishes that the Commissioner's Office is entitled to draw up administrative protocols in which administrative offences are described. This concerns personal data protection and access to information breaches. The Commissioner can send administrative protocols to the court and then the court decides on the breaches in question.

In addition, the Administrative Code of Offences also provides grounds to issue administrative protocols where public authorities do not comply with the submissions of the Commissioner.

Such activities cannot normally be viewed as part of the Ombudsman duties as it is pointed out that drawing-up administrative protocols is incompatible with the purpose of the Commissioner prescribed by the Constitution and the Law of the Commissioner. In practice, the workload related to the initiation of administrative liability has grown disproportionately and, in some cases, paralysed, the work of the Office. Considering that the legal regulation on administrative offences seems to be

far from perfect, for example in terms of imperative content of administrative protocols[5], there is substantial room for improvement in the existing legal framework.

XI. Mandate of the Commissioner Implementing National Preventive Mechanism

Ukraine ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2006. Activities of the national prevention of torture are conducted by the Commissioner's office since 2012. To this end, Articles 13 and 19-1 of the Law of the Commissioner were amended.

According to the requirements of the Law of the Commissioner, a separate structural unit, the Department for Implementation of the National Preventive Mechanism, was established within the Secretariat of the Commissioner. Coordination functions are granted to the Representative of the Commissioner for Human Rights (the Authorized Human Rights Representative) and the Head of the Department. In this regard, the competence given to the Representative should be clarified in terms of delegated administrative powers, guarantees, and financial security.

Eventually, in light of the expertise provided by international and national specialists, it was decided to introduce the national preventive mechanism in the format "Ombudsman+," which means that in carrying out monitoring visits, employees of the Commissioner's Office act in cooperation with civil society activists. The model includes the following elements: the central office of the Commissioner (Authorized Human Rights Representative and Department of NPM) and the regional represent-

[5] The main difficulty which arises in using this judicial enforcement is that the person who does not follow the Commissioner's recommendation has to reveal their personal data necessary for drawing up a protocol. If they refuses to provide the requested data, the Commissioner cannot draw up the protocol). and time limits for imposing liability (Article 38 of the Code of Administrative Offences sets up time limits for the imposition of administrative penalty. If the administrative offence cases stipulated in the Code or other laws are triable by court (judge), a penalty may be imposed no later than within three months from the date of commitment of the offence, and where the offence is continuing, no later than within three months from the date of detection of the offence, apart from the cases on administrative offences stipulated by the Code. According to Article 17 of the Law on the Ukrainian Parliament Commissioner for Human Rights, appeals shall be submitted to the Commissioner within one year after disclosure of the act of violation of human rights and in case of exceptional circumstances, this period can be extended by the Commissioner, but should not exceed two years. Inconsistency of provisions of these two laws determines that the Commissioner is forced to consider appeals on violation of human rights despite expiry of time limits for the imposition of administrative penalty for this violation.

atives of the Commissioner from the "ombuds" side, and the council of experts, the representatives of NGO's and the observers from the other ("+") side. The activities of the latter are coordinated by the regional public relations coordinators. It should be mentioned that the jurisdiction of a regional public relations coordinator of the Commissioner extends not only to the region where he or she operates, but also to the neighbouring regions where there are no such coordinators.[6] In this context, it should be noted that the Law of the Commissioner does not provide any legal provisions regarding regional coordinators of Commissioner's Office and their assistance in the NPM implementation process. As mentioned, the number of the regional offices is considerably lower than the number of regions. There are 1–2 coordinators in the regions, who perform both certain NPM functions and other functions of the Commissioner's Office (e.g., control the observation of human rights to information, make appeals, prepare the proposals of the submissions, participate in courts proceedings, list the protocols of the administrative offences, etc.). These findings raise certain concerns regarding the structural organization of the Office. Thus, the division of responsibilities of the Office should be reconsidered and set in more precise terms.

When performing the functions of national preventive mechanism, the Commissioner is obliged by the Law of the Commissioner to cooperate with the Sub-Committee on Prevention of Torture, international organizations and relevant bodies of foreign states working in this area.

In performing the NPM functions, the Law of the Commissioner establishes wide competences to the Commissioner, including the right to visit the places where persons are forcibly held in (psychiatric institutions, childcare centres, social and rehabilitation centres), interview persons who stay in those places, etc. In this regard, no weaknesses in the legal regulation were found.

