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**ABOUT THE JOURNAL**

Kyiv-Mohyla Law and Politics Journal (KMLPJ) is an international, interdisciplinary, and peer-reviewed online journal. It covers the broad areas of Law, Politics, International Law, and International Relations focusing mainly on Jurisprudence, Constitutional and International Law Issues, Political Theory and Methodology, and European Studies as well as other areas. KMLPJ is published in cooperation with the Ukrainian European Studies Association. The editorial office is based at the National University of Kyiv-Mohyla Academy, Ukraine.

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REVIEWS

# EDITORIAL

This 11th issue of Kyiv-Mohyla Law & Politics Journal (KMLPJ) follows the established practice of selecting and publishing high quality scholarly papers in law and political science from all over the world. The KMLPJ has always been focused on academic quality and editorial transparency based on principles of open access. Therefore, the KMLPJ offers unrestricted and free open access to the papers without any time limit. The KMLPJ's Editorial Board expresses deep gratitude to our sponsors who have been making this happen since the launch of the KMLPJ in 2015. Our efforts were recognized by independent reviewers, and in February 2025 the KMLPJ was accepted for indexing into Scopus database which made it even more accessible to scholars around the world. This is the achievement of the editorial team, members of the Editorial Board, strict and objective reviewers, competent authors and devoted readers. We don't stop here and look forward to keeping up with high quality academic standards we have set for ourselves from the very first day of the KMLPJ's existence.

This issue covers a range of significant topics in the articles carefully selected by our editorial team with the assistance of independent reviewers. It starts with the general EU-related topic reflected first in the article by **Robert Talaga** and **Ida Musiałkowska** "Instrument for Structural Policies for Pre-Accession as an Introduction to the Use of the Cohesion Fund," where Polish authors address the issues of important preparation issues every EU-candidate will be facing. Rich Polish experience in preparation for joining the European Union reflected by the authors is very important and valuable for Ukrainian audience as we are currently undergoing these procedures. This material is followed by a thorough research article "Legal Techniques in EU Legislative Drafting: A Model for Ukraine's Law-making Reform" by **Tetiana Hudima, Volodymyr Ustymenko, Ruslan Dzhabrailov, and Oleh Zahnitko**. The team of researchers addresses technical issues of EU legislative drafting which is also crucial for our EU-accession process as harmonization of Ukrainian legislation with major EU legislative norms is a cornerstone of current Ukrainian legislative processes. This article is followed by "Judicial Reform in Ukraine in the Times of Post-revolution Opening and the Lessons the EU can Learn" by **Dmytro Koval and Andrii Latsyba** who share Ukrainian experience in reforming our judicial system. The authors' thorough research allows them to construct sound advice that can be used by the EU itself.

The three first legal articles are followed by "Current Trends and Prospects of Ukrainian Return Migration" by **Marharyta Chabanna** who brings an important political science issue of return migration by Ukrainians. Considering the ongoing war, Ukrainians have to flee from their home country and become refugees in another states. However, a number of Ukrainians travel the other way, they go back to Ukraine. The author analyses the reasons for that decision, why people make it, what challenges they face, what is the eventual outcome of their decision from the point of view of political scientist.

The next set of articles focuses on the other important and unforgettable issue in Ukrainian history – the Genocide. This set opens with "Genocide Trials in the International Criminal Court: Challenges of Fact-finding, the Ukrainian Case and ECHR Standards" – a thorough research on ICC jurisprudence in genocide cases by **Oleksandr Drozdov, Olena Drozdova, and Iryna Basysta.** The team of these authors has

rich experience in analyzing international courts' jurisprudence, and their presented material is rich in new findings and academic as well as practical suggestions. This set is followed by **Maksym Vishchyk's** "Undoing the Group's Fabric: Social Disintegration as a Possible Manifestation of Genocidal Intent" where this scholar provides thorough analysis of genocidal intent features from legal point of view.

Further material "The Polyakh Case: Implications for Lustration in Ukraine and Abroad" by **Bohdan Bernatskyi and Anastasiia Mits** focuses on the issues of lustration. This article provides a thorough insight into foreign experience, focusing primarily on one of the most significant cases in the area.

The following two articles touch upon the rights of the youth from legal and political science points of view. The first material "The Rights of the Child in the Universal Declaration of Human Rights (1948): The History of Creation and the Role of the Ukrainian SSR in that Process" by **Aisel Omarova and Mykhaylo Shepitko** combines the historical and legal analysis of children's' rights as seen by the Universal Declaration of Human Rights. While the second material "Shakal-Express as a Political-Affective Technology: Cancel Culture, Moral Judgment, and Digital Activism among Ukrainian Generation Z during Wartime" by **Ihor Tsyhvintsev** focuses on a special political technology aimed at Ukrainian youth during wartime.

The next article "Unmanned Aerial Vehicles During First World War and Interwar Period (1914-1939), Military Experiments, Origins of International Legal Regulation" by **Mykhailo Akimov and Iryna Pokhylenko** touches upon the essence of military legal regulations developed in the last century. This article gives us understanding on the foundations of those regulations.

Proper state needs proper administrative procedures. Therefore, the following article "Theoretical and Practical Challenges of Proper Administrative Service Fee Regulations" by **Viktor Tymoschuk** who provides thorough analysis of the issue.

The 12th article "International Commercial Mediation and the Development of the Right of Access to Justice" by **Mourad Yousfi** provides an insight into private law issues of dispute resolution focusing mainly on mediation.

The last 13th article "General and Special Norms Concerning Careless Crimes in the Aspect of Legal Certainty as a Component of the Rule of Law" by **Serhii Bahirov** reflects on the interrelation between the demands the principle of the rule of law sets onto specific criminal law provisions in the area of careless crimes.

This issue also includes a reflection "Review of Court Practice in Disputes on Reclamation of a Share in Common Joint Property" by **Iryna Dzera**, who decided to share her insights on the relevant court practice with our readers.

And finally, a long-awaited book review by **Oleksii Tseliev, Yuliia Matveieva, and Ievgen Zvieriev** who jointly decided to review the last book "Philosophy of Law" authored by the late Professor Mykola Koziubra who has tragically passed away last year. Prof. Koziubra has served as a member of our editorial board and was a renowned scholar in the areas of jurisprudence, theory of law, constitutional law and philosophy of law. He has been our beloved Teacher who was always eager to share his very deep thoughts with us, his students and colleagues. His book is already being used in many Ukrainian universities, and by this "Lucidly and attractively simply about complex issues of understanding law: General Legal Theory instructors' reflections on the monograph Mykola Koziubra "Practical Philosophy of Law"" material

National University of Kyiv-Mohyla Academy Faculty of Law scholars who were part of "Prof. Koziubra's school" wanted to pay a tribute to his memory.

Kyiv-Mohyla Law & Politics Journal will continue selecting and publishing the best of the best of authors' materials thus making sure that the quality of the published scholarship is of the highest scholarly standard. This requires difficult, sometimes extremely demanding but always engaging work of our editorial team that would never materialize without the support of our sponsors. Kyiv-Mohyla Law & Politics Journal wishes to sincerely thank **Ms. Halyna Traversa, Ms. Olha Romanova, Mr. Mykola Khomenko, Mr. Lyubomyr Drozdovskyi, Saienko-Kharenko Law Firm, Everlegal Law Firm, Avellum Law Firm** who have contributed significantly for this issue of our journal to appear. The KMLPJ also expresses its gratitude for support by the **(**EMBRACing changE: Overcoming obstacles and advancing democracy in the European Neighbourhood **(EMPRACE))** project under the EU Horizon Europe scheme, project No.101060809.

And finally, Kyiv-Mohyla Law & Politics Journal editorial team would like to pay tribute to the memory of our first Editor-in-Chief **Prof. Andriy Meleshevych** who has inspired us all to take the challenge of creating a high-quality scholarly interdisciplinary journal published by the National University of Kyiv-Mohyla Academy by attracting the bright minds and what they bring with them. Time passes fast, and this year we are at a point of five years that our beloved and much missed Professor Meleshevych is not with us anymore. However, the team of the journal keeps to its promise to him and will continue to further work hard to make sure quality scholarship is seen and read.

We would also like to specifically thank our numerous readers. You are the ones we are doing our work for!

*Prof. Roman Petrov, Editor-in-Chief*
*Dr. Ievgen Zvieriev, Managing Editor*

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# INSTRUMENT FOR STRUCTURAL POLICIES FOR PRE-ACCESSION AS AN INTRODUCTION TO THE USE OF THE COHESION FUND

***Abstract***

*The transformation processes of 1989 initiated Central European countries' aspirations to integrate with Western Europe. In response, the world's leading industrialized nations pledged support for systemic transformation, leading to the European Community's establishment of the PHARE program in 1989 for Poland and Hungary. Over time, this assistance expanded to other aspiring EU member states, forming a coordinated pre-accession strategy.*

*A key financial instrument within this strategy was the Instrument for Structural Policies for Pre-Accession (ISPA), introduced in 2000. Modelled on the EU's Cohesion Fund, ISPA aimed to support economic and social cohesion through large-scale investments in environmental protection and transport infrastructure. The program facilitated compliance with EU environmental standards and the development of trans-European transport networks (TENs). In Poland, ISPA-funded projects improved air and water quality, waste management, and integrated national transport systems with EU networks.*

*The literature on the use of pre-accession funding and ISPA in particular is fragmented and not abundant. Therefore, this article sheds light on ISPA's programming, application processes, implementation challenges, and outcomes in a comprehensive way. The study employs legal analysis, critical evaluation of reports, and statistical data to assess ISPA's performance. The findings provide insights into optimizing pre-accession assistance mechanisms and guiding future EU cohesion policy funding. It also serves as a source of policy-learning for the prospective EU Member States.*

***Key Words:*** *ISPA, pre-accession funds, EU funds, Cohesion Policy, Cohesion Fund, infrastructure, Poland*

## Introduction and literature review

The fall of the Iron Curtain unleashed the aspirations of individual central European countries to integrate with the free countries of the old continent. On 14-15 July 1989, the seven most industrialised countries of the world decided at a summit in Paris to provide assistance to countries embarking on systemic transformation. Consequently, by a decision of 18 December 1989. The Council of Ministers of the European Community defined the legal framework for the support given to Poland and Hungary[1]. This created a two-country aid program for Poland and Hungary (Poland and Hungary Assistance for Restructuring their Economies). The adoption of such an instrument made it possible to provide support to countries that were clearly trying to rebuild the structures of their regained sovereignty. However, the structural reforms undertaken by a whole group of countries that included Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia did not go unnoticed by the European institutions. As a result, the assistance originally provided to two countries was extended to the entire group of countries aspiring to join the EU structures. The progressive process of political and economic rapprochement resulted, in the case of Poland, in the conclusion of the Europe Agreement establishing an association between the Republic of Poland and the European Communities and their Member States on 16 December 1991[2]. This arrangement enabled the development of further economic relations between European states[3].

Between 1998 and 2002, negotiations were held to agree the conditions necessary for full membership.

As part of the process of harmonising the Polish legal system with the solutions in place in the European Communities, issues related to environmental protection were a priority[4]. In fact, this was due to the fact that they were regulated at both the primary and secondary levels of Community law. At the same time, this coincided with the signing on 25 June 1998, during the Pan-European Conference of Ministers Responsible for the Environment in Aarhus, of the Convention on Access to Information, Public Participation in Environmental Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention signed on 25 June 1998). Upon becoming a full member, Poland had to fulfil its environmental protection obligations under both the European Agreement and Community treaties and directives, as well as take into account the provisions of the Aarhus Convention[5]. The costs of implementing all the aforementioned environmental regulations required increased expenditure on new institutional and procedural solutions. At the same time, this was in line with the process of transforming the entire state apparatus, including through the decentralisation of tasks, which were divided between state and local government bodies[6].

[1] Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, *Official Journal L 375 , 23/12/1989 P. 0011 - 0012*

[2] Journal of Laws. 1994, No. 11, item 38, as amended; hereinafter: the Association Agreement.

[3] P. Kalka, *Proces dostosowawczy na rynku dóbr a wymiana handlowa między Polską a państwami członkowskimi Europejskiej Wspólnoty Gospodarczej (Wspólnoty Europejskiej)* [w:] *Dostosowania do wymogów Unii Europejskiej. Przykład Polski*, ed. Piotr Kalka, Instytut Zachodni, Poznań 2007, s. 33-55.

[4] G. Grabowska, *Poland on the Way to the European Union: From Association to Accession in the Context of Environmental Policy (in:) Legal Convergence in the Enlarged Europe of the New Millenium*, (ed.) Paul L.C. Torremans, Kluwer Law International, The Hague—Boston—London 2000, p. 1–20.

[5] Op. cit.

[6] B. Popowska, *Ustrój polityczno-gospodarczy Polski między centralizacją a decentralizacją*, [in:] *Dostosowania do wymogów Unii Europejskiej. Przykład Polski*, ed. Piotr Kalka, Instytut Zachodni, Poznań 2007, s. 13-32.

On 24-25 March 1999, at the Berlin European Council, it was decided that from the year 2000, new financial instruments called pre-accession instruments would be introduced in the candidate countries, namely SAPARD and ISPA, and the rules for the disbursement of the Structural Funds were reformed (Agenda 2000). In this way, the candidate countries for full membership of the European Communities were covered by coordinated assistance within the framework of the adopted pre-accession strategy[7]. Support within the framework of market transformation and preparation for full membership was to be provided by special transitional financial instruments[8]. Another *pre-accession* assistance program for EU candidate countries, already closed, was the *Instrument for Structural Policies for Preaccession*[9], which was intended to support economic and social cohesion by co-financing large investment projects in the environment and transport sectors. The ISPA program was set up along similar lines to the Cohesion Fund used by the Member States[10]. The ISPA program was intended to help the countries of central and eastern Europe prepare for full membership by supporting projects to reduce developmental delays in the environment and transport sectors. In practice, ISPA was intended to help candidate countries achieve certain standards and norms under Community environmental law and agreements on the creation of trans-European networks, taking into account uniform conditions for the use of the candidate countries' national networks. In the field of environmental protection, the priority was to improve air quality and drinking water supplies by reducing water and air pollution, and to assist in waste management (waste treatment) and waste water collection and treatment. Projects in rail and road infrastructure co-financed under the ISPA program were intended to integrate Polish infrastructure within the national transport networks with the trans-European transport networks (TENs) of the European Union (road, rail or air). In cooperation between the European Commission and all the countries concerned, Polish routes of international importance were also agreed to become part of the TENs after full membership in the framework of the so-called Pan-European Transport Corridors agreed at the conferences in Crete (1994) and Helsinki (1997).[11]

Going beyond literature on historical process of Poland preparing itself to the EU accession the body of academic output on ISPA is fragmented and not very abundant. Papers report that projects funded under instruments like ISPA often faced financing, planning, and administrative

[7] Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89 (OJ L 161, 26.6.1999, p. 68).

[8] J. W. Tkaczyński, G. Rossmann, *Fundusze Unii Europejskiej*, Wydawnictwo Temida 2, Białystok 2003, pp. 63-77.

[9] Council Regulation (EC) No 1267/1999 of 21 June 1999 establishing an Instrument for Structural Policies for Pre-Accession (OJ L 161, 26.6.1999, p. 73); amended by Regulation (EC) No 2382/2001 (OJ L 323, 7.12.2001, p. 1).

[10] The Cohesion Fund was established under the Maastricht Treaty on the establishment of the European Union of 7 February 1992, which entered into force on 1 November 1993. The main objective of the Fund is to reduce disparities between the levels of development of the various regions and to reduce the backwardness of the least favoured regions. The Cohesion Fund (Cohesion Fund) was introduced as a result of discussions on the accession to the European Union of Ireland, Greece, Spain and Portugal, with a view to reinforcing the structural policies of those countries whose per capita Gross National Product (GNP) was less than 90% of the average GNP of all the Member States and which had a program for meeting the convergence criteria set out in Article 104 of the Treaty establishing the European Community. The Cohesion Fund was directly established under Article 161 of the Treaty establishing the European Community, although in fact the basis for its operation was laid down in Council Regulation No. 1164/94/EC of 16 May 1994 establishing the Cohesion Fund (as amended on 21 June 1999 by two Regulations No. 1264/EC and No. 1265/EC). The Cohesion Fund is not a structural fund but an instrument of economic and social cohesion policy. It implements these objectives by making a financial contribution to projects in the fields of the environment and trans-European networks in the field of transport infrastructure. Projects with a value in excess of €10 million may receive funding of up to 85% of the eligible costs if, in the field of transport, they are part of trans-European transport networks (road, rail or air), and environmental projects address problems in the fields of water and wastewater management, waste management, air protection or energy production. Since 1 January 2004, Ireland has no longer been eligible for the Cohesion Fund.

[11] L. Grudzińska, A. Harassek, W. Wojtkielewicz, *Kolejowe programy inwestycyjne realizowane ze współudziałem środków Unii Europejskiej*, Prawo i Finanse, 2003, no 3 , s 39

challenges[12]. For example, analyses of motorway and transport projects note difficulties securing consistent co-financing and managing institutional capacity, while evaluations of ISPA projects in water, waste, and rail reveal that inconsistent appraisal and demand-driven selection sometimes hindered regional benefits[13]. Several studies document that infrastructure investments did not uniformly reduce regional disparities. In some cases, they even contributed to divergent growth patterns in disadvantaged areas[14]. Key challenges identified in the literature covered also: financial or co-financing difficulties[15], regional disparities or risk of divergence[16]; appraisal, planning, or selection challenges[17]; political, legislative, or institutional environment[18]; management or capacity building[19]; environmental controversy, poor infrastructure condition, policy controversy related to infrastructure policy design[20]; project design issues[21]; or transition from socialism or regulatory challenges[22].

Administrative and financial mechanisms were a recurring theme, particularly regarding the management of European Union funds (including the Instrument for Structural Policies for Pre-Accession, and later the Cohesion Fund) and the challenges of project appraisal and co-financing. The authors underlined that robust administrative frameworks are necessary for effective infrastructure investment. Also transparent and consistent financial mechanisms are needed to maximize the impact of European Union funds[23]. While capacity building and adoption of best practices from older member states are important for successful project delivery[24].

Success factor related to effectiveness of infrastructural projects under integration processes in general lie in European integration conditions[25], policy interventions targeting proper investment choices[26], policy learning[27], improved institutional environment[28] or evaluation of performance-based approach[29].

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[12] M. Florio, S. Vignetti, *Cost-Benefit Analysis of Infrastructure Projects in an Enlarged European Union: An Incentive-Oriented Approach* Working Paper n.13/2003. Evaluation Conference, European Union, Budapest 26-27.06.2003 https://air.unimi.it/bitstream/2434/610151/2/30.pdf

[13] Op. cit.

[14] Bartlomiej Rokicki, Mieczyslaw W. Socha, Effects of Poland's Integration with the EU: Structural Interventions and Economic Development in the Eastern Border Regions, *The Journal of Comparative Economic Studies*, The Japanese Society for Comparative Economic Studies (JSCES), 2008, vol. 4, pp 81-114.

[15] M. Florio, S. Vignetti, op. cit.

[16] Bartlomiej Rokicki, Mieczyslaw W. Socha, op. cit.

[17] M. Florio, S. Vignetti, op. cit; Thomas Laursen, Bernard Myers, *Public Investment Management in the New EU Member States: Strengthening Planning and Implementation of Transport Infrastructure Investments.* World Bank Working Paper No. 161, 2009. https://doi.org/10.1596/978-0-8213-7894-6 ; Tomasz Komornicki, Barbara Szejgiec-Kolenda, The development of transport infrastructure in Poland and the role of spatial planning and cohesion policy in investment processes. *Planning Practice & Research*, 2020, *38*(5), 694–713. https://doi.org/10.1080/02697459.2020.1852677

[18] A. Brenck, Torsten Beckers, M. Heinrich, C. Hirschhausen. *Public-private partnerships in new EU member countries of Central and Eastern Europe: An economic analysis with case studies from the highway sector." (2005). Public Sector M anagement and Regulation Working PapersReprint from EIB Papers, Vol. 10, No. 2 (2005), 82-112;* C. Hirschhausen, *Modernizing Infrastructure in Transformation Economies: Paving the Way to European Enlargement, Edward Elgar Publishing, pp.280,* 2002

[19] A. Fraser, F. Gross, J. Bachtler, S. Miller, *Ex Post Evaluation of the Cohesion Fund (Including Former ISPA): Work Package D: Management and Implementation.* EPRC, Glasgow. https://pureportal.strath.ac.uk/en/publications/ex-post-evaluation-of-the-cohesion-fund-including-former-ispa-wor

[20] C. Hirschhausen, op. cit.

[21] A. Brenck, Torsten Beckers, M. Heinrich, C. Hirschhausen, op. cit.

[22] C. Hirschhausen, op. cit.

[23] M. Florio, S. Vignetti, op. cit.

[24] A. Fraser, F. Gross, J. Bachtler, S. Miller, op. cit.

[25] T. Komornicki, B. Szejgiec-Kolenda, op. cit.; A. Brenck, Torsten Beckers, M. Heinrich, C. Hirschhausen, op. cit.

[26] M. Wegener, T. Komornicki, P. Korcelli, Spatial Impacts of the Trans-European Networks for the New EU Member States, in (eds.) T. Komornicki and K. Czapiewski "New Spatial Relations in New Europe" EUROPA XXI, 2005, 13, 27-43; Warszawa, https://rcin.org.pl/igipz/Content/3092/Wa51_13309_r2005-t13_EuropaXXI.pdf

[27] I. Musiałkowska, *Wykorzystanie doświadczeń Unii Europejskiej w zakresie polityki spójności przez Mercosur*, Difin, Warszawa, 2017; M. Dąbrowski, I. Musiałkowska, and L. Polverari. "Introduction: Drawing Lessons from International Policy-Transfer Initiatives in Regional and Urban Development and Spatial Planning." *Regional Studies* 2018, 52 (9): 1165–68. https://www.tandfonline.com/doi/full/10.1080/00343404.2018.1462490.

[28] A. Brenck, Torsten Beckers, M. Heinrich, C. Hirschhausen, op. cit.

[29] M. Florio, S. Vignetti, op. cit.

Against this background this paper provides a comprehensive analysis and case study of the ISPA implementation in Poland with the focus on institutional aspects and processes. The purpose of this article is: 1) to characterise the programming of ISPA and the application for funds under the program, 2) to identify implementation problems and to assess the system and results, 3) to formulate policy recommendations for the future Member States. The methods used in the article include an analysis of legal acts, a critical analysis of reports and statistical data available from Polish and European institutions responsible for ISPA implementation. The paper is structured as follows: ISPA programming, application procedure, challenges related to the implementation of the program and program evaluation. Conclusions close the paper and point out that experiences from the programming of ISPA in Poland can be used to create a system for the use of pre-accession assistance and, in the future, of EU cohesion policy funds or infrastructural and regional policy development in the candidate countries.