The Optional Protocol requires regular monitoring of places of detention (e.g., it is recommended to inspect places of detention once in three years on average). In the NPM implementation process, the Authorized Human Rights Representative comprehensively monitors observation of human rights in places of isolation from society, primarily using "on the spot visits," which are found to be a powerful tool. The Authorized Human Rights Representative also personally meets with prisoners and other persons.

Taking into consideration a particularly high number of places of detention in Ukraine and scarce resources allocated to the Commissioner's Office (The Law

[6] http://www.ombudsman.gov.ua/en/page/secretariat/regionalni-predstavnicztva-upovnovazhenogo/regionalni-koordinatori.html.

stipulates that expenditures on financing the national preventive mechanism shall be provided in the state budget of Ukraine (Article 19-1 (10)), the cooperation between the Commissioner and the community of observers and representatives of the NGO's is inevitably very close. With the support of donor and international organizations, a network of Regional public relations coordinators gathering local community activists has been established. This network significantly enhances the credibility of monitoring visits conducted by the Office (NPM unit). Observers from across Ukraine and the Commissioner's representatives gather in different regions of Ukraine and improve their skills while conducting group visits to different places of detention. The cluster meetings help to fix the identified violations as soon as possible and contribute to the prevention of torture. Besides, they help to solve the problem of unequal number of observers in different regions as well as expanding the scope of activities despite the limited financing from the state budget.

The Law of the Commissioner stipulates that every year the Commissioner prepares a special report on the situation related to prevention of torture and other cruel, inhuman, or degrading treatment or punishment. This report shall be published in the media and sent to the President of Ukraine, the Verkhovna Rada of Ukraine, and the Cabinet of Ministers of Ukraine in compliance with the legislation of Ukraine on information.

The reports of monitoring visits as well as annual and special (thematic) reports are published on the website of the Commissioner. The recommendations of the Commissioner are sent to the responsible authorities and are aimed at overall improvements, including administrative practice, policy, and laws.

XII. Mandate of the Commissioner in the Legislative Process

The participation of ombudspersons in the legislative process proves to be a valuable preventive measure and may provide collective benefit for the entire society or large part thereof. In Ukraine, the role of the Commissioner in the law-making procedure is manifested through the wording of Article 3(4) of the Law. It provides that the facilitation of the process of bringing legislation of Ukraine on human rights and freedoms with the Constitution of Ukraine and international standards is one of the purposes of the parliamentary control exercised by the Commissioner. In practice, this task is interpreted broadly, and the Commissioner is entitled to act in each main stage of the legislative process.

Initiating the Law-making Process

According to Article 9(1) of the Constitution of Ukraine, the right of legislative initiative in the Verkhovna Rada of Ukraine belongs to the President of Ukraine, the People's Deputies of Ukraine, and the Cabinet of Ministers of Ukraine. Even though the Commissioner is not formally entitled to institute a legislative procedure, Article 13(3-1) of the Law of the Commissioner provides that the Commissioner is entitled to make in due course proposals for improvement of legislation of Ukraine in the sphere of human rights protection. Currently, there is no legal framework of how exactly these legislative proposals shall be made. To this end, the Commissioner collaborates with ministries and certain committees of the parliament, even by submitting the draft laws prepared on their own motion. The examples derived from practice seem to suggest that the Commissioner is proactive in his capacity as draft law promoter and finds it as one of the most efficient ways to prompt the state authorities to address systemic problems at the most suitable level.[7] In promoting legislative initiatives, the Commissioner has generally found support of the committee of human rights and on several occasions successfully conducted initiatives that led to adoption of laws.

The Commissioner has also an indirect or informal impact on the law-making process. In this regard, one should note the authoritative nature of opinions and recommendations issued by the Commissioner since they are also capable of triggering certain legislative initiatives. The documents adopted by the Commissioner provide for the interpretation of a legal provision frequently in light of the European standards formulated by the European Court of Human Rights and other international institutions of human rights protection. This may alert law-making bodies and give rise to certain legislative procedures. It is even more so when the Commissioner urges the state authorities to establish a well-defined policy rule.

Monitoring the Law-making Process

It is not uncommon that the Ombudsmen are asked to participate in the law-making process or assess the legislative proposals. As foreseen in Article 13(2) and Article

[7] Examples include the constitutional submissions regarding restrictive sessions of the Cabinet of Ministers; legal provisions of the Criminal Code on the right vested to the Criminal Bureau to detain people without trial; legal provisions of the Criminal Code on the appeal right against continuation of detention; legal acts concerning the status of creative workers and related institutions.

13(5) of the Law, the Commissioner has access to documents from all bodies of state power and the right to attend sessions of the Verkhovna Rada and the Cabinet of Ministers. Nevertheless, in practice the Commissioner has a restricted possibility to participate in the sessions of the Cabinet of Ministers. The Commissioner may be invited to the sessions only if the discussions strictly and directly concern human rights matter. In addition, under legal acts there is no formal possibility for the Commissioner to participate in parliamentary debates.

Even though the Commissioner's role is of an advisory nature in this area and he does not hold a formal right to challenge draft acts, these activities do contribute to the quality of the law and in particular, its compliance with the standards provided by the European Convention on Human Rights, as interpreted in the case-law of the European Court of Human Rights, and other international standards.

Monitoring the Implementation of Legal Acts

During his activities, the Commissioner shall monitor that existing legislation or administrative regulations are consistent with, in particular, the Constitution and international standards developed in the sphere of human rights protection. The Law of the Commissioner provides for two types of response if he becomes aware of deficiencies in regulations laid down by the parliament or other state authorities. The Commissioner may make use of the general measure and notify the public authority concerned, e.g., particular committee of the parliament or relevant minister, about the legal regulation that allegedly is not in accordance with the standards of superior power. In addition, Article 150(1)(1) of the Constitution and Article 13(3) and Article 15 of the Law of the Commissioner provide the Commissioner with a direct access to the Constitutional Court concerning the matters of constitutionality of particular legal acts. In this context, one should note that information about shortcomings in the legal regulation regarding the protection of human rights which are discovered by the Commissioner is to be included into annual report (Article 18(1) of the Law of the Commissioner).

With the Special Report of the Commissioner of the Verkhovna Rada on Human Rights, the Commissioner recommended to the parliament: to speed up the review and adoption of the draft law of Ukraine "On Amendments to Some Laws of Ukraine Regarding Certain Features of the Organization of Enforcement of Court Decisions and Decisions of Other Bodies During Martial Law" (Register No. 8064 dated September 21, 2022); to adopt amendments to the Criminal Code for the implementation of criminal prosecution of guilty natural persons for crimes against humanity.

The Commissioner also recommends to the Cabinet of Ministers of Ukraine: to ensure regulatory and legal regulation, development and implementation of the Unified Register of Civilians who suffered from the armed aggression against Ukraine, as well as the division of data in the Register by categories of such persons, taking into account the criteria of vulnerability; to develop and submit to the Verkhovna Rada a draft law on the legal status of persons who suffered from the armed aggression against Ukraine and their social guarantees, defining the concept of "a person who suffered from the armed aggression against Ukraine" and the categorization of persons who suffered from the armed aggression of the Russian Federation, as well as the mechanism of compensation for the damage caused, including restitution, compensation, rehabilitation, and satisfaction. Law enforcement agencies must ensure an effective investigation of the death (injury) of every civilian in accordance with the requirements of the UN Human Rights Committee (General Comment No. 36 to Article 6 of the International Covenant on Civil and Political Rights) and the practice of the ECtHR.

Besides, the Commissioner recommends to the Prosecutor General's Office to carry out, with the participation of international and national experts, a categorization of violations of the laws and customs of war which are prosecuted under Article 438 of the Criminal Code.

In its turn, the Commissioner recommends to the Ministry of Reintegration, State Emergency Service: to strengthen work on search, mapping and removal of mines and explosive remnants of war; to develop a strategy for the current protection of the civilian population against mine danger; to develop a strategy (plan of measures) for the normalization of life activities of the population in the de-occupied territories.

The Commissioner's recommendations regarding the rights of persons who left abroad and persons forcibly deported from Ukraine were expressed separately.

As a supplementary measure in monitoring the compliance of the current legal regulation with the international human rights standards, one can also mention cooperation with international human rights organisations. According to Article 19 of the Law of the Commissioner, the Commissioner is entitled to participate in the preparation of reports on human rights submitted by Ukraine to international organizations in accordance with current international agreements ratified by the Verkhovna Rada of Ukraine. This right certainly extends Commissioner's possibilities to monitor the compliance by Ukraine with international legal obligations in the field of human rights and influences the process of bringing Ukraine national legislation with the norms and principles of international law.