## ISPA programming

The ISPA program prepared by the European Commission was part of the pre-accession partnership, which involved preparing the candidate countries in priority areas of *the acquis communautaire.* When adopting the *acquis communautaire*, Poland declared that it would apply Community solutions even before full accession, treating the integration process as irreversible[30]. As a result, in January 1997, the National Strategy for Integration (NSI) was adopted[31]. In June 1998, the National Program of Preparation for Membership in the European Union (NPPM) was adopted[32].

Candidate countries were not legally obliged to develop national strategies for the transport and environment sectors on the basis of national investment plans and programs. However, the European Commission recommended that such national strategies for the transport and environment sectors should be developed on the basis of national investment plans and programs. The European Commission's environment and transport sector documents provided a reference framework (overall program priorities) for setting out the key implementation criteria for the national ISPA strategies. The European Commission provided assistance to remove inconsistencies that appeared in the national ISPA strategies. Candidate countries developed national strategies in either the environment or transport sectors. The national sectoral strategies of the candidate countries defined the criteria for the appraisal and selection of project proposals for funding under ISPA. These national ISPA strategies defined the objectives to be achieved under the program in each candidate country. Sometimes they were also part of the implementation of already existing national development strategies (national development plans), which could accelerate the implementation of already existing projects (undertakings) of international importance[33] . In this respect, the planned projects were interwoven into

[30] G. Grabowska, *Poland on the Way to the European Union: From Association to Accession in the Context of Environmental Policy (in:) Legal Convergence in the Enlarged Europe of the New Millenium*, (ed.) Paul L.C. Torremans, Kluwer Law International, The Hague—Boston—London 2000, p. 1–20.

[31] Monitor Integracji Europejskiej, special issue, 1997.

[32] Monitor Integracji Europejskiej, No. 19 1998, pp. 19-62

[33] Signed in 1974 in Helsinki and amended in 1992, the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) covers the entire Baltic Sea area, including the inland waters of the countries bordering the Baltic Sea. Under the Helsinki Convention, measures can be taken for the entire catchment area of the Baltic Sea to reduce pollution from land-based sources. In the early 1990s, Poland initiated environmental protection measures in the Baltic Sea region. The Krakow region, which includes a large concentration of industrial centres discharging into the Vistula River, was identified as a sensitive area in terms of protecting the Baltic Sea. A treatment plant project covering the entire urban area of Krakow was included in the National Urban Wastewater Treatment Program and, as one of the priority projects, was subsequently included in the national ISPA strategy for the environment sector in 1999.

the National Action Plan for Membership prepared by each candidate country.

**Application procedurę**

The budget for the ISPA program for the period 2000-2006 in its original version assumed the disbursement of €7708 million (excluding technical assistance for preparing the beneficiaries to correctly apply for project funding). The total amount of funding for the ISPA program for the period 2000-2006 was €7280 million. Funding for ISPA projects in the environment sector amounted to €3804 million and in the transport sector to €3904 million. The annual budget of the ISPA program for the period 2000 - 2006 before the adoption of the amendments was set at €1.04 billion. Receiving such funding for the environment and transport sectors in equal amounts was contingent upon the level of preparation of projects submitted under ISPA and the possibility of partial co-financing of submitted projects from national funds. The annual allocation of the ISPA program comprised the sum of commitments allocated by the European Commission for approved projects in accordance with the procedure set out in Articles 7 and 8 of Regulation 1267/99.

An ISPA candidate country assisted by the European Communities submitted project proposals to the European Commission. Each project had to be approved by a decision of the European Commission. Project proposals submitted by the candidate countries, once assessed and approved by the European Commission, allowed for the signing of a Financing Memorandum, which specified the amount of grant awarded and the timetable for project implementation.

Subsequently, the European Commission indicated the approved projects to which co-financing had been granted staggered over the years in view of the scale of the planned projects. In this way, the maximum amounts of funding allocated under the ISPA program for individual projects were determined. In fact, a contract was concluded between the European Commission and the beneficiary country, setting out the budgetary commitments for each project and the financial indicators of the project. Such an agreement was called a financing memorandum, which was used to monitor project implementation. The value of funds allocated by the European Commission for co-financing projects under the ISPA program was expressed in so-called financial plans (annual commitments) contained in financing memoranda separately for each project. Depending on the progress of the project, the commitment instalments set out in the memorandum could be reduced or postponed. Consequently, the financial plans could also be amended. The financial plans of the European Commission specified annual commitments for the co-financing of approved IPSA projects. Such projects were multiannual undertakings, which meant that project expenditure was incurred over a number of years up to the project completion date specified in the financing memorandum. Commitments by the European Commission to ISPA projects in a given year did not imply an obligation to pay the amount allocated at that time. Payments were made at the request of the ISPA beneficiary candidate country on the basis of expenditure incurred and accepted. The exception was an advance payment representing 20% of the ISPA grant, half of which was paid upon signature of the Financing Memorandum for each approved project and the remainder upon signature of the first contract of a multiannual project under implementation. The funds allocated by the European Commission for a given project could be requested over several years. Once the infrastructure which was the subject of an ISPA funded project was in use, the ISPA funded projects were considered to have been completed. Each

applicant country was required to submit a final report to the European Commission within 6 months of completing a project co-financed by ISPA.

| ***Year*** | ***Eligible cost project*** | ***Total amount ISPA co-financing*** |
|---|---|---|
| ***1*** | ***2*** | ***3*** |
| Environment sector - investment projects and technical assistance | | |
| ISPA 2000 | 749 576 | 465 848 |
| ISPA 2001 | 672 870 | 397 962 |
| ISPA 2002 | 299 534 | 194 273 |
| ISPA 2003 | 345 859 | 227 108 |
| Total environment | 2 067 838 | 1 285 191 |
| Transport sector - investment projects and technical assistance | | |
| ISPA 2000 | 438 677 | 329 008 |
| ISPA 2001 | 708 007 | 531 006 |
| ISPA 2002 | 356 461 | 267 496 |
| ISPA 2003 | 230 621 | 172 966 |
| Total transport | 1 733 767 | 1 300 475 |
| Technical assistance - horizontal | | |
| ISPA 2000[34] | 1 630 | 1 630 |
| Total | 3 803 234 | 2 587 296 |

*Table 1. Financial data for ISPA projects 2000-2003 - as at 31 January 2004 (€1,000) - Source: Reply of the Minister for the Economy, Labour and Social Policy to Query No. 2908 on the use of ISPA funds.*

**Challenges related to applying for funding under the ISPA program**

Member States submitted proposals to the European Commission for projects to be co-financed under the ISPA program. Project applications submitted as proposals for ISPA funding required economic and financial justification. Each application for ISPA funding had to contain mandatory elements such as a timetable for the works; a cost-benefit analysis; a financing plan taking into account non-ISPA sources of finance (Article 7(3)(a) and Annex I of the Regulation (EC)). All projects that were expected to generate income in the future once implemented required the submission of a complete financial analysis. Applicants for funding had to demonstrate the planned feasibility of the proposed projects. A financial and cost-benefit analysis of the project should be included in each application for ISPA funding.

When deficiencies were found in the financial and cost-benefit analyses accompanying the submitted projects, these could have been grounds for withholding the projects. In many cases, however, candidate countries were called upon to provide clarifications or corrections when inconsistencies were found in the submitted applications in order to increase the credibility of the analyses contained therein. The European Commission, assumed that the implementation of projects submitted for funding, despite aforementioned shortcomings in the cost-benefit analysis, was necessary to meet the basic needs of the candidate countries.[35] Cost-benefit analysis was less relevant for environmental projects

[34] Since 2000, ISPA has replaced PHARE as the funding source for project preparation assistance applying for EU funding. Despite the low capacity in the candidate countries to prepare projects for the program, the candidate countries were slow to use technical assistance funds. In 2000, only two projects were approved for a total of 3.7 million euro - cf. Court of Auditors 2003/C 167/01 Special Report No 5/2003 concerning PHARE and ISPA funding of environmental projects in the candidate countries together with the Commission's replies.

[35] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006

as there were no alternatives for them. There were also no generally accepted methods for quantifying environmental benefits. Environmental projects therefore did not have to include complete cost-benefit analyses and it was sufficient to submit a socio-economic analysis or a proxy statement of compliance with EU directives without quantifying the value of the project. This approach was justified by the situation related to the guidelines for applying for funding.

In 2000-2001 the first ISPA projects were submitted which included a cost-benefit analysis. The European Court of Auditors[36] audited the ISPA project proposals for financial and cost-benefit analyses. As a result, recurrent weaknesses were revealed.

First among the shortcomings were deficiencies in the assumptions made about the scenarios for the ISPA projects being implemented and the lack of information in the risk analysis about the discount rates for the projects being implemented.

A second group of weaknesses in the ISPA projects audited were inconsistencies in the cost-benefit and financial analyses in the project files. In many of the projects funded, implementation costs could not be maintained at the planned level due to inadequate financial preparation of the projects (underestimation of the costs of the project submitted for funding). A number of funded projects could not maintain their implementation costs at the planned level due to inadequate technical preparation of the projects (sending grant applications to the European Commission too early without detailed technical documentation for the best solution). This was also the case for projects coming from countries that had used international consultancy services. In many cases, it was not possible to keep costs at the planned level due to their insufficient control during the implementation phase of the projects. A not insignificant factor in keeping costs at the planned level was the sharp rise in inflation, which was reflected in the construction sector in some candidate countries as a result of rapid economic growth. In some of the candidate countries after accession, there was again an unforeseen and unexpected rise in inflation, which on the one hand was a consequence of faster economic growth, which was also reflected in the development of the construction sector, and on the other hand was a consequence of the rise in raw material prices on world markets. Both factors indicated were the cause of the above-average price increase in the construction industry. In all these situations, an increase in the cost of implementing projects co-financed from ISPA funds was not a basis for amending signed Financing Memoranda. As a rule, ISPA financing memoranda were not amended to to take account of cost increases. As a result, it was the candidate countries that were forced to cover the increased costs of the projects, which also entailed increased scrutiny of the funds spent on their completion. Also mentioned as factors for cost increases were large fluctuations in the exchange rate between the euro and the national currencies of the candidate countries, as well as delays between the award of ISPA funding and the commencement of construction work on a funded project. Such factors also included premature submission of project applications to the European Commission without proper technical documentation. Underestimated project implementation costs sometimes prevented the awarding of tenders due to the lack of bids submitted on the financial terms and conditions set out in the tender specifications.

The third group of shortcomings in the ISPA projects audited were the unproven socio-economic benefits and the

[36] Court of Auditors Special Report No 5/2003 concerning PHARE and ISPA funding of environmental projects in the candidate countries together with the Commission's replies, *OJ C 167, 17.7.2003, p. 1–20*

Court of Auditors Special Report No 6/2005 on the trans-European network for transport (TEN-T) together with the Commission's replies, *OJ C 94, 21.4.2006, p. 1–36*

incomplete estimation of the effects of the implementation of the co-financed projects on the transport sector. The European Commission was not in a position to state unequivocally that the projects submitted represented the highest added value (on the basis of a cost-benefit analysis).

**Evaluation of the implementation of the ISPA program**

The lack of a consistent methodological approach to cost-benefit and financial analysis and the inadequacy of the European Commission's guidelines for applying for assistance under the program were undoubtedly one of the reasons for the shortcomings of the national administrations of the candidate countries, which were not provided with specialist knowledge. In addition, the short deadlines for preparing and submitting project proposals under ISPA further adversely affected the level of projects submitted for funding. Nevertheless, the European Commission[37] in monitoring the implementation of the ISPA program emphasised the insufficient administrative capacity of the candidate countries, which affected the preparation of the national authorities for the implementation of ISPA. According to the ECA[38] the inadequate preparation of projects for ISPA funding was also a result of the lack of administrative capacity of the candidate countries as well as the "mixed effectiveness of international consultancy services" used by the candidate countries. This approach seems too one-sided from the point of view of the European institutions. Indeed, it should not be underestimated that certain shortcomings and inadequacies in the submission of applications for ISPA programs were definitely dictated by the lack of availability of guidelines before the deadlines for submitting project proposals to the European Commission with projects to be funded. In 2000. The European Commission developed and made available the first methodological guide on policies, procedures and rules for financing ISPA projects, which in essence provided advice on how to apply for financial assistance under the program. However, the first ISPA manual containing, inter alia, guidelines for cost-benefit analysis was only made available to ISPA beneficiaries during the preparation phase of the first round of project applications by candidate countries. For the first round of applications, it was not possible to use the three guidance documents, which were made available too late by the Commission. A second version of the ISPA manual was produced in 2002 with explanations of the tendering and contracting procedures. Updated guidance on cost-benefit analysis was made available in 2002, setting out average rates of return and recommended 'timeframes' for the different sectors and addressing the weaknesses of the earlier version. However, the guidelines did not include rules for determining the environmental impact of planned projects. An important shortcoming of the program was that the ISPA methodological guides were only produced after the candidate countries had submitted their projects to the European Commission for approval under the ISPA program. Indeed, the methodological guides made available to the candidate countries with such a delay could only be of relevance for future submissions to the European Commission with projects scheduled for funding under the program. Only in this way could the methodological guides have influenced the candidate countries' knowledge of EU policies, procedures and funding rules. The belated release of the ISPA manuals could not make any difference in principle to the projects submitted in the procedures already underway. However, this was approached

[37] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006, 33.

[38] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006, 33.

differently by the European Court of Auditors[39], which considered that the guidance contained in the detailed program application forms made available in 1999, as well as the guidance developed under previous pre-accession instruments on tendering procedures, was sufficient for candidate countries. In this respect, a 'Guide to Cost-Benefit Analysis of Investment Projects' was available for the PHARE program from 1997, which explained the main principles of cost-benefit analysis. In addition, from 1998 onwards, the European Commission organised PHARE support meetings in all Candidate Countries on the occasion of which issues were also raised to prepare for the introduction of ISPA, taking into account the changing implementation conditions in the Candidate Countries. In 1999, the European Commission made available application forms for funding, which were also intended to provide guidelines for the proper drafting of applications for funding, with the guidelines developed under the previous pre-accession instruments as an additional point of reference for tendering procedures. The European Commission developed an instruction manual for PHARE implementing bodies on how to apply the standard procedures called the *Extended Decentralised Implementation System*.[40] From 01 January 2001 to 30 April 2004 the Practical Guide for PHARE, ISPA and SAPARD contracting procedures was in force, which replaced the relevant chapters of the *Extended Decentralised Implementation System (EDIS) Manual* on procedures and standard documents for contracting services, supplies and works. The European Commission repeatedly amended the PRAG Manual (Practical Guide for PHARE, ISPA, SAPARD), which undoubtedly affected the implementation of the Phare SEC Program of the 2001 edition.[41] This undoubtedly also adversely affected the appropriate application of this document for the ISPA program. In contrast, the 2002 version of the ISPA manual mainly took into account significant changes concerning the regulatory environment[42] . However, the above documents creating a system of regulations requiring appropriate application was not sufficient at the start of the ISPA program, or even during its implementation, as evidenced by the modifications made to individual documents by the European Commission. For example, the ECA's recommendations on improving the risk analysis of projects planned for co-financing from pre-accession funds (as an element of cost-benefit analysis) were taken into account in subsequent documents addressed to the EU candidate countries after 2004[43]. The lack of uniform methodological rules for the preparation of projects applying for ISPA funding was a wider systemic problem. Even specialised international consultancies struggled to read the guidelines for correctly applying for ISPA financial assistance, and they certainly cannot be accused of lacking the necessary administrative capacity. A lack of administrative capacity on the part of the

[39] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006, 33.

[40] The EDIS manual contained a definition of the principles of programming the implementation, monitoring and reporting of programs financed from the European Union, and also defined the duties related to the control exercised by the supervisory authority, with regard to the implementation of the program, the use of funds originating from the program and the principles of rational financial management of funds originating from the program - cf. Krzysztof Gasparski, Magdalena Iwaniecka, Marta Krępska, Rita Kubylis, Zuzanna Kucińska, Marzena Rożnowicz, Witold Witowski, Anna Włodarczak, Małgorzata Zalewska, PHARE Cohesion Społeczno-Gospodarcza. Programme Summary, edited by Agnieszka Haber and Witold Witowski, Ministry of Regional Development , Polish Agency for Enterprise Development, p. 12.

[41] Krzysztof Gasparski, Magdalena Iwaniecka, Marta Krępska, Rita Kubylis, Zuzanna Kucińska, Marzena Rożnowicz, Witold Witowski, Anna Włodarczak, Małgorzata Zalewska, PHARE Socio-Economic Cohesion. Programme Summary, edited by Agnieszka Haber and Witold Witowski, Ministry of Regional Development , Polish Agency for Enterprise Development, p. 12

[42] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006.

[43] Court of Auditors Special Report No 12/2008 - Instrument for Structural Policies for Pre-Accession (ISPA), 2000-2006

candidate countries was certainly not the sole cause of delays and deficiencies in the grant award procedure. On the European Commission's side, there was also a lack of sound administrative capacity at the start of ISPA, as evidenced by the absence of engineering experts and economists to assess the ISPA project applications submitted[44]. In fact, they were recruited on the basis of temporary contracts with the European Investment Bank. which concerned people who had experience with the Cohesion Fund. The Commission did not systematically recruit high quality specialists from the EIB due to the limited financial resources available for this purpose. In addition, it cannot be generalised that the candidate countries did not have to deal with project implementation on the scale of ISPA-funded projects. Indeed, many of the candidate countries went through a period of intensive industrialisation within the framework of the people's democracies, carrying out even larger investment projects, albeit certainly based on completely different principles of a planned economy not always based on the criterion of profitability. In this respect, what was new for the candidate countries was the stringent planning and financial requirements that were laid down at the start of the ISPA program. The unavailability of the guidelines, which should have been made available by the European Commission much earlier, certainly had a major impact on the correct structuring of an application for ISPA funding. However, it was difficult for the candidate countries to insist on their right and demand earlier access to certain documents when they were in the weaker position of only aspiring to fully-fledged membership. This does not, however, alter the generally positive assessment of the entire ISPA program, which provided a number of positive experiences both for the candidate countries and for the European institutions, which were thus laying the foundations for cooperation with the new countries burdened by the experience of socialism for the most part.

**Conclusions and recommendations**

Undoubtedly, the procedures put in place to implement ISPA were necessary from the point of view of disbursing funds from the taxpayers of the countries belonging to the European Communities.

These funds had to be controlled both by the European Commission, responsible for the implementation of the EU budget, and by the European Court of Auditors, which controls all EU finances. The conclusions reached by both EU institutions were not always favorable to the candidate countries. Nor were the opinions reached always in line with the position of these countries. In addition, they had very limited influence on the shape of the accession policy implemented. Nevertheless, the opinions of the candidate states should be taken into account as well as conclusions on the key factors contributing to effective and efficient implementation of the pre-accession funds appearing in the scholarly debate[45]. Polemical, and at times even critical, positions towards the views presented by the EU institutions can be an added value in the discussion of the reasons for the effectiveness of the implementation of financial programs from EU funds. The conclusions are also of particular value to subsequent candidate countries for

[44] Court of Auditors 2003/C 167/01 Special Report No 5/2003 concerning PHARE and ISPA funding of environmental projects in the candidate countries together with the Commission's replies.

[45] E.g. A. Fraser, F. Gross, J. Bachtler, J., & S. Miller. *Ex post evaluation of the cohesion fund (including former ISPA): work package D: management and implementation*. ECRP, Glasgow, 2012 https://pureportal.strath.ac.uk/en/publications/ex-post-evaluation-of-the-cohesion-fund-including-former-ispa-wor ; Francesc Morata and Andrea Noferini, Introduction to European Cohesion Policy for candidate and potential candidate countries. Framework, experiences and instruments. Institut Universitari d'Estudis Europeus, Barcelona, 2009

accession to the European Union[46]. They can benefit from the previous experience of countries that have already gone down this road. In the current political realities, the efficiency of the accession negotiations is crucial. However, there is no doubt that the negotiating requirements for agreeing on a common position are an obligation for all parties to the ongoing dialogue. There is also no doubt that it is not only the European Commission that can impose certain requirements. Member states can also expect the European Commission to provide certain conditions, such as the full availability of clearly formulated documents on the rules for the use of pre-accession financial assistance. Such documents were lacking in due course during the implementation of ISPA, for example, in terms of a consistent methodological approach to applying for funds from this program. On the other hand, the appropriate use of documents prepared for other programs co-financed by EU funds was not always sufficiently transparent for both candidate countries and specialized international companies dealing with professional application for such funds. In this situation, it seems that the accusations leveled against candidate countries in terms of insufficient administrative capacity were too one-sided. Deficiencies in this regard also occurred on the part of the European Commission, which probably also had an impact on the timely preparation of documents enabling candidate countries to apply for pre-accession funds. Arguably, this had an impact on the due level of preparation of project applications for funding of specific projects according to the criteria required by the EU institutions. Indeed, the provision of such documents to candidate countries also affected the level of preparation of the administrative apparatus to implement the requirements of EU law.

In Poland, this situation raised concerns about the loss of pre-accession funds and, consequently, the squandering of an opportunity for faster development of the country[47]. As a result, the use of funds granted by the European Communities under the ISPA program was subject to simultaneous control by the national institution responsible for the expenditure of public funds[48]. The post-audit conclusions of the Supreme Audit Office confirmed ‘delays in the implementation of the ISPA program in the environment sector’. The general recommendations aimed at removing the identified irregularities pointed primarily to the need for coordination between the Committee for European Integration, the Ministry of Finance, the Ministry of the Environment, and the National Fund for Environmental Protection and Water Management. Procedural problems were also confirmed, which required the introduction of precise deadlines for the verification of tender documents submitted by final beneficiaries, as well as deadlines for the conclusion of project implementation agreements with Final Beneficiaries, into the ‘Agreement on the implementation of the ISPA Program’. However, such procedural details required the final position of the European Commission on tender procedures, contracting conditions and tender documentation for projects co-financed by the ISPA fund, as well as agreement with the European Commission Representation on the deadlines for the verification of tender documentation.

However, Poland's problems with implementing the ISPA program were not unique. According to the European Court of Auditors, delays occurred in 75% of projects approved between 2000 and 2003

[46] P. Żuber, *EU Pre-accession Processes in the fields of Decentralisation, Regional Policy and Coordination of Structural Instruments. The case of Poland.* Kyiv, March 2023.

[47] T.G. Grosse, *Szanse i zagrożenia dla wykorzystania funduszy Unii Europejskiej,* Studia Regionalne i Lokalne, 2003, No. 2, p. 99.