Conclusions

Having regard to the constitutional purpose of the Commissioner's activities, the Commissioner provides a significant contribution to the development of democratic accountability of state authorities within the Ukrainian system for protection of human rights. Currently, the principal function of the Commissioner, which is essentially reflected in several legal provisions set out in the Law of the Commissioner, is responding to the violations of human rights in various spheres of public law. An equally important activity that is carried out by the Commissioner and his Office is a participation in the development of human rights policy. The existing legal framework requires the Commissioner to undertake both functions in a proactive manner. Nonetheless, to strengthen these activities, the legal framework can be improved in a way that would recognise the Commissioner's standing in ensuring the right to good administration. In this regard, there is room for consideration whether the Commissioner could benefit if awareness of the right to good administration were enhanced via the constitutional and subsequently other legal regulation.

Generally, the existing law is following European and international standards. The Law of the Commissioner provides for all major elements of the Ombudsman activities that are aimed at ensuring effectiveness, independence, and impartiality of the Office. However, the current legal regulation should be improved. It is not well-structured and, in certain cases, lacks legal certainty and systemic approach. It was established that the Law of the Commissioner on certain occasions was amended without considering other legal acts or was subsequently not revised in accordance with new legal acts.

The legal framework offers every formal requisite guarantee of independence to the Commissioner. His status is constitutionally defined and further strengthened by legal regulation that establishes that the Commissioner is separate and independent from state or other public authorities. Legal provisions regarding immunity for the Commissioner in carrying out his functions are also in place. In addition, the Commissioner is given necessary discretion in implementing his policy regarding the distribution of the human resources of his Office and creating efficient working patterns. Legal regulation in this regard might need only a minor "tuning."

Having said that, the current legal regulation on the status of the Commissioner deserves attention in terms of the following:

Appointment procedure. Notably, the legal regulation regarding the voting for the candidates who are nominated to the post of the Commissioner should provide stronger guarantees for the independence of the institution. Respectively, the legal framework related to the number of votes required in the parliament for a decision on appointment to be adopted should be revised.

Cessation of the duties. Legal grounds for termination and dismissal of the Commissioner lack precision and legal clarity. Moreover, there are no legal notions that would aim to regulate directly the situation where, save in the event of the dismissal, the Commissioner's mandate comes to an end but the new Commissioner has yet to be appointed. In this respect, consideration should be given to establishing legal provisions providing for a temporary appointment or to clarification of existing legal rules.

Re-election procedure. The current legal regulation lacks legal certainty since it does not directly establish the right of the ongoing Commissioner to be nominated for a new term. Even though it must be emphasised that there has never been any practical problem in this respect, it is desirable that these discrepancies are removed. In addition to this, further analysis shall be undertaken to look more closely at whether opting for a single but longer term of appointment could have beneficial effects for the Commissioner and his Office in carrying out the mandate assigned to it by the Constitution.

Strengthening professional and administrative capacity of the Office. Further steps should be made to guarantee efficiency of the work of the Commissioner and his Office. In order to enhance the capacity to perform Commissioner's competences, there should be adequate conditions and means for training and qualification. In addition, international cooperation should be strengthened. Ensuring adequate level of funding to the Commissioner's Office, by providing appropriate remuneration for the Commissioner (linked to the high-ranking officials) and personnel of the Office, should also be taken as a priority.

Regional set-up of the Office. Regional offices are not formally established under national law. Currently, their status is subject to the regulation by internal rules which are adopted by the Commissioner. It is not proposed to interfere with the Commissioner's discretion as to organisation of the regional functioning of the Office. Nevertheless, the activities of the regional offices could be strengthened if their status and operating principles were defined under the Law of the Commissioner.

Accountability and presenting activity statements. Having regard to the contents of annual reports, the methodology in presenting relevant information and materials should be improved. Even though annual reviews are quite extensive, they do not provide the statistics with sufficient details and adequate explanations. In addition, there is room for improvement by preparing a user-friendly version of activity statements that would be addressed to the members of the society. At the same time, this could enhance the awareness of the Commissioner's functions.