[48] Informacja Najwyższej Izby Kontroli o wynikach kontroli przygotowania jednostek sektora publicznego do wykorzystania pomocy finansowej Unii Europejskiej w ramach programu ISPA w obszarze ochrony środowiska w latach 1999-2002; http://www.nik.gov.pl/kontrole/wyniki-kontroli-nik/kontrole,1048.html; Accessed 22.01.2025

in accordance with the original financial memoranda in all candidate countries.
The observations made have remained valid. Similar arguments can therefore be raised from the very beginning of the ongoing membership negotiations if only because of the principle of legal certainty operating in the system of EU law. Ensuring an adequate level of functioning of the public administration from the beginning of the ongoing negotiation process is also an important factor for the proper application of the aquis communutaire now and in the future[49]

This is important in view of the fact that, after accession to the EU, increasingly higher demands are being placed on the administrative capacity of each member state operating within the framework of the cohesion policy implementation system[50].

It was therefore rightly pointed out that there was a need for systematic analysis of the qualifications and aptitudes of persons responsible for the efficient, professional and effective performance of tasks related to the coordination and implementation of projects under the ISPA Program. In the Polish context, this concerned persons delegated to implement the ISPA program at the level of the Ministry of Finance, the Ministry of the Environment and the National Fund for Environmental Protection and Economy.

It is useful to analyze the conclusions of the reports of the EU institutions that control the implementation of the ISPA program, if only to ensure that previous systemic deficiencies are not duplicated. In the future, the use of the granted assistance will be simpler and at the same time more effective for all parties concerned.

Summing up, the paper findings go in line with literature review on defining challenges and key success factors such as: capacity building, risk-management, proper targeting of interventions, creation of stable policy environment and robust institutions (see section 1.). However the papers shows also the interplay with the European institutions as one of the important factors contributing to the successful performance of the pre-accession programs. The requirements formulated towards the e.g. European Commission and procedural aspects are also of crucial importance. Therefore, the paper adds to the body of literature not only by providing of a comprehensive analysis of the Polish case but also highlighting other determinants of proper implementation of funds.

After analysis made, some key recommendations for Poland in the context of the implementation of ISPA that might be of use for the future Member States are the following: 1) moving to performance-based, socially-oriented appraisal and use sectoral benchmarks, 2) investing in capacity building and adopt best practices from older European Union states, 3) ensuring supportive legal and institutional frameworks and realistic demand projections for e.g. public-private partnerships or public tendering, 4) integrating spatial planning, cohesion/ regional/ infrastructural policy, and legislative reforms, and finally 5) targeting interventions to regional needs and monitoring for adverse effects.

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## ІНСТРУМЕНТ СТРУКТУРНОЇ ПОЛІТИКИ ПЕРЕД ВСТУПОМ ЯК ПЕРЕДУМОВА ДО ВИКОРИСТАННЯ ФОНДУ ЗГУРТУВАННЯ

***Анотація***

*Трансформаційні процеси 1989 року поклали початок прагненню країн Центральної Європи інтегруватися із Західною Європою. У відповідь на це провідні індустріальні країни світу пообіцяли підтримку системних перетворень, що призвело до створення Європейським співтовариством у 1989 році програми PHARE для Польщі та Угорщини. Згодом ця допомога поширилася на інші країни, що прагнули стати членами ЄС, сформувавши скоординовану стратегію передвступної підготовки.*

*Ключовим фінансовим інструментом цієї стратегії став Інструмент структурної політики перед вступом (ISPA), запроваджений у 2000 році. Створений за зразком Фонду згуртування ЄС, ISPA мав на меті підтримку економічної та соціальної згуртованості шляхом масштабних інвестицій у захист навколишнього середовища та транспортну інфраструктуру. Програма сприяла дотриманню екологічних стандартів ЄС та розвитку трансєвропейських транспортних мереж (TEN). У Польщі проекти, фінансовані ISPA, сприяли поліпшенню якості повітря та води, управлінню відходами та інтеграції національних транспортних систем з мережами ЄС.*

*Література щодо використання фінансування перед вступом до ЄС, зокрема ISPA, є фрагментарною і нечисленною. Тому ця стаття всебічно висвітлює програмування ISPA, процеси подання заявок, проблеми реалізації та результати. У дослідженні використовуються правовий аналіз, критична оцінка звітів та статистичні дані для оцінки ефективності ISPA. Висновки дають уявлення про оптимізацію механізмів допомоги перед вступом та орієнтири для майбутнього фінансування політики згуртування ЄС. Вони також слугують джерелом інформації для вивчення політики для потенційних держав-членів ЄС.*

***Ключові слова:*** *ISPA, передвступні фонди, фонди ЄС, політика згуртування, Фонд згуртування, інфраструктура, Польща.*

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# LEGAL TECHNIQUES IN EU LEGISLATIVE DRAFTING: A MODEL FOR UKRAINE'S LAW-MAKING REFORM

***Abstract***

*This article examines the European Union's approach to legal act drafting through a system of principles, methods, and procedures that ensure the proper quality of legislation. It identifies key guidelines for drafting, including clarity and precision in the formulation of provisions, structural coherence of legal acts, adaptation of content to target audiences, and adherence to the principles of subsidiarity, proportionality, and legality. Particular focus is given to the legal techniques used to implement these principles in practice, such as necessity assessments, structural standards, codification, recasting, implementation monitoring, and multilevel legal and linguistic editing. Applying the EU approach to the Ukrainian context, the study overviews recent statutory reforms aimed at improving legislative drafting. The analysis shows that, while Ukrainian legislation has partially incorporated many EU legislative drafting concepts, their practical application depends on strengthening institutional capacity, enhancing expert support, and improving public participation mechanisms. The adoption of a uniform legislative drafting manual is proposed as a step toward harmonizing quality safeguards for enactments. The findings confirm the potential of EU standards to increase the efficiency and legitimacy of Ukraine's national law-making process.*

***Key Words***: *Legislative Drafting, Legislation Quality, Legal and Linguistic Expert Opinion, Impact Assessment, European Union, Harmonization of Laws, Regulatory Policies*

## Introduction

The European Union (EU) possesses an extensive and sophisticated body of legislation that directly impacts the lives of citizens and the functioning of the EU Member States. The quality of legal acts is essential to the legal system efficacy. Vaguely worded or complex legal norms can hinder the proper application of the respective acts, lead to fragmented implementation or to inconsistent interpretation across different jurisdictions. As emphasized by the Council [of the European Communities], the principle of legal certainty requires that EU (Community at a time) legislation be "*as clear, simple, concise and understandable as possible*" (Preamble, para. two)[1]. According to the EU Council and the Court of Justice of the European Union, *readily understandable* and *transparent* legislative acts are prerequisites for their *"proper implementation and uniform application among Member States"* (Preamble, (2))[2].

Within the EU, the critical importance of the legislative drafting also called '*drafting EU law'* - the process of creating and articulating legal acts - has long been recognized. In the early 1990s, steps were taken to enhance legal techniques and improve quality of the EU (then Community) legal acts. The Council Resolution of 8 June 1993 set an overarching objective of making legislation more accessible and introduced several criteria for draft legal acts' quality assessment[3]. Then, in 1994, European Parliament, Council of the EU, and European Commission concluded Interinstitutional Agreement on accelerated working method for official codification of legislative texts[4], followed by 1998 Interinstitutional Agreement on Common Guidelines for the Quality of Drafting of Community Legislation – a set of guidelines / a guide for all EU institutions engaged in lawmaking whether in editorial and/or formulating role (Preamble, para. 3)[5]. Those guidelines have since served as a compass for all actors engaged in the legislative drafting of the EU legislation and were subsequently reinforced by 2001 Interinstitutional Agreement on a more structured use of the recasting technique for legal acts[6], 2007 Joint Declaration on practical arrangements for the codecision procedure[7], 2011 Joint Political Declaration on explanatory documents[8] and the latest supplement in the form of 2016 Interinstitutional Agreement on Better Law-Making[9].

The relevance of this topic is underscored by the role of the legislation quality improvement: it is an integral part of the EU's Better Regulation strategy, an initiative reinvigorated in late 2015[10] with new agenda "Better regulation for better results" by

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1 Council of the European Union. *Council Resolution of 8 June 1993 on the Quality of Drafting of Community Legislation* (93/C 166/01), accessed April 10, 2025, https://op.europa.eu/en/publication-detail/-/publication/290144bc-51a5-43db-b0d1-e8b2b38d11fd/language-en.

2 European Union. *Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation (1999/C 73/01)*, accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_1999_073_R_0001_01.

3 *Council Resolution (93/C 166/01)*.

4 Interinstitutional Agreement of 20 December 1994 Accelerated working method for official codification of legislative texts (96/C 102/02), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A1996%3A102%3ATOC

5 *Interinstitutional Agreement (1999/C 73/01)*.

6 Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (2002/C 77/01), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2002.077.01.0001.01.ENG&toc=OJ%3AC%3A2002%3A077%3ATOC

7 Joint Declaration of 13 June 2007 on practical arrangements for the codecision procedure (2007/C 145/02), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2007.145.01.0005.01.ENG&toc=OJ%3AC%3A2007%3A145%3ATOC

8 Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents (2011/C 369/02), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.2011.369.01.0014.01.ENG

9 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (32016Q0512(01)), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.123.01.0001.01.ENG

10 European Parliament. *Decision of 9 March 2016 on the conclusion of an Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission* (2016/2005(ACI)), accessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52016DP0081

the Commission, which aims to ensure openness and transparency in decision-making, evidence-based policymaking, reduction of regulatory burden, and the provision of simple, comprehensible, and stable legal rules to citizens[11] and resulting in the most recent Commissions proposal on yet another Interinstitutional Agreement on better regulation[12]. Hence, enhancing law-making is not merely a legal technique matter but a key factor in the success of the EU's entire law-making activity.

Context of the EU legislative drafting assumes a particularly important role for improving national legislative processes as Ukraine has been also dedicating resources to these issues. This is especially relevant in light of Ukraine's official candidate status and ongoing accession process to the European Union, which presupposes alignment of the national legal system with the EU acquis and regulatory standards. The recently adopted Law of Ukraine On Law-Making Activity № 3354-IX (2023) defines the principles of legislating, including the rule of law (in particular, legal certainty), democracy, proportionality, necessity, reasonableness, systematicity etc.

## Literature Review on the EU Law-Making

Academic studies and official EU documents trace the evolution of the approach to legislative drafting at the Union level. The first documented systemic step was the aforementioned Council Resolution (1993) which articulated ten core drafting objectives for all Community legal acts. The basic requirements included clarity, simplicity, conciseness, consistency, unambiguity, structural standardization, and focus[13]. This resolution marked the beginning of a comprehensive doctrine on legislative quality in the EU.

The 1998 Interinstitutional Agreement on Common Guidelines for the Quality of Drafting of Community Legislation, effective since March 1999, was a subsequent milestone. This agreement was the result of joint efforts by the three principal EU institutions, which emphasized in Preamble (1) - (2) that: (a) legislation must be understandable both to public and economic operators as a prerequisite for its effectiveness and (b) the principle of legal certainty demands clarity of legal norms and predictability of their application[14]. The Interinstitutional Agreement established twenty-two (22) harmonized guidelines for the legislative drafting, consisting of: six (6) general principles; nine (9) provisions on specific parts - from structural components to numbering; three (3) on references and annexes; three (3) on amendment and repeals; and the remaining one (1) on final / transitional provisions. Although not binding, the provisions of the Interinstitutional Agreement included a number of practical steps, including a few tips on how the legal services can step up their active involvement in the legislative drafting.

Important reference is also the *Joint Practical Guide of the European Parliament, the Council, and the Commission for Persons Involved in the Drafting of European Union Legislation* (latest ed. 2015, first published in 2000), developed by the legal services of the three principal EU institutions in pursuit of 1998 Interinstitutional Agreement implementation[15]. The Joint Practical Guide provides detailed commentary on each principle and numerous practical examples of their application. It has become a primary resource for EU legislative drafters, complemented subsequently by other tools

[11] European Court of Auditors. *Law-Making in the European Union after Almost 20 Years of Better Regulation*. Luxembourg: European Court of Auditors, 2020. https://www.eca.europa.eu/lists/ecadocuments/rw20_02/rw_better_regulation_en.pdf.

[12] European Commission. *Communication from the Commission to the European Parliament and the Council: Proposal for an Interinstitutional Agreement on Better Regulation*, accessed April 10, 2025, https://data.consilium.europa.eu/doc/document/ST-9121-2015-INIT/en/pdf.

[13] Council Resolution (1993).

[14] Interinstitutional Agreement (1998).

[15] European Commission. Legal service, *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*, Luxembourg: Publications Office of the European Union, 2015, https://data.europa.eu/doi/10.2880/5575.

such as the Interinstitutional Style Guide[16], the European Commission's *Better Regulation Guidelines*[17] and the *Better Regulation Toolbox*[18] etc.

Beyond official documents, Tonye Clinton Jaja's book *Legislative Drafting: An Introduction to Theories and Principles (2013)*[19] has materially contributed to the theory of legislative drafting. The author that policymakers or other non-expert participants in the legislative process often lack the specialized knowledge and skills required for effective legislative drafting. *Jaja* (*2013*) calls for clear theoretical foundations in legal drafting, identifying efficacy as its principal goal. His book focuses not only on drafting techniques for normative texts but also on demonstrating the importance of a coherent regulatory framework in ensuring quality and consistency of legislation.

A valuable behavioural perspective is offered by Ellen Mastenbroek in *Guardians of EU Law? Analysing Roles and Behaviour of Dutch Legislative Drafters Involved in EU Compliance* (2017)[20]. Mastenbroek investigates the role of national legislative drafters in ensuring alignment with EU law and highlights a recurring conflict between EU legal requirements and domestic political interests. Based on in-depth interviews with Dutch law drafters, she (the author) concludes that when reconciliation is not possible, political considerations often take precedence over strict compliance with the EU acquis. This underscores the importance of behavioural and institutional factors in legislative drafting practices, which in turn impact the implementation of EU law and, subsequently, the efficacy of the integration processes.

Another noteworthy contribution is Edwin Tanner's *Clear, Simple, and Precise Legislative Drafting: How Does a European Community Directive Fare?* (2006)[21], which evaluates an attempt by Martin Cutts to rewrite Directive 88/378/EEC on toy safety, by using *plain language* principles. He argues that the archaic style of many EU directives, including Directive 2002/2/EC, often fails to meet the criteria of clarity and simplicity. Even after the European Commission introduced plain language guidelines, EU law texts retained complex legal jargon, undermining the accessibility of the laws to end users.

The academic works emphasize the multifaceted nature of legislative drafting in the EU, showing that the quality of the legislative texts depends not only on formal drafting guidelines but also on behavioural, cultural, and linguistic considerations. Importantly, academic consensus appears to be placing a causation link between the quality of law-making and the efficacy of the EU law through its comprehension by the public as well as ex post impact evaluation by the public. Authors stress that the EU's adopted standards - clarity, coherence and reasonable justification of norms -increase both predictability and legitimacy. For example, *Robinson (2011)*[22], in describing the EU law-making process, highlights a key role of legal editors (Legal Revisers) and legal linguists (Lawyer-Linguists) in ensuring compliance with legislating techniques. At all stages of the review process, such editors and linguists verify whether a text is clear, has correct grammar, is appropriate as to the form-factor, and is linguistically compatible with the multilingual nature of the EU law.

A separate dimension of the academic writing is dedicated to the *Better Regulation*

16 *Interinstitutional Style Guide*. Date of last update: 15.4.2025. Luxembourg: Publications Office of the European Union, 2025, accessed April 10, 2025, https://style-guide.europa.eu/en/news

17 European Commission. *Better Regulation Guidelines*, accessed April 10, 2025, https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf

18 European Commission. *Better regulation toolbox*, accessed April 10, 2025, https://commission.europa.eu/law/law-making-process/better-regulation/better-regulation-guidelines-and-toolbox/better-regulation-toolbox_en

19 T. C. Jaja, *Legislative Drafting: An Introduction to Theories and Principles*. Nijmegen: Wolf Legal Publishers, 2012.

20 E. Mastenbroek, "Guardians of EU Law? Analysing Roles and Behaviour of Dutch Legislative Drafters Involved in EU Compliance," *Journal of European Public Policy* 24, no. 9 (2017): 1289–1307, https://doi.org/10.1080/13501763.2017.1314537

21 Tanner Edwin, "Clear, Simple, and Precise Legislative Drafting: How Does a European Community Directive Fare?" *Statute Law Review* 27, no. 3 (2006): 150–175, https://ssrn.com/abstract=1098704 or http://dx.doi.org/10.1093/slr/hml007

22 William Robinson, "Legislative Drafting in the EU: Recruitment, Training and Continuing Education of Those Involved in the Drafting Process," accessed April 10, 2025, https://zakonodavstvo.gov.hr/UserDocsImages//arhiva//31%20110509%20WilliamRobinson%20EN.pdf.

and *Better Law-Making* initiatives[23]. In 2003, the three EU authorities entered into the Interinstitutional Agreement on Better Law-Making (2003/C 321/01)[24], which codified the initiative to standardize law-making practices in thirty-eight (38) sections. In 2010, it was reinforced by the Framework Agreement between the European Parliament and the Commission [25]; by 2010, however, the European Commission, the main legal drafting body of the EU, had already introduced a well-established set of tools to improve the quality of legislation, including mandatory impact assessments, broad stakeholder consultations, implementation monitoring, recasting and codification, and evaluation/review procedures - reflected in the annual reports of the European Commission and verified by the European Court of Auditors. The monitoring and evaluation procedures were, however, insufficiently or poorly framed. The 2016 Interinstitutional Agreement on Better Law-Making, concluded by the European Parliament, the Council, and the Commission, restated and detailed the commitment of the EU institutions to high-quality drafting, recasting, and codification, and the use of other modern legal drafting techniques - in over fifty (50) provisions of the main text and twenty-eight (28) provisions on delegated acts in the annex, the latter appended with seven (7) standardized clauses.

Thus, both academic and official sources agree that high-quality legislative drafting is an indispensable and foundational element of the efficacy of the law-making process. The sections below will articulate, drawing on the doctrine and EU practices, the principles and techniques for legislative drafting.

## Objectives and Methodology

The primary goal of this study is an analysis of the guiding principles and legal techniques in legislative drafting by the EU institutions, which are embedded in the EU law-making process, and an assessment of their significance and potential adaptability to the Ukrainian context, identifying, where applicable, how these tools can enhance the effectiveness and quality of Ukraine's national legislative process.

We deployed a combination of methods to tackle the objectives of the study:

- dogmatic (formal) method to examine the content of the EU founding treaties, interinstitutional agreements, and official guidelines (manuals, handbooks) on the legislative drafting. Comprehensive research of the texts allows a systematic interpretation of the formal rules and norms *expressis verbis*;

- comparative method: juxtaposing EU standards against concepts incorporated in Ukrainian legislation,[26] particularly the Law of Ukraine "On Law-Making Activity", to identify common principles, differences and areas for possible harmonization or adaptation;

- legal content analysis: a detailed examination of selected EU legislative provisions to illustrate application of certain principles or techniques: for example, the analysis of the model EU regulation structure, the use of preambles, the formulation of amendment provisions.

The research is based on primary legal instruments of the EU (Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), in particular, provisions on the principles of subsidiarity and proportionality, and on the foundations of EU legislative drafting); the above-mentioned Interinstitutional Agreements, notably the 1998 and 2016 Agreements on Better Law-Making; we have also used secondary legislation: EU Guidelines and Handbooks, such as the Joint Practical Guide (2000), the

[23] *Idem*. See also Golberg E. "Better Regulation: European Union Style," *M-RCBG Associate Working Paper* № 98. Harvard Kennedy School (2018), https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp98.

[24] Interinstitutional agreement on better law-making (2003/C 321/01), *Official Journal C 321, 31/12/2003 P. 0001 – 0005, a*ccessed April 10, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2003.321.01.0001.01.ENG

[25] Framework Agreement On Relations Between the European Parliament and the European Commission (32010Q1120(01), accessed April 10, 2025, https://eur-lex.europa.eu/eli/agree_interinstit/2010/1120/oj

[26] Zakon Ukrainy "Pro pravotvorchu diialnist" no. 3354-IX, vid 24 serpnia 2023 roku [Law of Ukraine "On Law-Making Activity" no. 3354-IX dated August 24, 2023], accessed April 10, 2025, https://zakon.rada.gov.ua/laws/show/3354-20#Text.

Commission's Better Regulation Guidelines (2021), and the Interinstitutional Style Guide, which has been in publication since 1997 and is currently available in all official EU languages. Academic literature, both European and Ukrainian, addressing the quality of legislation and legal drafting techniques, has been analysed to seek theoretical and empirical insights. With the research objectives in mind, we focused on EU institutional practices and did not include a detailed comparison with other legal systems, except for a few relevant parallels with the Ukrainian legal framework.

This set of methods enabled a comprehensive scope of inquiry into the subject -from jurisprudential basics (principles), through implementation (legal techniques), and finally, to an assessment of their efficacy in legislative drafting.

## Guiding Principles of Legislative Drafting in the European Union

### *Clarity, Simplicity, and Precision Principle*

Among the basic requirements is the accessibility (ease of understanding) of EU legislative acts to the addressees. The *1998 Interinstitutional Agreement* lays the first provision down as follows: "*Community legislative acts shall be drafted clearly, simply, and precisely*". Similarly, the *1993 Council Resolution* provided, in Section 1, that "*the wording of the act should be clear, simple, concise, and unambiguous; unnecessary abbreviations, 'Community jargon', and excessively long sentences should be avoided*". This guidance reflects the overarching principle of legal certainty, whereby every member of the public subject to the law should be able to comprehend their rights and especially obligations, as well as anticipate the consequences of the application of the relevant legal provisions[27].

*Clarity* is achieved by opting for an accessible vocabulary and grammatically appropriate structures. The EU lawyer-linguists perform final editing specifically to ensure that the text is "*grammatically correct and clear and precise*." [28] Complex sentences with multiple coordinated or indirect clauses tend to be described as "*unnecessarily convoluted*" and "*overly long*"[29]. The wording should, instead, appear as shorter sentences, avoiding passive voice and double negatives whenever possible. *Simplicity* implies the use of plain terms to explain complex legal concepts, accessible not only to legal professionals, but to any natural or legal entity - the intended recipients of the legislation - as long as this goal is achievable without compromising legal precision.

### *Legal Act Type Conformity Principle*

Techniques for drafting legislation must align with the form and legal effect (hierarchy) of the instrument that is being composed. Pursuant to the Interinstitutional Agreement, "*the drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding (Regulation, Directive, Decision, recommendation or other act)*"[30]. That is, both the substance and writing style of legal texts have to vary according to the type of the legal act intended: Regulations and Directives typically employ the imperative voice and directly applicable provisions, whereas recommendations and opinions contain more of a descriptive and dispositive style. Each type of act also has distinct structure: for example, Directives usually include a provision on transposition deadlines and, in case of delegated legislation, the reference to the empowering primary act. Consistency of structure and style for each legal act type improves clarity and unambiguity, as such consistency helps users to immediately identify the nature and legal ramifications of the respective act. Legal revisers verify that the

[27] Interinstitutional Agreement (1998).

[28] Robinson, "Legislative Drafting in the EU", 6.

[29] Interinstitutional Agreement (1998), sec. 4.

[30] *Ibidem,* sec. 2.

form and style of the draft text (of the act) correspond to intent of the act's binding or non-binding legal characterization; the Interinstitutional Agreement is particularly helpful in establishing that references by binding act to non-binding do not make the provision of the latter mandatory and *vice versa*[31].

### *Actor-Oriented Drafting*

The EU institutions must draft legal provisions with awareness of the legal awareness of their intended actors - entitled entities, obligors, as well as the enforcing and adjudicating authorities. In the words of the 1998 Interinstitutional Agreement, "*[t]he drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.*"[32]. That is, EU lawmakers should 'walk in the shoes' of potential readers (private citizens, entrepreneurs, officers of national competent authorities) and ensure that provisions are sufficiently clear to be understood by the target audience. This is especially challenging when imposing obligations, whether on private individuals or Member States, to avoid ambiguity about to whom the provisions are addressed and what is required - whereas ambiguity is the domain where EU diplomats thrive and the law withers. The 1993 Council Resolution (93/C 166/01) declares, accordingly, that "*the rights and obligations of those to whom the act is to apply should be clearly defined*"[33].

### *Conciseness Principle*

The EU guidelines on the legislative drafting call for the avoidance of excessive wording. The 1998 Interinstitutional Agreement provides: "*Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording ... should be avoided*"[34]. This rephrases the first section of the 1993 Council Resolution, which warns against "*excessively long sentences*"[35]. Both instruments, at the same time restrict, respectively, the "*excessive use*" and the "*overuse*" of abbreviations. These two legal techniques - short sentences and spelled out glossary terms - together aim to enhance the readability of the legal text. Additionally, conciseness requires eliminating redundancy and avoiding the repetition or duplication of provisions already regulated elsewhere (preventing overregulation). Condensation does not entail compromising on substance; rather, it optimizes grammatical structure so that every word counts and nothing is wasted. Readers are more receptive to concise legal acts; such texts are also easier to translate across the EU's twenty-four (24) official languages and are less prone to internal inconsistencies.

### *Structural System Principle*

A core legislative drafting principle is adherence to standardized structure: all legal acts of general application must follow a typical format, that is, title - preamble - enacting terms (which can be broken down into sections, chapters, articles) - annexes, where necessary[36]. Such a framework facilitates both the preparation and comprehension of legislation. For example, it is recommended that each act include, at the beginning, an article on the subject matter and scope of the act, as well as an article with a glossary of key

[31] *Ibidem*, sec. 17.

[32] *Ibidem*, sec. 3.

[33] Council Resolution (1993), sec. 4.

[34] Interinstitutional Agreement (1998), sec. 4.

[35] Council Resolution (1993), sec. 1.

[36] Interinstitutional Agreement (1998), sec. 7–9.

terms, if needed for clarity[37]. The text should be structured in a logically consistent sequence: first, provisions bestowing rights and imposing obligations; second, provisions conferring authority and setting procedures; third, implementing measures; and finally, transitional and final provisions[38] - the structure should be adhered to "*as far as possible*". Numbering lists is preferred over indentation to avoid chunky, unstructured blocks of text[39]. A logical structure enhances the coherence of the legal system: where similar issues are addressed similarly, the document becomes self-contained in the sense that it is manageable within the hierarchy and does not scatter key elements haphazardly.

### *Consistency and Coherence Principles*

Another cornerstone principle of EU legislative drafting is the requirement of both internal consistency and systemic coherence. A legal act's provisions must not contradict each other internally nor conflict with other effective EU law, or, in the Council Resolution wording: "*The various provisions of the act should be consistent; the same term should be used throughout to express a given concept*"[40]. This uniformity of terminology is reiterated and expanded in the 1998 Interinstitutional Agreement: "*[t]he terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field. Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language*"[41]. Lawyer-linguists of the EU institutions are specifically tasked with ensuring that the terminology is "*consistent with other acts in the same field and within the act itself*"[42] If new legislation introduces concepts already defined in existing EU law, the same terms should be used with the same meaning. Consistency also applies to the rules on cross-references to other acts: any links must be as specific as possible and minimized to avoid "chains" of circular references[43] - similar phenomenon known in conflict of laws as renvoi, which is considered one of the most confusing aspects. Likewise, duplication, rephrasing, explanation of, or contradiction to provisions of existing legislation should be avoided[44] unless explicitly justified. If new regulation renders earlier legislation obsolete, it must expressly repeal the old act, in whole or in part[45], to prevent conflicts of law and, therefore, improve the clarity of the legal system.

### *Multilingualism and Equal Authenticity Principle*

A distinct feature of the EU legislative drafting lies in the multilingual character of all EU legislation, which is published in twenty-four (24) official languages, each version is equally authentic. With the EU being flexible on membership, the languages of the legal systems in candidate member countries must also be considered: there are currently nine (9), but each may have more than one jurisdiction and/or language. Other languages to be considered are (a) EU neighbour countries aspiring for the membership in the Union, (b) the jurisdictions involved in the alternative integration projects, such as EEA, EFTA, Energy Community, Association Agreements etc., as well as (c) counterparties under the free trade agreements with the EU and the infrastructure projects of common interest.

The 1998 provisions require that formulations must "*respect the multilingual nature of Community legislation*" and carefully apply terminology that is attributable to any single national legal system[46]. In practice, this means that the initial text of the

[37] *Ibidem,* sec. 14-15.

[38] *Ibidem,* sec. 15.

[39] *Idem*.

[40] Council Resolution (1993), sec. 3.

[41] Interinstitutional Agreement (1998), sec. 6

[42] Robinson, "Legislative Drafting in the EU", 6.

[43] Interinstitutional Agreement (1998), sec. 16.

[44] *Ibidem*, sec. 12; Council Resolution (1993), sec. 8.

[45] Interinstitutional Agreement (1998), sec. 21.

[46] Interinstitutional Agreement (1998), sec. 5.

legal act, typically in English (over 80%) or French, must be comprehensible and translatable into other languages without semantic loss[47]. Legal terms specific to one Member State's system should be used cautiously and, where appropriate, defined or replaced with generally accepted concepts. The EU legislating process has developed a special intergovernmental language, characterized by a higher degree of neutrality and standardization, in order to minimize misinterpretation and mistranslation. Once the initial text in one of the EU official languages is finalized, it is translated into all other twenty-three languages, although the stages of involvement for lawyer-linguists may vary across the European Commission (the Directorate-General for Translation), the European Parliament (Legislative Quality Unit of the Directorate for Legislative Acts in the Directorate-General for the Presidency), and the European Council (the General Secretariat). What they have in common, though, is that in every case, the text of each language version undergoes rigorous legal-linguistic review by teams of multilingual lawyer-linguists to ensure that the texts "*correspond in all the language versions*"[48]. Equal authenticity is a key feature of the principle that prevents divergence in the law interpretations and applications across Member States while safeguarding the unity of EU law, including rare cases where one or more countries rescind their membership status.

***Legal Exceptionalism (no Declaratory Policy) principle***

EU legal act designers draw a clear distinction between rule-setting content and policy declarations or aspirations. The 1998 Interinstitutional Agreement prohibits including non-normative wording - such as wishes, enunciations, program statements, exhortations, statements interpreting legal acts, or explanatory statements[49] - into the standard structure of an act. If anywhere, political rationale and policy goals belongs in the preamble, which is a series of *recitals* and citations preceded normally by '*having regard to*' and '*whereas'* at the beginning of the text (act). The preamble explains the act's historical background, underlying policies, and objectives; it may outline priorities and principles but must not introduce binding provisions: "*the purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them.*" The wording of the preamble must contain neither normative provisions nor political statements[50]. Legislation or its draft is structurally separating, therefore, the motives (preamble) from the operative provisions (articles, norms) so that explanatory or declarative content is clearly - visually and logically - confined and juxtaposed. This separation reinforces both legal certainty (as the preamble is neither directly applicable nor binding, nor does it have autonomous interpretive value) and ease of comprehension, as it sets the scene for the reader before they proceed to the binding part of the act.

The principles listed above - accessibility, clarity, conciseness, consistency, legal exceptionalism, multilingualism, and structural standardization - form the core of EU legislative drafting techniques. Harmonized compliance is ensured at the institutional level: each of the three main bodies (the Commission, the Council, and the Parliament) has dedicated legal units responsible for overseeing the quality of draft legal texts. As noted, the European Commission's Legal Service has a team of legal revisers[51] who review projects during the preparation stage in the Directorates-General and again after adoption. The Council's Legal Service and the Parliament's Legislative Quality Units (within the Directorate for Legislative Acts in the Directorate-General for the Presidency) each employ lawyer-linguists, who are involved

[47] Robinson, "Legislative Drafting in the EU", 2-3.

[48] *Ibidem*, 6.

[49] *Ibidem*, Declaration by the European Parliament; Council Statements.

[50] *Ibidem*, sec. 9-10.

[51] Robinson, "Legislative Drafting in the EU", 2.

mostly at the end of the legislative process to proofread the text for adoption in all languages[52]. The experts use clear checklists covering: legality (appropriate legal basis of the act, authorization/delegation, no retroactive effect, respect for the fundamental principles of substantive EU law), compliance with formal requirements for text composition (proper type of act, structural components, numbering, completeness), clarity, precise and concise glossary usage (consistently applied), wording free from internal contradictions or external conflicts (concurrency), grammatical coherence, etc. Only after such thorough control does an EU legal act take its final form and become eligible for formal adoption and official publication.

## EU Legal Drafting Techniques

The legislative drafting principles outlined above are implemented at various stages of the EU law-making process through a set of legal techniques and procedures. These tools were devised to ensure higher quality and efficacy of legislating: from initiative planning to application by national competent authorities in the Member States. Below we analyse the key techniques:

***Ex Ante Analysis: Assessing Necessity and Impact,***

equivalent to the "necessity and justification" principle reflected in Law of Ukraine "On Law-Making Activity"[53] ('Law-Making Act' or 'LMA'), is embedded in the EU law-making process through the mandatory preliminary justification of any initiatives. The European Commission, as the only body that can propose the EU legislation[54], conducts comprehensive research on the problem and evaluates possible solutions before introducing any proposal. A central tool in this process is Impact Assessment ("IA"), a detailed analysis of the likely economic, social, and environmental ramifications of the proposed legislative or regulatory instrument.

Implementing a Union-wide Better Regulation agenda, the Commission has established clear standards for IA, such as the publication of roadmaps and initial assessments to gather feedback[55]. Broad consultations with stakeholders, including Green Papers (idea debates), White Papers (proposal debates), public surveys, and a 12-week public feedback period, allow incorporation of views from businesses, civil society, and academia at an early stage of drafting[56]. These procedures are used as planning tools, ensuring that future norms are evidence-based, well-justified, and goal-oriented. Typically, the act's preamble or explanatory memorandum in the Commission's proposal explicitly references or contains a section on the results of consultations and/or IA and/or expert views, thereby enhancing the proposal's transparency and legitimacy. Moreover, this process is directly related to compliance with the proportionality and subsidiarity principles: assessment of whether EU-level action is necessary and proportionate to the policy challenge uses all relevant stakeholders as a sounding board.

***Use of Citations and Recitals***

in the preamble plays a technical role of the media for justification of the EU legal act. Preamble contains a structured set of "recitals" explaining the main reasons and objectives behind the enactment. Each recital (preceded by "Whereas…") is aligned with a specific provision of the act's normative section and gives the reader a clue for its intended application[57]. This approach helps avoiding justifications or political statements in the binding part of the act[58]. The preamble in an EU legal act is not a mere formality but an

[52] *Ibidem,* 5-6.

[53] Zakon Ukrainy "Pro pravotvorchu diialnist", Art. 3.1(5).

[54] TEU, Article 17.2.

[55] E. Golberg, "Better Regulation: European Union Style," *M-RCBG Associate Working Paper no.* 98. Harvard Kennedy School, https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp98.

[56] *Idem*.

[57] Interinstitutional Agreement (1998), sec. 10.

[58] *Ibidem*, sec. 12.

important tool for interpretation. The Court of Justice of the EU often turns to recitals to clarify the legislator's intent. Each recital is numbered[59] and organized to reflect the flow of the chief provisions[60]. This structured format encourages drafters to clearly rationalize and articulate the reasons for each mandatory provision, or most of them. As a result, the legal articles can be more concise and substance-focused, whereas all explanatory content, if any, is confined to the preamble. This technique, as noted earlier, exemplifies normative and methodological content structuring, thereby improving overall clarity and comprehensibility.

***Scope and Glossary***

Legal technique to enhance clarity and precision in the EU legal acts is to begin with specific provisions on the act's *subject matter and scope*, followed by a *definitions* article. The scope deals both with the principal relationships that the act governs and the matters falling outside the scope of the act[61]. The definitions article is always at the beginning of the act (it is needed more often than not), following the article on the scope, and it contains all key terms along with their legal interpretation, promoting legal certainty and reducing ambiguity as agreed by the EU institutions[62]. The 1998 Interinstitutional Agreement also advises that normative content (mandatory rules) must not be included in the article with definitions. In implementing technical standards and technical regulations, among other acts, glossaries help facilitate multilingual interpretation and implementation. When terms are already defined in other EU acts, it is recommended to cross-reference the act already in force rather than recast it or reproduce it verbatim. This supports terminological consistency and ease of transposition by national legislators and courts: there is only one determined definition not only in the act but in the relevant segment of legislation, and, whenever there is more than one definition, the act specifies which one should be used.

***Amendment Technique***

Significant share of the EU legislation, in its substantive part, amends existing acts, among them directives and regulations. Incorrect amendment techniques can lead to legal confusion. The 1998 Interinstitutional Agreement, therefore, employs precise technical rules for amending legislation: it requires that amendments be formulated "*clearly…in the form of text to be inserted in the act to be amended*"[63]. The amending act explicitly identifies, this way, the parts to be altered - primarily, through restatement of the entire article, paragraph or section. Reducing textual amendments to full-provision replacements, repeals, and recasts thus avoids errors of fragmentation, as is often the case in Ukraine with insertions and omissions of words, sub-sentence clauses and sentences, instructions to change grammatical tense, etc. The underlying (incumbent) EU legal act can therefore be updated without ambiguity, excluding the practice of autonomous provisions in the amending acts[64] – 'that is, 'sham' amending, where a new act establishes a new rule without structural change to the pre-existing act but impacting, *de facto*, the substance of the incumbent rule. Such clarity in structural change is important, especially when a single amending act intends to modify multiple legal instruments: it must clearly delineate changes to *lex generalis* and *lex specialis*, to be followed by relevant amending acts to lower-level legal acts, where necessary. These practices preserve legal consistency and maintain the "single text" approach across the EU legal system.

***Codification and Recasting***

techniques are used to maintain legislative clarity and accessibility in the EU. Codification consolidates the original act and all subsequent amendments into a single legal text, without altering substantive content. The call for codification arises when a number of amendments accumulate into a few related pieces of legislation, so that users receive an updated, compact text, following a simplified and time-accelerated procedure that prohibits

[59] *Ibidem*, sec. 11.
[60] *Ibidem*, sec. 10.
[61] *Ibidem*, sec. 13.
[62] *Ibidem*, sec. 14.
[63] *Ibidem*, sec. 18.
[64] *Idem*.

changes to the substance; it is rather a specific form of incorporation.

Recasting is a modified technique - essentially codification combined with the introduction of new substantive provisions. The draft text of the recast (and the final version of the text) often lists the unchanged provisions, designating the correlation between their old and new numbering, e.g., 'Article 3-1 in the existing text will become Article 17 in the recast version'; newly modified provisions are also listed for convenience. The US equivalent of recasting would be a restatement, though it usually lacks a correlation table. This legal technique has convenient semiotics - it modernizes texts by merging numerous fragmented amendments that became effective at different points in time into one consolidated act, which resets application from day one. The 2016 Interinstitutional Agreement states that the use of recasting and codification reduces legislative complexity and enhances accessibility; therefore, the institutions are committed to these techniques as part of the Better Regulation project[65]. Simplification and "health checks" of EU legal rules *en masse* are equally valuable exercises in transparency, because the EU has long been criticized for stereotypical overregulation, even where the burden originated from bulky national implementations rather than the primary Directives[66]. Recast and codification techniques therefore, support legal certainty and accessibility, which are of paramount importance in a multilingual, multi-jurisdictional legal system.

***Transitional Provisions, Entry into Force, and Monitoring of Application***

of the EU legal acts are typically addressed in *the Final Provisions* at the end. Specific dates (day/month/year) for entry into force and application (e.g., an obligation may be imposed but no or only minimum penalties apply), and implementing obligations for Member States (e.g., in the case of an EU Directive) are provided to ensure clarity and increase precision, avoiding uncertainty[67]. Transitional provisions manage legal continuity, determining when and how the pre-existing legal facts, status(es) and circumstances rules will be, respectively, replaced, how the disputes and issues that emerged meanwhile will be resolved in the future, how long the old rules will may remain valid and which exemptions apply, if any - so that no legal grey areas or conflict of laws arise.

A growing number of acts include *review clauses*, a rather novel technique for Ukraine; such clause imposes an obligation on the European Commission to assess the impact of the act after a set period and submit a proposal on the changes necessary. This institutionalizes *ex post* evaluation within the law itself and aligns with the *continuous improvement principle* under the *Better Regulation* initiative[68] in the law-making cycle that currently consists of *planning - preparation - adoption – implementation - application - correction*[69]. The EU institutions are also considering, in addition, an automatic lapse of legislation unless the authorized institution decides to extend it ("sunset clause")[70], repeatedly if needed. Review clause, in the Regulation, can look as follows: '*By [DD Month YYYY], the Commission shall review the impact of this [Regulation / Article / policy / exemption / etc.] and shall accompany that review, where appropriate, with a legislative proposal to amend [the part subject to review]*". Such a review clause not only encourages accountability at the Union, Member State, and economic entity levels, but it also helps with precision planning of the resources needed to measure and adjust the law and its enforcement, aspiring to the continuous modernization of the law and law-making.

***Implementation Transparency***

Although implementation can occur only after enactment, the EU integrates several measures into the legislative drafting process to enhance transposition and application of the respective legal act. One such measure is the *correlation table* (also prepared as *table of concordance)*, which the Commission may

65 Interinstitutional Agreement (2016), sec. 46; Golberg, "Better Regulation: European Union Style", 22 and 26.

66 Golberg, "Better Regulation: European Union Style", 23.

67 Interinstitutional Agreement (1998), sec. 20.

68 Interinstitutional Agreement (2016), sec. 21 and 23.

69 European Court of Auditors *Law-Making in the European Union* (2020), 29.

70 Interinstitutional Agreement (2016), sec. 23.

require from the Member States to visualize approximation of each provision in the EU Directive or other legal act to the corresponding national legal action (measure). In 2011, the European Parliament, Council, and Commission jointly[71], and, separately, the European Commission and the Member States jointly[72] endorsed the use of such tables as '*clear and precise*' explanation tools useful for '*unequivocal'* oversight of the transposition on the heels of decision of the Court of Justice of the EU. Accordingly, EU legal acts include in the final provisions, from time to time, obligations of the Member States to report on the progress of implementation. This *transposition (implementation) transparency* technique streamlines determination of compliance with the scope and timing required, thus reinforcing clarity and non-discriminatory interpretation of the obligations by / across Member States, including, where applicable, sanctions and penalties for breach.

To recap, we see that the legal techniques above span across the entire law-making cycle from planning stage (*ex-ante* assessment and stakeholders feedback), through a text composing (design of structure, grammar, proofreading and otherwise editing), transposition monitoring up to review (amendment, recast, codification). Their ultimate common purpose is to make EU legislation efficacious, consistent, and clear. Below, we examine the causation effects between the quality of legislative drafting as input and the efficiency of the legislative process and the application of laws as output.

## Impact of Legislative Drafting on the EU Legislating Efficiency

The quality of legislative drafting impacts, directly and indirectly, the general efficiency of the EU's law-making process and the adopted legal provisions' efficacy. These impacts can be observed on several interrelated levels:

1. the success rate for adoption of a bill through the legislative process;
2. the quality of implementation by Member States;
3. the application and enforcement of the norms in practice, and
4. the public's trust in the rule of law.

***Accelerating and Facilitating the Decision-Making***. Well-composed, clearly structured and articulated bills and other legislative proposals are more likely to move efficiently through the EU law-making institutions. When a text is comprehensible and coherent, less time is spent debating wording or resolving uncertainties. This is particularly important in the *ordinary legislative procedure* context, which requires reconciliation of the final text between the European Parliament and the Council[73]. A higher-quality Commission Proposal discourages the want of amendments by other institutions. Besides, clear wording reduces the number of variations in interpretations by other political actors, thus, fostering consensus. In opposite case, poorly composed or ambiguous text triggers extension in debates, a flood of amendments, and/or may even jeopardize the legislative initiative altogether. Therefore, sound legal techniques save institutional time and resources. Nonetheless, one should acknowledge that political compromise can sometimes come at the expense of textual precision. Scholars note that EU's interinstitutional *trialogues* result in a deliberately "constructive ambiguity" to reconcile positions[74]. Although this step expedites adoption, it creates risks at the legal application stage; balancing political flexibility and legal clarity remains an ongoing challenge of the EU legislative drafters.

***Quality of Implementation by Member States***

[71] Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents. OJ C 369, 17.12.2011, p. 15.

[72] Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents. OJ C 369, 17.12.2011, p. 14.

[73] "The Ordinary Legislative Procedure - step by step," European Parliament, accessed April 10, 2025, https://www.europarl.europa.eu/olp/en/ordinary-legislative-procedure/overview

[74] P. Leino-Sandberg, "Transparency and Trilogues: Real Legislative Work for Grown-Ups?" *European Journal of Risk Regulation* 14, Special Issue 2 (June 2023): 271–290, https://doi.org/10.1017/err.2022.40.

Precisely formulated EU legal acts are easier to transpose into the national legal systems. When a directive unequivocally determines rights and obligations, defines key terms, Member States have easier task of preparing corresponding statutory or regulatory changes to comply with the obligation. The "one word – one meaning" [75] principle helps avoid confusion in translation and transposition, because national legislatures benefit from the original version in their own language, ensuring better alignment, while citizens and economic operators benefit from legal certainty. On the other hand, vague or overly general wording may be transposed with variations across Member States that were uncalled for; such fragmentation undermines the unity of EU law. The 1998 Interinstitutional Agreement recites, therefore, that the quality of legislative drafting is "*a prerequisite for the proper implementation and uniform application of Community legislation in the Member States*"[76], which ensures fewer breaches and enforcement actions, including court cases.