As regards the mandate of the Commissioner, currently, the Commissioner is charged with overall competence. Within the existing legal framework, in choosing the legal tools for protection of human rights the Commissioner has been given

flexibility and informality. Even though deciding for the most suitable model of the Commissioner's activities falls into the discretion of the parliament, several important issues should be further analysed and, where appropriate, improved:

Law-making process. The existing legal framework is not meant to provide for a sturdier legal ground and methodology as to how the Commissioner participates in the law-making process. The legal regulation should establish a mechanism for the Commissioner to provide active oversight of law-making process and its goals, support and implement policy of human rights protection, and thereby foster the quality of laws. This includes providing meaningful and more formalized opportunities for the Commissioner to contribute to the process of preparing draft law proposals and to the *ex ante* impact assessment. Thus, the evolved and strengthened role of the Commissioner should involve the development of a more structured relationship with the legislative bodies. Under current circumstances, this is of particular importance since the Commissioner is capable of promoting regulatory coherence in pursuit of greater harmonisation of supranational and national levels of human rights protection.

Monitoring the existing legal regulation and its implementation in practice. One of the effective instruments of the Commissioner to address the systemic human rights problems and to generate new legislative initiatives in this field is the constitutional entitlement to apply to the Constitutional Court on the issues of the constitutionality of the legislation or the official interpretation of the relevant constitutional provisions. The active use of this right by the Commissioner has been increasing in recent years and proved to be potent. Indeed, the right of the Commissioner to apply to the Constitutional Court regarding the constitutionality of the legislation or the official interpretation of the Constitution has proved to be an effective instrument in responding to the systemic human rights problems. However, a few measures can be considered to increase the effectiveness of this instrument even more: the introduction of measures that could ensure high quality of applications by the Commissioner, and legal provisions (preferably in the Law on the Constitutional Court) for the order of consideration of cases by the Constitutional Court, including the possibility to give priority to those cases where the systemic human rights problems are involved.

Protection of human rights before courts. Overall, currently the Commissioner provides a valuable contribution in facilitating access to available legal and judicial remedies for vulnerable people. Nevertheless, preliminary concerns are raised in connection to the Commissioner's right to apply to courts in terms of its necessity. Essentially, the Commissioner has jurisdiction over any human rights violations in judicial proceedings and takes up various roles in this regard, e.g., acts as a legal representative or public prosecutor. In light of the fact that the state legal aid scheme

is in place, there is no rationale for the Commissioner to act as a representative of the disadvantaged members of the society. Moreover, the Commissioner's mandate is not limited to monitoring of judicial administration but also allows for certain interventions in judicial proceedings. The right to initiate a review of final judicial decisions may be seen as unsubstantiated interference into the administration of justice if the law does not provide for appropriate and sufficient safeguards. In addition, it is not quite clear how the abovementioned function correlates with the legal provisions of the Law of the Commissioner, which in essence prohibit the interference in cases before courts. Having regard to this, deeper analysis shall be performed on the matter under consideration, preferably, in a comparative manner. At the same time, opportunities may by sought for strengthening the Commissioner's role as *amicus curiae* if the necessity to build up strong legal relationship of the Commissioner vis-à-vis courts is established.

Handling individual complaints. Given the fact that the Commissioner is easily accessible and free-of charge, capacity of the Commissioner to investigate and handle individual complaints should be strengthened. Essentially, this is inseparably linked to the revision of the relation between the Law of the Commissioner and the Law on Citizens' Appeals. A few points of criticism could be made in this regard. Interestingly enough, the Law of the Commissioner does not provide for any separate rules and principles related to the administrative procedure carried out by the Commissioner and refers to the Law of Citizens' Appeals. The improvement of the legal framework regarding the grounds of admissibility of the complaints, review criteria, grounds for adopting different kinds of acts is an urgent need. In addition, the legal framework is rather ambiguous in terms of what exactly happens after the Commissioner has decided to open the case on human rights violations and how it correlates with other powers of the Commissioner, e.g., the right to make a constitutional submission or legal request.

Initiation of liability. Further, the Commissioner's competence in initiation of administrative liability and especially drawing-up administrative protocols cannot be viewed as being in line with the constitutional purpose of the Commissioner or international standard of the Ombudsmen. It is evident that the Office of the Commissioner is not well equipped to carry out investigations to draw-up administrative protocols and lacks the necessary expertise in this sphere. Moreover, this creates a disproportionate workload and consequently obstructs the exercise of the principal functions of the Commissioner.

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