Besides, clear text enables the so-called "accessible" implementation: national competent authorities and officers have better understanding of the changes required in domestic laws. Studies suggest more accurate and effective national transposition and implementation measures when national legal experts were involved in the composition of EU legal acts ('fase ascendente' / upstream phase) and then contributed at the domestic level to legislative drafting ('fase discendente' / downstream phase), thus creating a link between the phases[77] and bringing the diverse perspectives of 27 legal systems into Brussels offices. Transparency tools, such as correlation tables (tables of concordance), facilitate monitoring and verification, reinforcing the accountability of Member States and thus improving the efficacy of legal acts[78].

***Application and Judicial Oversight***

As end-users, citizens and economic operators measure the efficiency of the law by the ease of determining individual rights and obligations and enforcing them. A well-worded legal act directly contributes to legal certainty: when requirements are clearly articulated, compliance is more likely, and enforcement becomes more straightforward. For example, if a Regulation lists product safety criteria, the economic operator can plan *de minimis compliance*, whereas the inspecting authority has unequivocal guidelines for verification - thereby reducing the number of disputes and court cases.

In a judicial process, once again, the quality of legislative drafting at the earlier stages of the legal mechanism significantly impacts judicial interpretation. National courts and the Court of Justice of the EU rely heavily on the legislative text and can apply the provisions confidently when they are clearly worded. Conversely, unarticulated or ambiguous rules result in preliminary ruling requests, delay case resolution, and increase legal fees. Judicial interpretation is inevitable, but sound legal techniques in composing the text reduce the burden on the judiciary to the minimum necessary. Well-structured preambles provide further support to judges in discerning the legislator's intent and applying the provisions in accordance with their purpose. Hence, the predictability of judicial outcomes is significantly impacted by the quality of text composition: the less room for loose reasoning, the more authority and stability the application of legal rules has.

***Public Trust and Legitimacy of the EU values***

Public perception is another unavoidable aspect of the efficacy of laws. The EU has often been criticized for adopting complex and bureaucratic regulations that non-expert individuals can hardly comprehend; therefore, improving legislative drafting is key to enhancing public perception of the legitimacy of EU law. Legal acts, if worded in plain language, openly debated, and explained in preambles and preceding Commission proposals, foster public confidence in the rule of law. Citizens are less likely to be alienated and more likely to accept legislation "*…transparent and readily understandable by*

[75] Council Resolution (1993), sec. 3.

[76] Interinstitutional Agreement (1998), Preamble (1).

[77] R. Baratta, "Complexity of EU law in the domestic implementing process" in *The Theory and Practice of Legislation*, formerly *Legisprudence*, ed. by W.Robinson, vol. 2, issue 3 (2014). Special Issue: European Union Legislation, 305, https://u-pad.unimc.it/bitstream/11393/241751/1/Complexity%20of%20EU%20Law.pdf.

[78] Golberg, "Better Regulation: European Union Style," 94.

*the public and economic operators*"[79]. This aligns with the *Better Regulation* objectives, which emphasize public integration at every phase of the policy cycle as part of a transparent legislative process[80]. Technically, this is reflected in practices such as the publication of legislative proposals for public consultation, feedback on comments received, stakeholder input collection, and explanatory statements accompanying final decisions. In this way, legal drafting techniques contribute to the democracy and accountability pillars of the EU legislation's legitimacy.

***Feedback Mechanisms and Legal Adaptability***

Legislation's efficacy can also be assessed through the system's ability to self-adjust and maintain relevance. Higher quality of the legislation drafting would comprise *ex-post* impact assessment, such as review clauses, sunset clauses and/or mandatory implementation reports - see *supra*. The monitoring and feedback drive an evaluation and improvement, safeguarding, thus, the legal norms from irrelevance and "oblivion".

The *evidence-based law-making* principle, also reflected in Ukraine's legislation, requires that effective norms be regularly assessed; the result of assessment steers the new legislative initiatives away from the errors: instead of postponing the change until the negative issues accumulate (as often is the case in Ukraine), the legislative process in the EU is efficient due to regular and incremental review of the legal acts. The 2016 Interinstitutional Agreement obliges the Commission, Council, and Parliament to implement the Better Regulation framework through continuous monitoring, review, and simplification where possible[81]. This approach reflects a mature law-making culture, where legislative drafting technique is not limited to wording concerns but is, *per se*, a strategic tool for managing EU legislation *en masse* - ensuring more efficiency in preparation and adoption (as well as implementation and enforcement), fewer disputes with reduced adversity, and ultimately, greater efficacy in achieving the objectives of EU legislation.

## Correlations between Ukraine's and the EU Legislative Drafting Techniques

***General principles***

In the last ten years, Ukraine has been making strides in implementing some of the legislative drafting principles used by the European Union. A milestone achievement was the adoption of the Law of Ukraine *On Law-Making Activity* in 2023, which established a comprehensive regulatory framework for the design of legal provisions. The Law determined the legal and organizational foundations for drafting legal acts, including the identified actors (can be used as citations), outlines the principles and procedures of law-making activity (can be used as recitals), and establishes formal rules for legislative drafting techniques. It is the first time that the statute declared as foundations: (a) rule of law (including legal certainty principle), (b) democracy, (c) proportionality, (d) necessity and justification, and (e) systemic coherence. The Law also introduces new instruments aimed at aligning the Ukraine's practice with the EU. Notably, the provisions of the Law mandate, before a text of the bill is composed, a *concept note* - a policy document analysing the current state of the relevant social relations and effective legal rules[82]. This, basically, mirrors the EU practice of *Green Papers* - preliminary policy justifications of new legislation initiative. Moreover, *Green Papers* and *White Papers* are now explicitly part of the list of analytical documents that may accompany key legislative proposals, reflecting, thus, a shift towards *evidence-based law-making*, wherein legislative decisions are made following a profound policy analysis with potential options for the solutions of the issues involved.

[79] Interinstitutional Agreement (1998), Preamble (1).

[80] Interinstitutional Agreement (2016), sec. 38; European Court of Auditors, *Law-Making in the European Union after Almost 20 Years of Better Regulation*, 4.

[81] Interinstitutional Agreement (2016), Title VIII; Golberg "Better Regulation: European Union Style", 22.

[82] *Bila knyha zakonodavchoho protsesu (White Paper on the Legislating)*. Verkhovna Rada of Ukraine, 2023, https://pravo.org.ua/wp-content/uploads/2024/04/Bila-knyga-zakonodavchogo-protsesu-1.pdf.

### *Feedback by Stakeholders and Public*

The Law places significant weight on public consultations: open discussion and its material elements are formalized as a required element of the law-making process. In practice, however, the role of public debate needs reinforcement: experts note that mandatory consultations are a general requirement for executive branch authorities, whereas legislative bills submitted by Members of the Verkhovna Rada (the legislature) often bypass this stage or reduce it to a mere formality[83]. The Law *On Public Consultations* (№ 3841-IX, dated April 20, 2024) made a prominent news for the positive change in the situation: Law 3841 requires a centralized online public consultations portal to engage public in the policy-forming and the policy-making[84]. Still under development, this portal is intended to serve as a hub for accessing current consultations and submitting proposals, while the Law 3841 will only become effective in 12 months after the martial law expires[85]. Meanwhile, citizens can access information and leave their comments in the "Public Feedback" section on the official website and social accounts of the Verkhovna Rada, the committees and the Members of Verkhovna Rada[86]. Hence, although the standards for transparency have been enacted, the real integration of public consultations into all legislative procedures remains a challenge.

### *Monitoring and Assessment Mechanisms*

Ukrainian government and parliamentary structures have begun adopting other EU-inspired drafting tools, such as regulatory impact assessments and anti-corruption reviews, which are usual procedures now. Law 3841 (on consultations of the public) institutionalized the *legal monitoring* notion - defined now as a systematic tracking of legal acts' *realization,* and assessing their efficacy and efficiency. Previously, *ex-post* assessment was almost entirely missing,[87] in contrast with the EU practice; currently, monitoring of implementation (realization, application) is officially recognized as part of the law-making process[88]. However, the legal scholars believe that Ukraine still lacks standardized methods and sufficient institutional capacity for systemic impact assessment of the laws in effect[89]. Articulating the assessment techniques in details and formally adopting them will be critical for transformation of a legal monitoring into a routine efficient component of the legislating – in accordance with the EU-Ukraine Association Agreement[90] that requires implementation, by Ukraine, of the *ex-ante* and *ex-post* legal act's impact assessment[91] as a matter of priority when the EU-Ukraine Accession Agreement is already being negotiated.

Ukraine's legal community is actively engaged in these developments. For example, the Research Service of the Verkhovna Rada, established in 2022, has published several analyses on the implementation of the new law on law-making and the harmonization of parliamentary procedures with European approaches. Legal scholars from leading research institutes - including the Koretsky Institute of State and Law and the National Academy of Sciences - have proposed amendments to the Rules of Procedure of Parliament and related legislation to align them with modern drafting principles.

### *Ukraine's Expert and Institutional Capacity*

Academic community and think-tanks, while actively addressing the improvement of the legislative drafting technique, have been

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83 *Bila knyha zakonodavchoho protsesu*, 2023, 13.

84 *Zakon Ukrainy "Pro publichni konsultatsii"* (Law of Ukraine "On Consulting the Public") no. 3841-IX dated June 20, 2024, accessed April 10, 2025, https://zakon.rada.gov.ua/laws/show/en/3841-20, Art. 14.

85 *Ibidem,* Sec. 1 of Final and Transitional Provisions

86 *Ibidem,* Sec. 2 of Final and Transitional Provisions.

87 N.I. Atamanchuk, *Pravovyi monitorynh v Ukraini: suchasnyi stan ta perspektyvy podalshoho reformuvannia* (*Legal monitoring in Ukraine: current status and prospect of further reform*). Recommended for publication by the Scientific Council of the Institute of Law-Making and Scientific Legal Expertise of the National Academy of Sciences of Ukraine, May 30, 2024, protocol № 5.

88 Zakon Ukrainy "Pro pravotvorchu diialnist", Article 67.

89 O. V. Muza, "Aktualni pytannia zakonodavchoho rehuliuvannia pravovoho monitorynhu v Ukraini." *Aktualni problemy derzhavy i prava* 101 (2024): 134–139.

90 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:22014A0529(01).

91 N.I. Atamanchuk, *Pravovyi monitorynh v Ukraini:….*

emphasizing the need for involving highly qualified legal linguists and drafting technicians in the law-making process. Verkhovna Rada's Research Service made several papers in implementation of the Law On Law-Making Activity, including alignment of the Ukraine`s and the EU practices in legislating[92]; proposals have been made to amend Verkhovna Rada's Regulation (i.e., the statute on the legislative procedure[93]) and the Verkhovna Rada's law on the committees[94], so that the processes can run in accordance with the new law-making principles. The proposals were also made by the National Academy of Sciences, e.g., V. M. Koretskyi Institute of State and Law published collective monograph[95], meanwhile Institute of Law-Making and Scientific Legal Expertise held a round-table discussion of the law-making statute[96], which proposed a set of improvements for the legislative drafting practices. Other monographs looked at the theoretical foundations of the legislative drafting techniques[97] and their pragmatic application[98], they accentuate on engagement of professional linguists, and legal technique specialists, propose to establish permanent expert advisory councils at the committees of the Verkhovna Rada of Ukraine consisting of the above experts as well as academics[99]: such a mechanism would enable early-stage review of legislative bills to ensure such qualities as better clarity and higher preciseness before formal readings by the members of the Verkhovna Rada.

### *Challenges and Potential Responses*

Ukraine's legislative drafting techniques have been converging with the EU guidance and guidelines, both in terms of form and substance (procedures). Principles of clarity, proportionality, and structural integrity had now been embedded in the Ukrainian legislation, while the efforts are underway to (a) strengthen a legal-linguistic expert reviews, (b) increase the public engagement and transparency of the legislating. Achieving full correspondence with all core EU practices requires that the reform in Ukraine is continued to (a) institutionalize expert support in legislating, (b) comply with public engagement standards', and (c) enable evidence-based decision-making across all stages of the legislating cycle. When these challenges are successfully addressed, it will improve the quality of national legislation and facilitate Ukraine's efficient integration into the supranational legal system of the European Union.

Despite notable progress, several issues hinder full correspondence between EU and Ukrainian legislative drafting techniques, among them:

(a) the need to back up the principles declared with the institutions and practices for clarity and proportionality;

(b) the need for a much more detailed restatement of methodological guidelines on drafting legal texts, borrowing from the EU's *Joint Practical Guide* and other instruments;

(c) the practice of evidence-based policy-making must be:

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92 Research Service of Verkhovna Rada of Ukraine, "Shchodo predmeta rozrobljuvanoho proektu zakonodavchoho akta stosovno uzghodzhennia polozhen Rehlamentu VRU ta Zakonu "Pro komitety VRU" iz Zakonom «Pro pravotvorchu diialnist» [*On the Scope of the Draft Legislation under Development: in the Matter of Reconciling Provisions of Verkhovna Rada Regulation with Law of Ukraine "On Law-Making Activity"*]: *Analitychna zapyska (Analytical Note)*, July 2024, accessed April 10, 2025, https://research.rada.gov.ua/documents/analyticRSmaterialsDocs/prav_politic/analytical_notes-pravpol/75271.html.

93 Pro Rehlament Verkhovnoi Rady Ukrainy : Zakon Ukrainy [*Law of Ukraine "On Legislating Regulations"*] no. 1861-VI dated February 10, 2010. *Verkhovna Rada Ukrainy.* Accessed April 10, 2025. https://zakon.rada.gov.ua/go/1861-17.

94 "Pro komitety Verkhovnoi Rady Ukrainy": Zakon Ukrainy [*Law of Ukraine "On Committees of the Verkhovna Rada of Ukraine"*] no. 116/95-BP dated April 4, 1995, *Verkhovna Rada of Ukraine, a*ccessed April 10, 2025, https://zakon.rada.gov.ua/go/116/95-%D0%B2%D1%80

95 N. M. Parkhomenko, ed. *Optymizatsiia pravotvorchoi diialnosti: teoretyko-pravovi zasady:* monohrafiia (Optimization of Law-Making Activity: theoretical and legal foundations: monograph). (Kyiv: Yurinkom Inter, 2025).

96 O.O. Kot, A.B. Hryniak and N.V. Milovska, ed.board *Zakon Ukrainy "Pro pravotvorchu diialnist" yak mekhanizm udoskonalennia pravotvorchoho protsesu v Ukraini* (Law of Ukraine "On Law-Making Activity" as a Ukraine's law-making process' improvement mechanism): zbirnyk materialiv naukovo-praktychnoho kruhloho stolu (Kyiv, April 12, 2024). (Kyiv: Instytut pravotvorchosti ta naukovo-pravovykh ekspertyz NAN Ukrainy, 2024).

97 Yu. O. Buhayko, *Linhvistychna ekspertyza zakonoproektiv v Ukraini: teoretychnyi ta konstyutsiinopravovyi aspekty: monohrafiia (Linguistic Expertise of Legislative Bills in Ukraine: theoretical and constitutional law aspects)*. (Kyiv: Alerta, 2023).

98 O.O. Kot, A.B. Hryniak and N.V. Milovska, eds, *Pravovyi monitoryng yak skladova pravotvorchoi ta pravozastosovchoi diialnosti (Legal Monitoring as an element of law making and application activity):* monohrafiia. (Kyiv: Alerta, 2023).

99 *Bila knyha zakonodavchoho protsesu, 13*.

(I) extended to all legislative actors, including Members of the Verkhovna Rada (that is, beyond executive branch authorities).

(II) legislative actors must assess impact, thoroughly analyse issues, conduct consultations, and collect input from stakeholders;

(III) make the publication of concept notes and public consultations for all bills mandatory[100], as noted above;

(d) proofreading and editing legislative bills at the stage of committee review, sessions, and hearings, with the participation of expert lawyer-linguists in the staff of the institutions - to avoid terminological ambiguity and conflicts (concurrence) of laws, and to improve clarity and consistency;

(e) the establishment of a functional legal monitoring system. Committees in the legislature, ministries, the Research Service of the Verkhovna Rada, etc., must conduct regular reassessments of the impact of enacted statutory law and initiate amendments or restatements based on empirical data and practical experience. Such an approach is a core element of EU legislative culture[101].

## Conclusions and Forecasts

The European Union has developed a mature and institutionalized framework for legislative drafting, based on fundamental principles such as clarity, coherence, legal precision, multilingual consistency, and adherence to subsidiarity and proportionality. These principles are enshrined in interinstitutional agreements and implemented through lawyer-linguists, legal services, and multi-stage quality control. Legal techniques include impact assessments, standardized structure and language, amendment mechanisms, and transitional provisions, all ensuring accessibility and legal certainty.

Ukraine has begun to adopt many of these elements through its Law on Law-Making Activity, with contributions from the Verkhovna Rada's Research Service and legal academic institutions. Key priorities identified include codifying legislative drafting practices, introducing legal-linguistic review, and strengthening impact assessments and public consultations.

Nonetheless, implementation gaps remain: Ukraine must institutionalize quality control procedures, enhance legal editing practices, and improve consultation mechanisms by ensuring transparency, digital integration, and feedback standards. A unified rulebook for legislative drafting is also needed. Thus, EU legislative drafting serves as a benchmark for Ukraine's evolving regulatory culture, with substantial potential to enhance the quality and legitimacy of national law-making.

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[100] *Idem*.

[101] N.I. Atamanchuk, *Pravovyi monitorynh v Ukraini:…..*

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# ТЕХНІКО-ЮРИДИЧНІ ПРИЙОМИ НОРМОПРОЄКТУВАННЯ В ЄВРОПЕЙСЬКОМУ СОЮЗІ: МОДЕЛЬ ДЛЯ РЕФОРМУВАННЯ ЗАКОНОТВОРЕННЯ В УКРАЇНІ

***Анотація***

*У статті досліджено техніко-юридичні прийоми нормопроєктування в Європейському Союзі як комплекс принципів, методів і процедур, спрямованих на забезпечення належної якості нормативно-правових актів. Виокремлено ключові орієнтири законодавчої техніки ЄС, зокрема вимоги чіткості та точності формулювання норм, структурної узгодженості змісту, врахування інтересів та потреб адресатів правового регулювання, а також дотримання принципів субсидіарності, пропорційності й законності. Особливу увагу приділено інструментам практичного втілення цих принципів: оцінці необхідності правового регулювання, застосуванню структурних стандартів, кодифікації та переформулюванню актів (recasting), моніторингу імплементації, а також багаторівневій юридико-лінгвістичній експертизі. З урахуванням українського контексту проаналізовано останні ініціативи щодо вдосконалення законодавчої техніки. Показано, що попри часткове впровадження європейських підходів, результативність їх реалізації в Україні залежить від посилення інституційної спроможності, розвитку експертної підтримки та ефективних механізмів публічної участі. Запропоновано запровадження уніфікованого керівництва з нормопроєктування як інструменту гармонізації стандартів якості правотворення. Отримані результати підтверджують потенціал стандартів ЄС для підвищення ефективності та легітимності національного законотворчого процесу України.*

***Ключові слова:*** *законодавча техніка; якість законодавства; юридико-лінгвістична експертиза; оцінка впливу; Європейський Союз; гармонізація законодавства; регуляторна політика.*

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# JUDICIAL REFORM IN UKRAINE IN THE TIMES OF POST-REVOLUTION OPENING AND THE LESSONS THE EU CAN LEARN

***Abstract***

*The article analyses the progress and results of judicial reform in Ukraine after the Revolution of Dignity through the prism of interaction between key stakeholders – civil society, state bodies, and international partners, particularly the European Union. The study combines an analysis of scientific literature with empirical data obtained through interviews with direct participants in the reform processes after 2014. The authors trace how the window of opportunity created by mass protests and a change in the country's political course influenced institutional transformations in the field of justice. The study identifies factors that contributed to and hindered the implementation of reforms: on the one hand, public demand for the purification of the judiciary, the activation of civil society and the support of international partners, and on the other hand, resistance from the old elites, the superficial commitment of new political actors to deep transformations and the lack of proper dialogue between key stakeholders. The study concludes that the success of judicial reform in Ukraine is partial, demonstrating that even in a favorable context, systemic changes require sustained political will and effective cooperation between internal and external actors.*

***Key Words****: Revolution of Dignity; Ukraine; judicial reform; democratization; civil society; European Union; post-revolutionary transformations.*

## Introduction

The last months of 2013 in Ukraine witnessed one of the most significant and transformative experiences in Ukraine's modern history – the beginning of mass protests that later became known as the Revolution of Dignity. The protests were

triggered by the decision of then-President Yanukovych and the government to make a U-turn in the country's course, changing the economic and political vector of Ukraine out of the EU towards Russia and its Customs Union. Before the change of course was announced, Ukrainian society, to some extent, tolerated, at least for the time being, the lack of governmental transparency, high level of corruption, encroachments on private business, and a distrusted and lackingly independent judicial system that were endemic to Yanukovych's Ukraine.

The observed tolerance may partly stem from the expectation that even those endemic problems can be addressed during the process of aligning with the EU standards of good governance, corruption prevention, building an impartial and independent justice system, etc. Therefore, the signing of the Association Agreement between the EU and Ukraine, which was at risk before Yanukovych and was influenced by his government's decision to abandon the EU in favor of Russia, was regarded as a necessary first step to initiate Ukraine's transformation into a better and more transparently governed state.

As a result of the Revolution of Dignity, Yanukovych and some of his key lieutenants abruptly left the country in February 2014. The subsequent reorganization of the government and parliament, along with the signing of the Association Agreement and increased engagement with EU programs aimed at supporting Ukraine's democratic development, created a 'window of opportunity' for major changes in critical areas of state and society. Notably, these included building anti-corruption structures and judicial reform.

This article recounts how judicial reform in Ukraine developed and, in greater detail, examines how stakeholders perceive this reform. The background context in which these issues are discussed includes the EU's support for the reform and how much the opportunity created by the Revolution of Dignity has been utilized by the EU.

## Conceptualization of the Revolution of Dignity in relation to democratization

Scholars from various disciplines have studied the Revolution of Dignity through the lens of the democratic reforms it enabled. While some of the studies looked at the implementation of the EU-oriented reforms as steps towards better governance, liberalization, and democratization[1], others, in addition to that, inquired into the "embeddedness of the changes ongoing at the policy level in the various segments of society and the interaction of individual and collective agency with these changing structures."[2] This line of literature emphasizes that societal change cannot be reduced to a set of formal reforms and requires contextualization to be fully understood, i.e., taking into account factors such as armed conflict, precariousness, low levels of trust between key actors, and external legitimization factors, among others.[3] Here, the authors usually try to go beyond the legalistic understanding of the reforms and look at the potential changes of (and blockages from) the power structures,

[1] Henry E. Hale and Robert Orttung, *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine* (Stanford University Press, 2016), https://doi.org/10.11126/stanford/9780804798457.003.0014.

[2] Zuzana Novakova, "Four Dimensions of Societal Transformation: An Introduction to the Problematique of Ukraine." *The International Journal of Social* Vol. 7, no. 2 (2017): 2. https://www.jstor.org/stable/26883324.

[3] Ibid, 6; Anastasia Tataryn, "From Social Uprising to Legal Form," *Law Critique* 30 (2019): 44-45, https://doi.org/10.1007/s10978-018-9235-x.

the Soviet legacy in governance, neo-patrimonial values, and the EU political efforts to advance reforms.[4] Another important prism through which the democratic developments in Ukraine have been examined is the transitional justice perspective.[5] In this sense, democratic reforms are viewed as part of the Ukrainian response to the war and anti-democratic inclinations from the pre-revolution era. However, scholars using the transitional justice prism predominantly focus on war crimes investigations, compensation for victims, and similar measures, overlooking the impact of sectoral democratization reforms on rebuilding the state after the war and during the period of electoral democracy.

A significant volume of scholarship exists investigating the emergence of openings for certain structural reforms in Ukraine after the Revolution of Dignity, claiming that "2014 was a time caesura that divided two different periods in Ukraine's history, as well as two different developmental trajectories of the state and society as a consequence".[6] It seems that one of the most academically covered reform that springs from the Revolution of Dignity is an anti-corruption one.[7] Scholars examine the political climate that led to the creation of the National Anticorruption Bureau of Ukraine, the effects of power distribution among domestic political actors competing for ownership over reforms,[8] the role of civil society in shaping anti-corruption efforts, and related factors.[9] On the issue of judicial reform, the existing body of literature largely agrees that this reform has been a relative failure.[10] As some authors stress, this happened as a result of the "political elites' shallow commitment to powerful, independent courts, as well as the absence of a strong reformist constituency within the Ukrainian judiciary."[11]

This article builds upon the existing body of literature and attempts to look beyond the legal peculiarities of the post-revolution judicial reform in Ukraine. To achieve this, it focuses on the analysis of the interaction between different stakeholders involved in tailoring the reform and on the role and impact of the EU in facilitating the transformation of the judicial sector.

This study differs from existing work in its methodology. The authors mainly rely on interviews with key participants directly

4 Marta Králiková, "Power Structures and Normative Environment: Limits to the Rule of Law and the EU's Normative Power in Ukraine," *UPTAKE Working Paper* No. 3 (2017): 13-16 https://doi.org/10.13140/RG.2.2.36684.72325.

5 Konstantin Zadoya, "Transitional Justice in Ukraine: Challenges and Opportunities," *Leges si Viata*, 2018, http://smtp.kpi.kiev.ua/archive/2018/9-2/13.pdf.

6 Wojciech Siegień, "War and Modernization in Ukraine: A Comparative Study of Systemic Education Reforms," in *Global Agendas and Education Reforms*, ed. Birol Akgün and Yusuf Alpaydın (Palgrave Macmillan, 2024), 116, https://doi.org/10.1007/978-981-97-3068-1_6; "Three Years of Reforms: Has Ukraine Reformed Enough for Surviving," VoxUkraine, https://voxukraine.org/longreads/three-years-of-reforms/index-en.html?utm_source=chatgpt.com.

7 Nicholas Pehlman, "Patrimonialism through Reform: Public Participation in Police Reform, Institutional Capture, and Bureaucratic Independence in Ukraine," *Harvard Ukrainian Studies* 37, no. 3/4 (2020): 323-327, footnotes 1-9, https://www.jstor.org/stable/48626498.

8 Marina Zaloznaya and William M. Reisinger, "Mechanisms of Decoupling from Global Regimes: The Case of Anticorruption Reforms in Russia and Ukraine," *Demokratizatsiya: The Journal of Post-Soviet Democratization*28, no. 1 (2020): 77-111, https://muse.jhu.edu/article/747821 ; John Lough and Vladimir Dubrovskiy, "Are Ukraine's Anti-Corruption Reforms Working?," *Chatham House* (blog), November 19, 2018, https://www.chathamhouse.org/2018/11/are-ukraines-anti-corruption-reforms-working.

9 Oksana Huss et al., "Explaining Variation in the Effectiveness of Anti-Corruption Activism in Ukraine's Regions: The Role of Local Context, Political Will, Institutional Factors, and Structural Factors," *Demokratizatsiya: The Journal of Post-Soviet Democratization* 28, no. 2 (2020): 201-27, https://muse.jhu.edu/article/754565; Felix Blatt and Caroline Schlaufer, "The Influence of Civil Society on Ukrainian Anti-Corruption Policy After the Maidan," *Central European Journal of Public Policy*15, no. 1 (2021): XXXX, https://doi.org/10.2478/cejpp-2021-0001.

10 Tataryn, "From Social Uprising to Legal Form," 53; Maria Popova and Daniel J. Beers, "No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan," *Demokratizatsiya: The Journal of Post-Soviet Democratization* 28, no. 1 (2020): 130-137, https://muse.jhu.edu/article/747827.

11 Popova and J. Beers, "No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan," 130-137.

involved in reform processes since 2014. To provide a comprehensive and balanced view, the study examines judicial reform from the perspectives of various stakeholders, including civil society representatives, government officials, and the European Union through its international support mechanisms. Therefore, the work combines analysis of academic sources with materials obtained from respondents, mainly aiming to identify which factors, according to those surveyed, contributed to the reform and which factors impeded it. The authors recognize that this approach may include inaccuracies due to the subjectivity of respondents' assessments and the limited ability to verify non-public processes associated with the reform's development. At the same time, this perspective, emphasizing dialogue and the experiences of those involved, together with more "legalistic" research, can provide valuable insights. This study does not seek to track every step of the reform or determine all the causes of individual failures, but instead offers a broader view of the systemic issues that have hindered the full implementation of judicial reform.

Within this study, interviews were carried out with representatives of civil society, including experts involved in various non-governmental organizations, active participants in the Reanimation Package of Reforms, and members of the Public Integrity Council. On the state side, the study references the work of a government official who represented the Presidential Administration in multiple judicial reform processes after the 2014 Revolution of Dignity. On the European Union side, a senior expert on judicial reform, who holds a leading role in the judicial reform component of the EU Pravo Justice project, was interviewed.

## The timeline of judicial reform in Ukraine after 2014

Judicial reform in Ukraine is a long-term process, with its origins dating back to the restoration of independence in 1991, when the newly formed state inherited the Soviet judicial system. Although de jure this system appeared to be an orderly state model of justice, de facto, it remained under constant political influence.[12] It often adapted to changes in the ruling regimes.[13] This led to low levels of trust and satisfaction with the work of national courts among the general public.[14] In the following decades, Ukraine underwent several waves of reforms. These included: the so-called "small judicial reform" laid down in the Transitional Provisions of the Constitution[15]; the reform during the presidency of Viktor Yushchenko, which was characterized by certain liberal tendencies[16]; the period of Viktor Yanukovych, when the independence of the judiciary was significantly restricted[17]; and the era of the Revolution of Dignity, when the

12 Maria Popova, "Ukraine's Politicized Courts," in *Beyond the Euromaidan: Comparative Perspectives on Advancing Reform in Ukraine*, ed. Henry E. Hale and Robert W. Orttung (Stanford University Press, 2016), 145, https://doi.org/10.11126/stanford/9780804798457.003.0008.

13 Ibid.

14 Králiková, "Power Structures and Normative Environment: Limits to the Rule of Law and the EU's Normative Power in Ukraine," 6.

15 Ukraine, *Constitution of Ukraine, Transitional Provisions*, Constitution 254к/96-ВР, adopted June 28, 1996, Chapter 15, para 12, https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text; Oksana Khotynska-Nor, "The impact of the "small judicial reform" on the development of the judicial system of Ukraine: organisational aspects," *Sudova apeliatsia* 1, no. 42 (2016): 6-15, https://scholar.google.com/citations?view_op=view_citation&hl=ru&user=kOLIXtMAAAAJ&citation_for_view=kOLIXtMAAAAJ:qjMakFHDy7sC.

16 Serhiy Yarosh, "Judicial reform in Ukraine: reform of the judicial system in 2001–2010," *Rakurs*, September 11, 2019, https://racurs.ua/ua/2417-sudova-reforma-v-ukrayini-2001-2010-roky.html.

17 "White Book of Reforms 2025. Chapter 3. Judicial reform and law enforcement," VoxUkraine, May 6,

courts effectively became an instrument of repression against political opponents and civil society.

The Revolution of Dignity was a pivotal event that sparked the process of judicial reform, which has since become one of the top priorities for both civil society and the new political elites. Post-revolutionary changes occurred in three main stages: 2014, 2015, and, most significantly, 2016. Already in 2014, the Law of Ukraine "On Restoring Trust in the Judiciary in Ukraine"[18] was adopted, which established a Temporary Special Commission to review judges involved in making "political" decisions during the Maidan protests. The same law removed heads of courts from their posts and introduced a mechanism for re-election to these positions by the judges of the respective courts themselves. Nevertheless, in approximately 80% of cases, judges re-elected the same people who had previously held leadership positions.[19]

The next important step was the adoption of the Law of Ukraine "On Ensuring the Right to a Fair Trial" in 2015.[20] Its purpose was to restart the work of the High Qualification Commission of Judges of Ukraine (HQCJ) and the High Council of Justice (HCJ).[21] However, the new composition of these bodies was mainly formed from old judicial personnel, which did not contribute to the further advancement of the reform.[22]

The most ambitious wave of judicial reform in the history of independent Ukraine began in 2016. The main changes touched amendments to the Constitution of Ukraine, and the adoption of the Law 'On the Judiciary and Status of Judges'.[23] The innovations included:

- Conducting mandatory qualification assessments of all judges, the results of which, in the event of failure to confirm the ability to administer justice according to the criteria of competence, integrity, or professional ethics, would be grounds for dismissal from office;
- Establishment of a new Supreme Court and holding of a new competition for the selection of judges.
- Creation of the High Council of Justice, empowered to suspend, transfer, and dismiss judges, submit proposals to the President for their appointment, and give consent to their detention or arrest.
- Redistribution of powers and re-election of members of the High Qualification Commission of Judges;
- Creating a Public Integrity Council (PIC) as an auxiliary body that checks judges and candidates for compliance with standards of integrity and professional ethics;
- Establishment of higher specialized courts – the High Anti-Corruption Court and the High Court of Intellectual Property

2025, https://voxukraine.org/en/white-book-of-reforms-2025-chapter-3-judicial-reform-and-law-enforcement.

18 Ukraine, Verkhovna Rada Ukrainy, *On Restoring Trust in the Judiciary in Ukraine*, Law 1188-VII, adopted April 8, 2014, https://zakon.rada.gov.ua/laws/show/1188-18#Text .

19 Center of Policy and Legal Reform and DEJURE Foundation, *Formation of the New Supreme Court: Key Lessons* (2018), para 4, https://pravo.org.ua/wp-content/uploads/2024/10/1518518656formuvannya-novogo-vs_klyuchovi-uroki.pdf.

20 Ukraine, Verkhovna Rada Ukrainy, *On Ensuring The Right To A Fair Trial*, Law 192-VIII, adopted February 12, 2015, https://zakon.rada.gov.ua/laws/show/192-19#Text.

21 "Vyshcha Rada Yustyciyi" which was later reorganised into the "Vyshcha Rada Pravosuddia", both names translate as High Council of Justice

22 Center of Policy and Legal Reform and DEJURE Foundation, *Formation of the New Supreme Court: Key Lessons*, para 4.

23 Ukraine, Verkhovna Rada Ukrainy, *On the Judiciary and Status of Judges*, Law 1402-VIII, adopted June 2, 2016, https://zakon.rada.gov.ua/laws/show/1402-19#Text.

Other changes concerned the age of judges, the term of their appointment, the reshaping of the President's powers in the field of the judiciary, and many other aspects. More detailed analyses of the specific legislative and institutional steps undertaken during the reform can be found in works that more closely focus on the legalistic dimension of the reform [24]

Despite seemingly large-scale changes, judicial reform has not brought the expected results, as almost every innovation has revealed significant gaps.[25] In particular, the revamped HQCJ and HCJ once again raised doubts about their independence and objectivity, particularly in matters of disciplinary sanctions against colleagues. A particular stumbling block was the process of selecting judges in 2016–2018, which was characterized by a low level of transparency, unclear and inconsistent criteria, poor quality assessment, and disregard for the information and conclusions prepared by the Public Integrity Council.[26] Similar criticism was levelled at the selection of judges to the Supreme Court in 2017.[27] At the same time, the creation of the High Anti-Corruption Court and the selection process for it, with the participation of international experts, is usually recognized as a relatively successful step.

## Unfolding of the reform and the EU role in its implementation

Overall, the experts interviewed consider judicial reform to be partially successful, as some essential achievements have been made, but addressing deep-seated systemic changes remains unfulfilled. Additionally, perceptions of its effectiveness differ greatly among various groups: civil society largely criticizes the reform and often views it as a failure, while representatives of the state and some international support projects do not share this view.

In light of the above, this study aims to analyze various perspectives on the implementation process of reform and to determine the positions of key actors regarding the factors, in their opinion, that contributed to or hindered its implementation in the post-revolutionary period. At the same time, the study does not aim to establish the reasons for each failure of the reform, but rather to identify general trends that led to the incomplete utilization of the reform momentum after the Revolution of Dignity.

### *a. Positively contributing factors*

Although judicial reform had many critical moments, its implementation still marked significant progress compared to the pre-revolutionary period. The 2016 reform represented the most comprehensive transformation in Ukraine's judiciary history, including constitutional amendments and the creation of new institutions. It is therefore important to examine the factors that enabled this reform to better understand how periods of crisis and mass mobilization can act as catalysts for democratization.

The main factor driving the intensification of judicial reform was the Revolution of Dignity, as consistently and unanimously emphasized by all respondents. Primarily, it sent a clear signal of public demand for the cleansing of power and a

[24] Popova and J. Beers, "No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan," 120-125

[25] Tataryn, "From Social Uprising to Legal Form," 43-44. Center of Policy and Legal Reform and DEJURE Foundation, *Formation of the New Supreme Court: Key Lessons*.

[26] Center of Policy and Legal Reform et al., *Qualification assessment of judges 2016-2018: interim results*(2019), https://dejure.foundation/kvalifikaciyne-ociniuvannia-suddiv-2016-2018-promizhni-rezultaty/.

[27] Center of Policy and Legal Reform and DEJURE Foundation, *Formation of the New Supreme Court: Key Lessons*.

complete overhaul of the system. During this period that the judiciary revealed itself to be a repressive tool of the state: judges imprisoned protesters without bail and effectively justified police violence.[28] The call for change originated from the general public, which exerted strong pressure on the new government. Simultaneously, representatives of the political elite noted that after the Revolution, they also recognized the need for reform as part of a new social contract with society. They stressed that it would be incorrect to view the reform solely as an initiative of civil society, since the driving force was a broader social consensus. However, as the analysis of judicial reform failures will demonstrate, real change is only achievable through the involvement of all key stakeholders and genuine cooperation among them.

The revolution caused a major shift, creating a "window of opportunity" for large-scale changes. The new political direction focused on increased openness to cooperation, which encouraged civil society to become more active and strengthened its role in pushing for reforms. All respondents stressed that such changes would not have been possible under the previous government. Public sector experts pointed out that most of the earlier reform efforts, from Yanukovych's era, were mostly superficial – they were formal and symbolic, without any real aim to transform the system. Meanwhile, civil society was in a fragile situation, as its activities were heavily restricted due to fears of repression by the authorities.

The second key factor was the increase in dialogue between civil society and the government. It involved two connected elements: the energizing of civil society and the rise of new political elites in power. After the Revolution of Dignity, public representatives reported a sense of excitement and unity around a shared goal in society. This unity encouraged the formation of new types of organizations, particularly the Reanimation Package of Reforms, a coalition of civil society groups that coordinated working groups of experts on various reforms, including judicial and anti-corruption. Conversely, the emergence of a new political elite significantly improved communication with the government, as the new parliament members included individuals ready to work with civil society and international partners to push reforms. However, as will be explained below, not all key government officials shared this proactive stance.

The third factor was the active involvement of international partners, who began supporting both the new government and civil society shortly after the Revolution. Respondents specifically highlighted the roles of the European Union and the Council of Europe. This support was multi-faceted, encompassing project, organizational, and political aspects. The European Union was among the first to provide core financial backing for the Reanimation Package of Reforms, which allowed the coalition to establish its own office and hire administrative staff. Additionally, civil society experts underline the significance of the EU's political influence, which clearly signaled that judicial reform is a crucial part of Ukraine's push for European integration. Government representatives also pointed out the vital role of the Pravo-Justice project, which systematically offered expert assistance to authorities. Notably, its contribution was key to the creation and operation of the Council for Judicial Reform, an advisory body to the President of Ukraine, serving as a platform for dialogue between

[28] Popova, "Ukraine's Politicized Courts," 148.

the government, the public, academics, and international partners.

***b. Factors hindering reform***

At the same time, despite positive developments and the opening of a 'window of opportunity', judicial reform has not achieved the expected results and remains a subject of active criticism. This study summarizes key trends from the perspective of the main participants in the reform process regarding the factors that, in their opinion, have hindered the success of the reform. The clear conclusion is that the most consistent critical stance is expressed by representatives of civil society, owing to their role in exercising public oversight.

First, civil society representatives point out that one of the biggest obstacles to the success of the reform remained the actors inherited from the previous government. Primarily, this refers to the so-called 'judicial mafia' – a part of the judiciary that has persisted since pre-revolutionary times and has firmly defended the status *quo*. Resistance from them was not always driven by a direct interest in maintaining corrupt practices; often, it was due to an unwillingness or inability to act differently, as the system had been functioning according to established rules for a long time. Additionally, significant barriers were created by representatives of certain political forces linked to oligarchic circles or private interests, who systematically obstructed the reform of the judicial system. Public disinformation backed by Russia or anti-reform politicians was identified as an additional negative factor. One expert noted that this was the source of a discrediting narrative about the so-called 'Sorosites' — accusations that all civil society activists act solely in the interests of grants and impose a 'foreign agenda' on Ukraine. Representatives of international projects also reached similar conclusions, citing the reluctance of the old authorities and issues with corruption within the judiciary.

Secondly, one of the main concerns of civil society is the lack of initiative from authorities or their reluctance to accept proposals from civil society organizations. Experts note that they cannot recall a single instance where their proposals were fully considered; almost always, decisions were made as a result of some kind of compromise. At the same time, it is emphasized that immediately after the Revolution of Dignity, the state authorities showed much greater openness to cooperation, as confirmed by legislative changes from 2014 to 2016. However, this level of interaction gradually declined, especially in relations with the Presidential Administration, which hindered further reform implementation.

From the perspective of state representatives, one issue was civil society's inability to 'celebrate joint victories.' An example is the situation with law adoption in 2016 after a lengthy process of preparation: immediately afterward, public organizations began to push for new changes to the newly updated legislation. Additionally, state representatives emphasized that they had provided all necessary platforms for cooperation, particularly through the Council on Judicial Reform, which was intended to serve as a communication platform between the authorities and the public. Moreover, as noted by state representatives, in its 2019 report "Assessment of the 2014–2018 judicial reform in Ukraine," the Council of Europe considered the judicial reform successful, noting that 90% of the tasks outlined in "The 2015–2020 Justice Sector

Reform Strategy," adopted in May 2015, had been completed. [29]

Thirdly, one of the main obstacles in the reform process was the difficulty in communication and cooperation between the key stakeholders. Specifically, as mentioned earlier, this involves the interaction between civil society and the government in determining the best methods for implementing reforms and the criteria for evaluating their success. An important factor in this was the length of the judicial reform, which greatly increased differences in the perspectives of various actors. At the same time, there are examples of shorter-term and more effective processes, particularly the creation of the National Anti-Corruption Bureau, even though anticorruption reform in the larger context faces similar challenges. Post-revolutionary enthusiasm helped pass the bill quickly and without major opposition.

Nevertheless, civil society experts expressed concern that cooperation with individual international projects was complicated by their long-term presence in Ukraine. In their view, this created a perception of excessive cooperation between such projects and the judicial system, giving disproportionate influence to the old judiciary and calling into question their impartiality. It seems that an additional factor contributing to the misunderstandings was the limited capacity of these projects for self-reflection due to the significant funds already invested in the relevant areas. The 2010 selection of judges and the 2017 selection of Supreme Court judges were cited as examples.

In response to the latter (2017), international project representatives noted that they believed the selection was quite successful because Supreme Court judges came from diverse professional backgrounds—academia, the legal sector, and other fields—which contributed to a more balanced judicial system. Additionally, they highlighted that although the Supreme Court's image was damaged by allegations of corruption against its president, this does not necessarily mean that the stigma affects all other judges. Therefore, a gap exists between civil society representatives and international partners regarding the criteria used to define the success of reforms.

Another point of disagreement was the involvement of international experts. Civil society representatives emphasized that international projects sometimes misused their involvement: despite their undeniable importance, such experts did not always fully understand the local context. It was also noted that international experts were typically less critical of the authorities, which is why the authorities favored them. Nevertheless, support for national experts is a long-term investment that would benefit from their continued participation in policymaking or government activities over time. Representatives of international projects, in turn, justified this practice as essential during the transition period, as it promotes greater transparency.

Government representatives also criticized international projects, accusing them of creating excessive advantages for the so-called ‘civil oligarchy’. The argument was that resources and opportunities for representation were predominantly allocated to the largest organizations, thereby overlooking many local actors, which contradicted the multidimensional and complex nature of civil society. Another issue affecting cooperation was the excessive bureaucratization of specific projects, which limited their ability to adapt to changes in the political environment. In particular,

[29] Council of Europe, *Assessment Of The 2014-2018 Judicial Reform In Ukraine And Its Compliance With The Standards And Recommendations Of The Council Of Europe Consolidated Summary* (2019), para 7, https://rm.coe.int/doc-00-assessment-consolidated-summary/168097a777.

following the revolutionary events, the political context underwent significant transformations; however, some projects proved unable to adapt to the new, more dynamic challenges.

## Conclusions

The Ukrainian case demonstrates that periods of crisis and mass mobilization can create significant opportunities for democratization. However, these chances stay fragile unless they are supported by ongoing political will, genuine commitment from the elite, and effective cooperation between domestic and international stakeholders. This conclusion adds to the comparative debate on judicial reform in transitional democracies, illustrating that partial success, rather than complete transformation, might be the most common result when deep-rooted interests remain strong.

Among the overall factors that positively influenced the progress of judicial reform after the Revolution of Dignity, the following stand out: strong public demand for change; the shift in the political landscape; the rise of new political elites who largely shared the values of the reform-minded segment of society; active and effective dialogue among key stakeholders—state institutions, civil society, and international partners—as well as political and material support from these international partners. The political engagement of international partners helped to clearly define the reform direction, boosted civil society's position, and motivated the government to carry out changes. Material support, in turn, was vital for ensuring the capacity of civil society and state institutions, which remained especially vulnerable when implementing practical steps in the post-crisis period.

At the same time, the reform faced several factors that greatly limited its results. First, the strong influence of old power structures and political elites played a major role, as they were mostly uninterested in breaking out of the system built over decades and did not help push for bold systemic changes. Second, the new political elites showed a lack of strong commitment to carrying out consistent and thorough reforms, often accepting compromises that compromised quality. Third, misunderstandings among key stakeholders and the absence of effective dialogue to resolve these issues created a major obstacle. This caused communication breakdowns and generally weakened the reform's effectiveness.

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# УРОКИ ДЛЯ ЄС ЩОДО ВИКОРИСТАННЯ ПІСЛЯ-РЕВОЛЮЦІЙНИХ ВІДКРИТТІВ НА ПРИКЛАДІ СУДОВОЇ РЕФОРМИ В УКРАЇНІ

***Анотація***

У статті аналізуються прогрес і результати судової реформи в Україні після Революції гідності через призму взаємодії між ключовими зацікавленими сторонами – громадянським суспільством, державними органами та міжнародними партнерами, зокрема Європейським Союзом. Дослідження поєднує аналіз наукової літератури з емпіричними даними, отриманими в результаті інтерв'ю з безпосередніми учасниками процесів втілення реформ після 2014 року. Автори простежують, як вікно можливостей, створене масовими протестами та зміною політичного курсу країни, вплинуло на інституційні перетворення у сфері правосуддя. У дослідженні визначено фактори, що сприяли та перешкоджали впровадженню реформ: з одного боку, суспільний попит на очищення судової системи, активізація громадянського суспільства та підтримка міжнародних партнерів, а з іншого – опір старих еліт, поверхнева прихильність нових політичних акторів до глибоких трансформацій та відсутність належного діалогу між ключовими зацікавленими сторонами. У дослідженні робиться висновок, що успіх судової реформи в Україні є частковим, що свідчить про те, що навіть у сприятливих умовах системні зміни вимагають стійкої політичної волі та ефективної співпраці між внутрішніми та зовнішніми акторами.

***Ключові слова**:* Революція гідності; Україна; судова реформа; демократизація; громадянське суспільство; Європейський Союз; післяреволюційні перетворення.

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# CURRENT TRENDS AND PROSPECTS OF UKRAINIAN RETURN MIGRATION

***Abstract***

*This article examines contemporary trends in Ukrainian external migration and the factors influencing return migration, underscoring the need for return policies that foster economic growth and social stability. The study identifies key determinants of return, considering both forced and rational migration drivers alongside the social profile of displaced persons. Particular attention is given to pull and push factors that either facilitate return or encourage an extended stay in host countries. The analysis is structured around two main dimensions – security and socio-economic conditions – providing an evaluation of the opportunities available in Ukraine and host states. Given the challenges related to return – including housing issues, economic uncertainty, labor market barriers, legal and bureaucratic constraints, and reintegration difficulties – the author underscores the need for a comprehensive return strategy. In particular, in collaboration with international organizations and civil society, Ukrainian government needs to implement policies that ensure safe return, access to housing, medical care, legal assistance, psychological support, financial programs, and educational opportunities for returnees. In this regard, the author emphasizes that information and communication campaigns about available opportunities can play a crucial role in facilitating sustained return.*

***Key Words****: Contemporary Ukrainian migration, Return migration, Security risks, Social reintegration, Post-war reconstruction, European Union*

## Introduction

According to the International Organization for Migration (IOM), russia's full-scale invasion of Ukraine in February 2022 "resulted in one of the largest and fastest displacements in Europe since the Second World War"[1]. In 2022, nearly 17 million Ukrainians crossed the state border, with more than 9,2 million returning home by spring 2023. Over time, the number of displaced persons abroad has gradually declined due to a significant share of returnees, primarily those who left Ukraine at

[1] International Organization for Migration (IOM). "World Migration Report 2024." https://publications.iom.int/books/world-migration-report-2024.

the beginning of the war. The Center for Economic Strategy (CES) reported that as of mid-2023, between 5,6 and 6,7 million Ukrainians[2] remained in European countries and other parts of the world due to the war. According to data from the United Nations High Commissioner for Refugees (UNHCR) from early 2025, about 6,4 million Ukrainian asylum seekers have been registered in Europe, with an additional 560 000 outside the EU[3].

However, even now, it remains difficult to determine precise figures, as they continue to fluctuate. The specifics of recent Ukrainian migration, which complicate calculation methodologies and lead to variability in official migration data, include the challenge of determining whether returns are permanent or temporary[4], as well as accounting for pendulum migration and the so-called "new wave" of rational or economic migration from relatively safe regions.

Since the security situation has been the primary driver of forced migration, at the outset of the war, most refugees initially intended to return. Among those who remain abroad, some are expected to return after the cessation of hostilities in Ukraine, while preliminary data suggest that approximately 2 million Ukrainians[5] will stay abroad permanently. Furthermore, considering the composition of migrant households – particularly the high percentage of middle-aged women and children – the ongoing outflow of the population for family reunification cannot be ruled out. Particularly, the removal of the travel ban for conscripts may result in an additional 300 000-500 000 people leaving the country[6], which will have significant implications for the demographic landscape.

The recent Ukrainian migration has already led to significant changes in domestic social and economic structure while also impacting the host countries. The economic impact of external migration should not be underestimated, particularly due to current labor shortages, and the heavy toll on the domestic economy from decreasing household spendings which affects economic growth. According to preliminary estimates, "depending on how many Ukrainians do not return home after the end of the war, economic losses due to the decline in production and consumption may range from

[2] Mykhailyshyna, Daria, Samoyliuk, Maksym, and Tomilina, Maria. "Refugees from Ukraine: Who Are They, How Many Are There, and How Can They Be Returned?" Analytical Note. Center for Economic Strategy, August 29, 2023. p. 6. https://ces.org.ua/wp-content/uploads/2023/09/bizhenczi-z-ukraïni.-finalnij-zvit.pdf.

[3] UN Refugee Agency Regional Bureau for Europe. "Ukraine Refugee Situation." Last modified 20 March, 2025. https://data.unhcr.org/en/situations/ukraine.

[4] Internation al Organization for Migration mentions the difficulty to determine whether returns are permanent or temporary. For instance, in January 2023, due to the survey of all respondents currently in their place of habitual residence, 16% fall within the returnee definition (estimated 5,56 million returnees) because 80% of them indicate they are planning to remain in their homes (4,4 million), and 85% have been in their homes for a period longer than one month. See: International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https:// dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[5] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[6] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

2,6 to 7,7% of GDP per year"[7]. In addition, during and after the war it will be difficult to increase export-oriented production and develop more complex and technological production. One of the most critical aspects of ongoing migration is the continued outflow of highly qualified professionals in sectors such as healthcare, IT, and education. So, while it may be possible to fill less skilled positions through external migration to Ukraine, addressing the consequences of the outflow of highly qualified professionals will be more challenging. In this regard, the development of sustained return policies that support economic growth and ensure social stability requires thorough consideration of migration drivers, trends, and consequences, both current and lasting.

**Purpose and methodology**

In the article, the concept of migration is outlined from the perspective of migration law. Thus, migration is defined as the movement of people for various purposes across the borders of certain territorial entities with the purpose of permanent or temporary change of residence[8]. Moreover, this population movement implies the change of place of residence for a more or less significant distance and duration is accompanied by socially significant economic, social, demographic and other consequences (positive and negative, overt or hidden, current or long-term, etc.)[9]. Forced migration is defined by the European Commission as "a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine or development projects)"[10]. In this regard, forced or involuntary migration should be interpreted based on the distinction between conflict-induced and disaster-induced displacement[11].

To study relevant migrant outflows, interpret their volume and prospects, and research their implications, it is essential to identify the variable factors influencing such migration and their relation to the social profile of displaced persons. In this regard, the most suitable approach for researching return migration is the push and pull factors theory developed by S. Stouffer. He argued that the number of individuals who migrate is directly related to pull factors and available opportunities while being inversely related to push factors, which include local legislation, access to information, the attitudes of the local population, and economic conditions.

When considering return, it is taken into account that the International Organization for Migration has defined returnees "as those

[7] Mykhailyshyna, Daria, Samoyliuk, Maksym, and Tomilina, Maria. "Refugees from Ukraine: Who Are They, How Many Are There, and How Can They Be Returned?" Analytical Note. Center for Economic Strategy, August 29, 2023. p. 6. https://ces.org.ua/wp-content/uploads/2023/09/bizhenczi-z-ukraïni.-finalnij-zvit.pdf; Vinokurov, Yaroslav. "If Millions of Ukrainians Leave the Country Definitively, This Will Have a Significant Impact on the Economy." Ukrainska Pravda, September 11, 2023. https://www.pravda.com.ua/eng/articles/2023/09/11/7419258/.

[8] Bezuhlyi, Pavlo. "The Theoretical Foundations of Migration Process Research." Political Life, 2018, no. 1: 5-13. https://doi.org/10.31558/2519-2949.2018.1.1.

[9] Bezuhlyi, Pavlo. "The Theoretical Foundations of Migration Process Research." Political Life, 2018, no. 1: 5-13. https://doi.org/10.31558/2519-2949.2018.1.1.

[10] European Commission. "Forced migration." https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/forced-migration_en.

[11] Migration data portal. "Forced migration or displacement." Last updated on 20 June 2024. https://www.migrationdataportal.org/themes/forced-migration-or-displacement.

who are currently in their place of habitual residence, who indicate they have returned following a minimum of 2 weeks in displacement due to the war (since February 2022)"[12]. At the same time, the methodological significance for the research lies in the substantial role of pendular migration in the contemporary context, as well as the characteristics and controversies surrounding the phenomenon of temporary return.

This makes contemporary Ukrainian migration a compelling subject for academic research. Thus, the aim of this study is to specify the factors influencing return migration, taking into account the transformed motivations for external migration, both forced and voluntary, as well as the social profile of displaced persons. Studying these factors will allow for consideration of the challenges that Ukraine may potentially face during post-war reconstruction, as well as the development of a return policy in light of the current and ongoing migrant outflow, relevant factors of the described trends, including conditions in the states that have accommodated the largest number of refugees.

**Research findings and discussion**

The most significant driver contributing to the mass influx of Ukrainians abroad at the onset of the full-scale invasion was the limited domestic infrastructure in the Central and Western regions of Ukraine to accommodate all refugees. Regarding the factors of relocation abroad, in 2022 the Info Sapiens organization provides the following data: 26% of respondents cited the conduct of hostilities or the bombing of their settlement as the reason for leaving (only 13% said that their settlement was relatively safe); 18% of respondents cited fighting near their settlement; shelling of settlement was mentioned by 25%; shelling of nearby settlements – by 13%; other factors (when settlement was safe) were mentioned by 13%[13]. At the same time, 38% of Ukrainians, believed that leaving Ukraine during the war was unacceptable. 35% of them didn't want to leave family or partner. Difficult adapting to conditions in another country was named by 18%, having physical disabilities or other restrictions – by15%, 9% had to stay to keep a job. Lack of money was an obstacle for 24% of respondents, 22% convicted that it is enough to move within the borders of Ukraine to feel safe[14].

The choice of destination made by people who left Ukraine was influenced by the following factors: the presence of friends, a partner, or acquaintances in the selected country (31%); family members residing there (27%); foreign friends or acquaintances from the host country (14%); availability of benefits for Ukrainians during the war (14%); the presence of a large Ukrainian diaspora (6%); knowledge of the local language or its similarity to Ukrainian (2%); employment opportunities (2%); geographical proximity to Ukraine (2%); relocation of a company that employing the respondents (2%); access to free or low-cost housing (1%); medical assistance (1%); and educational

[12] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[13] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

[14] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

opportunities (1%). Additionally, 2% reported choosing their destination randomly. Despite the fact that the majority of Ukrainians moved to countries where they had existing social connections (friends, acquaintances, or relatives), 14% prioritized available benefits – this share was twice as high among refugees in Germany[15].

Additionally, it's worth noting that the alignment of conditions in host states with the expectations of displaced persons led to certain shifts in their distribution within the European Union. In 2022, Poland accommodated the largest number of refugees. However, in 2024 the figures were as follows: Germany hosted 1,126 million of Ukrainians[16], Poland – 957 000, Czech Republic – 373 000, Spain – 186 000, Italy – 169 000, the Netherlands – 136 000 and Slovakia – 113 000[17]. Outside the European Union, the largest countries in terms of the number of Ukrainians hosted since the beginning of the full-scale invasion are the USA (280 000 people), Great Britain (253 200) and Canada (210 200)[18][19]. It is evident that these trends are largely connected to how effectively migrants' expectations are met, particularly for those aiming to integrate into the host communities.

As sociological research shows, since the beginning of the war, the needs of refugees are largely shaped by household composition and socio-demographic features, as these factors influence their capacities and resources. In other words, both the specific needs and the factors driving migration decisions – such as the choice of a host country – are closely linked to the social status of displaced individuals and their region of origin. Generally, migrants mention access to healthcare and work opportunities in host countries as key factors influencing their intentions[20]. Financial support (50%) and employment assistance (39%) were also the primary needs[21]. At the same time, significant share seek financial aid, while employment challenges were particularly prevalent among refugees from the East and South of Ukraine[22]. The proportion of refugees requiring assistance in the host country was lower among those without children (77%) and among those from Kyiv (76%) and Northern Ukraine (78%)[23].

On the whole, the distribution of refugees by region of origin remains

[15] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

[16] Nowadays Germany hosts the largest number of refugees in Europe: 7 % of all refugees in the world. See the data: International Organization for Migration (IOM). "World Migration Report 2024." https://publications.iom.int/books/world-migration-report-2024.

[17] Bohdan, Tetiana. "The Status of Ukrainian Refugees in the EU Is Only for Three Years. What Next?" Economic Truth, January 12, 2024. https://www.epravda.com.ua/columns/2024/01/12/708597/.

[18] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Ukrainian Refugees: The Future Abroad and Plans for Return. Third Wave of Research. Center for Economic Strategy, March 28, 2024. https://ces.org.ua/ukrainian_refugees_third_wave_research/.

[19] Bohdan, Tetiana. "The Status of Ukrainian Refugees in the EU Is Only for Three Years. What Next?" Economic Truth, January 12, 2024. https://www.epravda.com.ua/columns/2024/01/12/708597/.

[20] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[21] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

[22] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

[23] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

relatively stable over time: there are no signs that the proportion of those fleeing from any particular region of Ukraine is increasing[24]. According to the 2024 data, the majority of relocators are from the Northern and Eastern regions of Ukraine. Within specific administrative divisions, the top regions are Kyiv (18% of respondents), Kharkiv region (13,8%), and Donetsk region (9,5%) [25]. Among those who were affected by the war, 43% still plan to return to Ukraine[26] (last year the vast majority refugees planning to eventually return indicated their return would happen "when the situation allows" when many of their places of origin are still being bombed, contaminated by landmines or in cases where their houses have been destroyed)[27].

The overall trends in intentions to return are as follows. According to the data of the all-Ukrainian nationally representative Omnibus survey, conducted in March 2022, only 12% of Ukrainians who went abroad due to the war at the time of the survey wanted or planned to reside there[28]. In May 2022 57% of respondents reported their intention to return from abroad at the first opportunity, and 19% have not yet decided[29]. As of January 2023, due to the survey of IOM, of all respondents currently in their place of habitual residence, 16% fall within the returnee definition (estimated 5,56 million returnees)[30] (the difficulty in determining whether returns are permanent or temporary lies in the fact that 80% of them indicate they plan to remain in their home (4,4 million), and 85% have been in their homes for a period longer than one month)[31]. In February 2023, 12% of respondents reported plans to return permanently within the next three months. However, the majority viewed the situation in their places of origin in Ukraine as not conducive to ensuring a sustainable return home at that time. Overall, 65% expressed a desire to return to Ukraine one day, 18% remained undecided about returning in the mid- or long-term, and 5% had decided not to return[32]. According to the calculations of the CES, made in 2024, from 1,4 to 2,3 million Ukrainians may remain outside Ukraine under various scenarios[33]. Specifically, data from the Kyiv International Institute of Sociology, collected in April 2024, indicate that half of the Ukrainians

[24] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[25] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[26] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[27] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[28] Info Sapiens. "80% of Refugees Are Satisfied with Living Conditions in Poland and Germany, but Only 62% Are Satisfied with Conditions in Italy." June 1, 2022. https://www.sapiens.com.ua/ua/socpol-research-single-page?id=229.

[29] Gradus Research Company. "Ukrainians Are Returning to Work and Home - A Survey." May 2022. https://www.gradus.app/documents/248/Ukrainians_returning_home_and_getting_back_to_work_llWZE4i.pdf.

[30] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[31] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[32] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[33] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Ukrainian Refugees: The Future Abroad and Plans for Return. Third Wave of Research. Center for Economic Strategy, March 28, 2024. https://ces.org.ua/ukrainian_refugees_third_wave_research/.

residing in Poland, Germany, and the Czech Republic are unlikely to return to Ukraine[34].

To determine the drivers of return, it is essential to take into account the full range of motivations for external migration. While the security factor initially driving forced migration largely determined the social profile of Ukrainian refugees (which has become a distinctive feature of contemporary Ukrainian migration, setting it apart from migration from other countries), over time, voluntary or rational migration has somewhat altered the social profile of Ukrainian refugees as well as their intentions to return. As of December 2024, women aged 35-44 made up 44% of all refugees abroad, which is 6 percentage points less than at the beginning of the year, when their share was 50%. At the same time, the share of adult men among refugees increased to 27%, which is 9 percentage points higher than in January 2024 (18%). At the beginning of 2024, children made up approximately a third of all refugees; by December, their share decreased from 32% to 29%[35]. So, women and children still constitute the majority, but their ratios are experiencing notable changes.

Such a situation is related to what are considered as new waves of migration. After the wave of returns between May and September 2022 of those who left in February-March 2022, and the increase in displacements in the autumn of 2022 due to intensified shelling of Ukraine's energy infrastructure, the next waves of Ukrainian migration were observed in the summer of 2023, autumn of 2023, and spring of 2024. In addition to the fact that these waves were primarily related to the escalation of the security situation, the lack of electricity due to russian shelling, and a corresponding decrease in economic activity, in May 2024, a new mobilization law led to a situation where the number of people leaving Ukraine began to rise, while the number of returns decreased. As demographers mention, the "new wave of Ukrainian migration" contrasts with the spontaneous migration that occurred at the onset of the full-scale war[36]. By 2024, "new migrants" are leaving Ukraine for professional development and improved financial conditions, being so-called new labor migrants, who seek to take advantage of simplified labor migration[37]. In brief, the following clusters are outlined: war or «classical» refugees (middle-aged women with children) – 25%, for whom the return factor is security situation; "labour migrants" – 29%, for whom the return factor is labour conditions; individuals who have well-qualified job or business in Ukraine – 29%[38], and who is most likely to return[39].

When examining the factors influencing return, it is relevant to employ methodological approach for distinguishing between pull and push factors developed by

[34] Hrushetskyi, Anton. Survey of Ukrainian Refugees in Germany, Poland, and the Czech Republic: Life Satisfaction Abroad, Return to Ukraine, Interest in the Situation in Ukraine. Kyiv International Institute of Sociology. https://kiis.com.ua/?lang=ukr&cat=reports&id=1408&page=1#_ftnref1.

[35] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[36] Zanuda, Anastasiia. "Escape from War or Conscious Departure: How Migration from Ukraine Has Changed and What Its Consequences Will Be." BBC Ukraine, October 16, 2024. https://www.bbc.com/ukrainian/articles/c93px84133jo.

[37] Zanuda, Anastasiia. "Escape from War or Conscious Departure: How Migration from Ukraine Has Changed and What Its Consequences Will Be." BBC Ukraine, October 16, 2024. https://www.bbc.com/ukrainian/articles/c93px84133jo.

[38] Lapa, Valentyna, and Bolotov, Vsevolod. "How the Ukrainian Government Works with Ukrainian Refugees." Ukrinform, April 14, 2024. https://www.ukrinform.ua/rubric-society/3851571-ak-ukrainskij-urad-pracue-z-ukrainskimi-bizencami.html.

[39] Lapa, Valentyna, and Bolotov, Vsevolod. "How the Ukrainian Government Works with Ukrainian Refugees." Ukrinform, April 14, 2024. https://www.ukrinform.ua/rubric-society/3851571-ak-ukrainskij-urad-pracue-z-ukrainskimi-bizencami.html.

S. Stouffer. This approach is already being applied to the study of contemporary Ukrainian return migration. I. Solohub presented the results of several regression models that illustrate the correlation between various factors influencing the return of Ukrainian migrants. Model 1 compares returnees residing in Ukraine with migrants remaining abroad. Thus, the author identified: a) demographic factors (such as single/unmarried individuals and those who emigrated with a spouse, etc.), b) pull factors (including a longing for family and home, the desire for children to study in Ukraine, better employment opportunities in Ukraine, availability of real estate in Ukraine, and information from the Ukrainian government, etc.), and c) push factors (e.g., financial difficulties experienced abroad). Model 2 compares migrants staying abroad who plan to return with those who are staying abroad and do not plan to return. The relevant drivers are: a) demographic factors (such as having planned to emigrate before the war, leaving in February-March 2022, holding refugee status, and not having visited Ukraine since February 2022); b) pull factors (including improvements in the security situation, longing for family and home, the desire for children to study in Ukraine, better employment opportunities in Ukraine, and the desire to participate in the post-war reconstruction of Ukraine); and c) push factors (e.g., higher living standards abroad)[40]. These findings can be enhanced and further detailed with the following information.

As shown by IOM, the variations in refugees' intentions to return depend on their demographic profile, region of origin, household composition, the proximity of host countries to Ukraine, and the length of displacement[41]. A similar set of determinants is mentioned by the CES. Such factors are gender, age, marital status, education, country of residence, household composition, habitual region in Ukraine, current employment status and employment before the war, as well as current income level, and income level prior to the war[42].

According to the data of UNHCR those hoping to return, in 2023 a higher proportion of displaced people was found among the following groups: households composed only by one adult with dependents (69%) (compared to those only composed by adults without dependents), households who were living in the South of Ukraine (71%) (compared to those from the West and Kyiv city (61-62%)), households hosted in countries neighbouring Ukraine (75%) (compared to those in other countries in Europe (59%))[43]. In particular, Ukrainians currently residing in Poland are 90% more likely to wish to return than those in Germany[44].

An intention to return is more likely among older persons (they are more inclined to return to Ukraine: for each additional year

[40] Dubrovskyi, Volodymyr, Cherkashin, Vyacheslav, Vakhtova, Anna, and Hetman, Oleg. War Migrants: Global Experience and Ukrainian Particularities. Ukrainian Economic Platform, Kyiv, 2024. https://iset-ua.org/images/Policy-war-migranti-final.pdf.

[41] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

[42] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[43] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[44] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

of age, the likelihood of wanting to return increases by 3%[45]), being undecided about return is more likely among those living alone and those with less proximity to their place of origin, no intention to return is more likely among "certain demographic groups, smaller households, males, young adults and/or with vocational or technical education)[46]. Women are 31% more likely to wish to return to Ukraine than men[47]. And no intention to return is more likely among those with specific displacement patterns (i.e. left during the first months of the war, originating from the North, hosted in countries not sharing a border with Ukraine and/or without spouse or children still there)"[48].

The higher the pre-war income level, the more refugees are inclined to return (those with above-average income are nearly three times more likely to return than those with the lowest income)[49]. And it is logical that Ukrainians who are still working remotely for a Ukrainian company are 67% more likely to return than those who are not working or looking for job[50]. Generally, students and people who are actively looking for jobs are less likely to return; but people with high incomes are more likely[51].

There is somewhat contradictory data from surveys regarding the place of origin as a driver for return. According to CES, people who left cities are 41% less likely to wish to return than those who left villages[52]. IOM provides data indicating that a slight majority of returnees are residents of large cities (56%), or the suburbs of large cities (10%). However, relatively few families had returned to rural areas (7%)[53].

Consequently, in addition to the ongoing security risks in Ukraine and specific conditions in their regions of origin, refugees' intentions are mainly shaped by their access to basic needs and rights in host countries, as well as opportunities in the labor market, education, and integration into local communities. In light of the aforementioned, we are exploring the return factors in two dimensions: security and economic. In this regard, the logic of pull and push factors remains applicable, as it is important to evaluate these drivers by comparing the conditions that asylum seekers face in host countries with those in Ukraine.

[45] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[46] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[47] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[48] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[49] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[50] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[51] Bohdan, Tetiana. "The Status of Ukrainian Refugees in the EU Is Only for Three Years. What Next?" Economic Truth, January 12, 2024. https://www.epravda.com.ua/columns/2024/01/12/708597/.

[52] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[53] International Organization for Migration (IOM), Ukraine. "Ukraine Returns Report – (16-23 January 2023)." https://dtm.iom.int/reports/ukraine-returns-report-16-23-january-2023.

The security dimension is unambiguous. For 33%, the possibility of obtaining or arranging housing in safe regions of Ukraine is key. 27% are ready to return if Ukraine's air defense is strengthened[54]. Apart from the security factor, according to the survey conducted by *Info Sapiens*, respondents identified the following return factors: decent paid job in Ukraine – 28,3%, higher standard of living in Ukraine – 20,7%, restoration of infrastructure in home region – 17,7, end of the temporary asylum – 17,4%[55]. However, security considerations, of course, remain the top priority. The following factors might encourage migrants to return mostly, i. e. end of the war – 51,2% respondents, absence of hostilities or air strikes in the territory of residence – 34,1%[56].

According to the data from the CES, while 47% cited security uncertainty in Ukraine as the reason for staying abroad, almost a third reported a lack of employment and means of subsistence in Ukraine[57]. Every fifth person mentioned insufficient access to basic services (healthcare, water, electricity, infrastructure), and 15% pointed to the lack of access to quality education for children[58].

Therefore, in 2024 as a reason for returning to Ukraine, Ukrainians mentioned the normal functioning of critical infrastructure (34%) and security (34%)[59]. In May 2024, 26% stated the resolving of housing issue, as well as the end of a full-scale war by 26%. Slightly fewer respondents mentioned employment prospects (16%) and the arrangements for children to participate in school/kindergarten (13%)[60]. For 36% of surveyed Ukrainian migrants, the availability of financial assistance in Ukraine at the time of return is important[61].

This logic is also supported by the UN, which outlines such factors of return as security in the place of habitual residence, access to information about it; access to housing and basic services such as energy supply, healthcare, and education; opportunities to find a job. To specify, it should be noted that the most common reasons for the refugees' intention not to return are linked to the situation in their place of origin and their living conditions in the host countries. It is clear that the main reason is security concerns or temporary military occupation (almost 50% of respondents cited this reason). At the same time, among the main factors related to conditions in the place of origin, the respondents indicated lack of work (31%), lack of basic services (16%) or adequate housing (12%). Meanwhile, the

[54] Gradus Research Company. "Migration Intentions of Ukrainians in Ukraine and Abroad." July 2024. https://gradus.app/uk/open-reports/migration-intentions-ukrainians-ukraine-and-abroad/.

[55] Dubrovskyi, Volodymyr, Cherkashin, Vyacheslav, Vakhtova, Anna, and Hetman, Oleg. War Migrants: Global Experience and Ukrainian Particularities. Ukrainian Economic Platform, Kyiv, 2024. https://iset-ua.org/images/Policy-war-migranti-final.pdf.

[56] Dubrovskyi, Volodymyr, Cherkashin, Vyacheslav, Vakhtova, Anna, and Hetman, Oleg. War Migrants: Global Experience and Ukrainian Particularities. Ukrainian Economic Platform, Kyiv, 2024. https://iset-ua.org/images/Policy-war-migranti-final.pdf.

[57] Zanuda, Anastasiia. "Escape from War or Conscious Departure: How Migration from Ukraine Has Changed and What Its Consequences Will Be." BBC Ukraine, October 16, 2024. https://www.bbc.com/ukrainian/articles/c93px84133jo.

[58] Zanuda, Anastasiia. "Escape from War or Conscious Departure: How Migration from Ukraine Has Changed and What Its Consequences Will Be." BBC Ukraine, October 16, 2024. https://www.bbc.com/ukrainian/articles/c93px84133jo.

[59] Hrushetskyi, Anton. Survey of Ukrainian Refugees in Germany, Poland, and the Czech Republic: Life Satisfaction Abroad, Return to Ukraine, Interest in the Situation in Ukraine. Kyiv International Institute of Sociology. https://kiis.com.ua/?lang=ukr&cat=reports&id=1408&page=1#_ftnref1.

[60] "Half of Ukrainian Refugees Are Ready to Return Home from Europe." Ukrinform, May 23, 2024. https://www.ukrinform.ua/rubric-society/3863614-polovina-ukrainskih-bizenciv-gotovi-povernutisa-z-evropi-dodomu.html.

[61] Gradus Research Company. "Migration Intentions of Ukrainians in Ukraine and Abroad." July 2024. https://gradus.app/uk/open-reports/migration-intentions-ukrainians-ukraine-and-abroad/.

reasons related to the conditions of their stay in the host country are finding or having a stable job (19%), attending school (13%) and feeling integrated into the host community (11%)[62].

Consequently, consolidating the information about the factors affecting residing in host countries, we emphasize that the choice for long-term stay often depends on covering material needs and possibilities of social integration into local community. In general, covering the needs of asylum seekers means access to a safe environment, rights and services; accessing social protection; access to healthcare; work opportunities; access to renting accommodation. Notably, in April 2024, 28% of Ukrainian refugees were completely satisfied with the conditions, 38% were rather satisfied[63]. Overall, the concerns regarding host countries include the requirement to know the local language (28%), limited career opportunities (25%), the inability to overcome cultural differences (21%), and a reduction in financial assistance (20%)[64]. Despite the fact that 53% of adult migrants found a job abroad, a lot of refugees from Ukraine, who are currently working, have low-skilled jobs and almost 30% say that their job abroad is less qualified than their job was in Ukraine[65]. Additionally, we should not underestimate the role of public perception of migrants in host communities. Approximately 80% of refugees have a positive view of the attitudes of locals. The best attitudes are found in countries with higher levels of ethnic and cultural diversity, such as Canada, the USA, and the United Kingdom. The highest levels of hostility in Germany, Poland, Czech Republic[66].

At the same time, it should not be forgotten that the conditions for asylum seekers from Ukraine are influenced by how interested the countries are in the influx of labor force and the increase in consumer demand. This, consequently, also determines the creation of job opportunities and access to education for Ukrainian migrants.

In other words, it is essential to recognize the impact of ongoing forced migration on the economies of European states. Along with the integration of migrants into the labor markets of various countries, it has generated a positive effect despite the increased financial burden on state budgets for their support. This phenomenon has contributed to the revival of national economies driven by increased consumer demand, job creation, and tax revenues from the activities of relocated individuals. This can be viewed as a highly beneficial factor for the integration of migrants into local communities. Economists emphasize that "if Ukrainians remain abroad, then European countries will receive a direct economic benefit; however, if they return, there will be an indirect benefit for the EU"[67]. It's worth to take into account

[62] UN Refugee Agency Regional Bureau for Europe. "Lives on Hold: Intentions and Perspectives of Refugees from Ukraine." February 2023. https://data.unhcr.org/en/situations/ukraine.

[63] Hrushetskyi, Anton. Survey of Ukrainian Refugees in Germany, Poland, and the Czech Republic: Life Satisfaction Abroad, Return to Ukraine, Interest in the Situation in Ukraine. Kyiv International Institute of Sociology. https://kiis.com.ua/?lang=ukr&cat=reports&id=1408&page=1#_ftnref1.

[64] Gradus Research Company. "Migration Intentions of Ukrainians in Ukraine and Abroad." July 2024. https://gradus.app/uk/open-reports/migration-intentions-ukrainians-ukraine-and-abroad/.

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[66] Vyshlinskyi, Hlib, Mykhailyshyna, Daria, Samoyliuk, Maksym, Levchenko, Yeleazar, Myronenko, Olesandra, and Tomilina, Maria. Research Ukrainian Refugees after Three Years Abroad. Fourth Wave of Research. Center for Economic Strategy, March 3, 2025. https://ces.org.ua/refugees_fourth_wave/.

[67] Vinokurov Y. If millions of Ukrainians leave the country definitively, this will have a significant impact on the economy. How can Ukraine avoid the worst possible scenario? Ukrainska Pravda. 11 September 2023. URL: https://www.pravda.com.ua/eng/articles/2023/09/11/7419258/.

that the largest group of Ukrainians in the EU are women aged 35-49. About 70% of them have higher education and lived in cities before the full-scale war[68]. Consequently, some countries provide improved access to the labor market and offer professional-level language courses, simplify recognizing skills and qualifications, and create opportunities for professional advancement as well as provide school education. They also provide information and access to social services. Additionally, factors such as fostering favorable conditions for business growth, along with grants and project financing, are also beneficial for relocation.

For its part, the Ukrainian economy needs to mitigate the consequences of labor force outflow. First of all, we have to mention the decline in production and consumption and its effect on GDP. Business downsizing due to migration processes have had a significant impact on Ukraine's economic growth. In 2022, it fell by a record 30,4%, household spending decreased (that means a significantly larger amount of money needs to be redistributed through the state)[69]. At the same time, economic losses are partially offset by remittances from migrants. These funds, which flow into Ukraine, are often used to cover living expenses, invest in education and healthcare, and support local businesses. Besides that, many refugees abroad spend money using the Ukrainian banking system[70]. It is also important to consider certain opportunities, such as the development of businesses related to servicing migrants.

Both internal and external migration has also affected the structure of the labor market in Ukraine. On the one hand, the outflow of highly qualified employees may lead to a shortage of professionals in certain sectors (such as healthcare, IT, and education). On the other hand, the decrease in the labor force may prompt increases in wages and improvements in working conditions for the remaining employees. Further risks are related to the outflow of highly qualified labor as well as the lack of workers. Among the significant consequences, it is worth noting the impact on the demographic structure of the population, as the majority of refugees are women and children. Additionally, attention has to be drawn to the emigration of youth, particularly in search of educational opportunities. In view of the aforementioned points, it is logical to highlight that migration has also exacerbated regional disparities.

Regarding the consequences of migration outflow and the motivations of potential returnees, it's worth examining the opportunities for stimulating the return. Due to IOM methodology, a return is considered "sustainable" if further migration is a matter of free decision – that is, the living conditions of migrants meet at least basic standards in terms of security, material conditions, healthcare, etc.[71] Such conditions can be ensured through joint efforts by Ukrainian government, governments of those host

[68] Bohdan, Tetiana. "The Status of Ukrainian Refugees in the EU Is Only for Three Years. What Next?" Economic Truth, January 12, 2024. https://www.epravda.com.ua/columns/2024/01/12/708597/.

[69] Vinokurov, Yaroslav. "If Millions of Ukrainians Leave the Country Definitively, This Will Have a Significant Impact on the Economy." Ukrainska Pravda, September 11, 2023. https://www.pravda.com.ua/eng/articles/2023/09/11/7419258/.

[70] The scale of such expenses exceeded USD 1,5 billion per month and USD 5 billion per quarter in 2022. See: Vinokurov, Yaroslav. "If Millions of Ukrainians Leave the Country Definitively, This Will Have a Significant Impact on the Economy." Ukrainska Pravda, September 11, 2023. https://www.pravda.com.ua/eng/articles/2023/09/11/7419258/.

[71] Dubrovskyi, Volodymyr, Cherkashin, Vyacheslav, Vakhtova, Anna, and Hetman, Oleg. War Migrants: Global Experience and Ukrainian Particularities. Ukrainian Economic Platform, Kyiv, 2024. https://iset-ua.org/images/Policy-war-migranti-final.pdf.

countries which intend to reduce social costs, public sector, as well as international organizations. Certainly, the priority should be to provide housing for those Ukrainians who have been affected by military attacks. Considering that among those who are employed (45%)[72], the majority have found lower-skilled jobs, such individuals are more likely to consider returning to Ukraine as a way to regain their status. Therefore, government programs for job search assistance and/or retraining (especially since there is now a shortage of labor in Ukraine in certain specialties) could serve as an incentive for return. Considering the demographic composition of migrants and the active integration of children into the school education systems of host countries, it is important to create conditions for the integration of school-age children and youth into the Ukrainian educational environment.

Concerning existing initiatives, the following can be noted. Since there are four factors that influence the decision to return – security, employment and the possibility of entrepreneurship, housing issues, and the quality of education – two of these issues can be addressed by the grant program "*eRobota*", which helps Ukrainians start or develop their own businesses, get professional education, which can be obtained from the State Employment Service, and the "*eOselya*" program, which allows individuals to obtain a subsidized loan.

In this regard, various online services provide information on available support for returning to Ukraine, both from the state and from non-governmental organizations. So, in relation to technical perspective, it is worth noting "Ukrainian Refugee Response Learning Platform" which brings together representatives from nine Caritas organizations in Eastern European countries – Bulgaria, Czech Republic, Hungary, Moldova, Poland, Romania, Slovakia, and Ukraine. Its main goal is to strengthen the capacity of local, regional, and national organizations to respond to the needs of displaced persons from Ukraine, as well as to promote their voluntary return. Another initiative is "The Return Home Platform" which was created to support citizens who wish to return to Ukraine as well.

At the same time, based on the available information, we can assume that the main challenges of return migration are related to housing issues, including difficulties in finding accommodation due to the destruction of infrastructure or increased demand. Additionally, economic uncertainty resulting from the destruction of infrastructure and businesses will play a crucial role by limiting job opportunities. This challenge could be compounded by a mismatch between the skills acquired abroad and the requirements of the labor market in Ukraine. Legal and bureaucratic barriers can also pose significant challenges. Furthermore, there may be a lack of support services, with an insufficient number of programs and resources available to help returnees adapt. Reintegration issues refer to difficulties in adapting to the social environment, including the restoration of social ties, and there is also the potential for social stigmatization of returnees.

To summarize, it should be noted that challenges faced by returnees, which the state should primarily address, are related to security risks, economic uncertainty and reintegration issues. To avoid feelings of isolation and frustration stemming from

[72] Lapa, Valentyna, and Bolotov, Vsevolod. "How the Ukrainian Government Works with Ukrainian Refugees." Ukrinform, April 14, 2024. https://www.ukrinform.ua/rubric-society/3851571-ak-ukrainskij-urad-pracue-z-ukrainskimi-bizencami.html.

difficulties in accessing social services, healthcare, and educational opportunities, it is crucial to provide returnees with mental health support and counseling services, along with necessary resources, to facilitate the reintegration process.

**Conclusions**

The hostilities in Ukraine and the inability of domestic infrastructure to accommodate all refugees were the key drivers of the unprecedented external migration in early 2022. At the same time, the factors influencing displacement have evolved during the war, thereby shaping the variability of return dynamics.

While security was the primary driver of displacement abroad, other factors have gradually gained significance. As migration studies and opinion polls indicate, in addition to the safety situation in Ukraine, the intention of displaced persons to stay or leave their place of temporary residence is influenced by their demographic profiles, financial status, as well the attitude of host communities, access to the labor market, educational opportunities. Concerns regarding the conditions in host countries include language proficiency requirements, limited career opportunities, significant cultural differences, and reductions in financial assistance. Relevant circumstances faced by asylum seekers shape the prospects for social integration – whether temporary or long-term – for both those who intend to return to Ukraine after the security situation stabilizes and those seeking to settle permanently in their current place of residence. On the other hand, it is important to consider that the challenges faced by returnees involve security risks, economic uncertainty, and reintegration issues.

Since the socio-economic consequences of external migration are quite ambiguous, encouraging migrants to return to Ukraine will undoubtedly be one of the government's priorities, requiring the involvement of international organizations as well as the public sector. Accordingly, a comprehensive set of measures should be developed, focusing on the needs of potential returnees, their social status, and demographic composition. In this regard, it is crucial to be aware that the main factors influencing the intention to return are largely shaped by the security situation, the implementation of reintegration programs for returnees, and the improvement of housing, employment, and educational opportunities.

Creating favorable conditions for the return that will contribute to the post-war reconstruction of Ukraine requires joint efforts by the Ukrainian government, public sector, and also international organizations. In particular, establishing partnerships with international and non-governmental organizations should also occur to secure resources and support return programs. The efforts of local communities and volunteer organizations will also be valuable. Establishing effective cooperation with EU countries is also essential to creating favorable conditions for returnees. This cooperation could include providing legal assistance abroad, supporting the post-war reconstruction of affected regions, opening access to the European labor market, and facilitating the reintegration of children and youth into the Ukrainian educational system.

Generally, it's essential to ensure a safe return and to develop a comprehensive return strategy with regard to the needs of returnees, providing housing, medical services, legal assistance, and psychological support. A

strong factor in encouraging sustained return may also be the implementation of financial programs, such as providing one-time payments upon return and access to loans for business recovery. Programs that offer vocational training and education for returnees will also be in demand to facilitate their employment and social adaptation. In this regard, an effective information and communication campaign will play a crucial role in informing potential returnees about the conditions being established and the resources available.

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## СУЧАСНІ ТЕНДЕНЦІЇ ТА ПЕРСПЕКТИВИ УКРАЇНСЬКОЇ ЗВОРОТНОЇ МІГРАЦІЇ

***Анотація***

*У статті проаналізовано сучасні тенденції української зовнішньої міграції та чинники зворотної міграції, з акцентом на необхідності розробки політик повернення, спрямованих на зміцнення економічного розвитку та соціальної стабільності держави. У дослідженні виокремлено детермінанти реміграції з урахуванням як спричинених війною, так і раціональних (економічних) факторів мобільності, а також соціально-демографічного профайлу переміщених осіб. Особливу увагу приділено зіставленню умов, які сприяють поверненню або стимулюють триваліше перебування у державах, що надали притулок. Аналітична рамка вибудувана навколо двох основних вимірів: безпекового та соціально-економічного, що дає змогу оцінити спектр можливостей, доступних в Україні та приймаючих країнах. З огляду на численні виклики, пов'язані з реміграцією (пошкодження інфраструктури, економічну невизначеність, бар'єри на ринку праці, правові та бюрократичні обмеження, а також соціально-психологічні труднощі реінтеграції), авторка наголошує на необхідності комплексної стратегії повернення. Зокрема, доцільним є впровадження українським урядом – у співпраці з міжнародними організаціями та громадянським суспільством – політик, що забезпечують безпеку, доступ до житла, медичну допомогу, правову та психологічну підтримку, а також передбачають реалізацію фінансових програм та освітніх можливостей для осіб, які повертаються. У цьому контексті підкреслено вагому роль інформаційних та комунікаційних кампаній щодо доступних можливостей, спрямованих на забезпечення сталого повернення та реінтеграції.*

***Ключові слова:*** *сучасна українська міграція, зворотна міграція, безпекові ризики, соціальна інтеграція, повоєнна відбудова, Європейський Союз*

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# GENOCIDE TRIALS IN THE INTERNATIONAL CRIMINAL COURT: CHALLENGES OF FACT-FINDING, THE UKRAINIAN CASE AND ECHR STANDARDS

***Abstract***

*The prosecution of genocide in the International Criminal Court (ICC) presents significant challenges in fact-finding, evidence collection, and legal interpretation. This article examines the complexities of proving genocidal intent, the admissibility of evidence, and the role of international cooperation in ensuring accountability. A particular focus is placed on the Ukrainian case, analyzing the legal and procedural hurdles in establishing genocide under the Rome Statute. Furthermore, the study explores the European Court of Human Rights (ECHR) standards relevant to genocide trials, emphasizing the intersection between human rights law and international criminal justice. By comparing ICC and ECHR approaches, this research highlights the necessity for robust investigative mechanisms, witness protection, and compliance with due process standards. The findings underscore the importance of strengthening international legal frameworks to enhance the effectiveness of genocide prosecutions.*

***Key Words:*** *Criminal proceedings, due process, evidence admissibility, fact-finding, investigation of international crimes, international cooperation, prosecutor, victims' rights, witness protection.*

## Introduction

*The relevance of the research topic*. Genocide is one of the most severe crimes that threatens fundamental human rights, endangering the existence of entire ethnic, national, racial, or religious groups. Its prevention, investigation, and judicial prosecution are key tasks for international criminal justice. In the contemporary world, particularly in the context of the ongoing armed aggression of the Russian Federation against Ukraine (2014–2025), the issue of genocide becomes particularly urgent, as such crimes have vast humanitarian, political, and legal consequences.

The importance of the study is determined by the need to analyze the challenges related to the establishment of genocide facts in the International Criminal Court (ICC). The practice of the ICC demonstrates the difficulty of proving the intent to destroy, determining the group that has suffered persecution, as well as gathering and assessing evidence that meets the high standards of international justice. At the same time, the European Court of Human Rights (ECHR) has established specific approaches to cases involving massive violations of human rights, which must be considered in the context of investigating crimes in Ukraine. The Ukrainian case is a unique example in the international legal field. The systematic actions of Russia aimed at destroying Ukrainian identity, such as mass killings, deportations, child abductions, and other forms of human rights violations, require qualification as genocide. In this context, studying the ICC's experience and applying the standards developed by the ECHR is extremely relevant for ensuring justice, strengthening the rule of law, and holding perpetrators accountable. Thus, the chosen topic is significant both for the development of international criminal law and for Ukraine's human rights practice in the face of current challenges. It will contribute to the formation of effective approaches to documenting crimes, proving them, and ensuring the rights of the victims.

Although both the International Criminal Court (ICC) and the European Court of Human Rights (ECtHR) address serious violations of international law, their mandates and standards of proof differ substantially. The ICC focuses on the individual criminal responsibility of persons accused of core international crimes, requiring proof "beyond reasonable doubt" for conviction. In contrast, the ECtHR deals with the international responsibility of States for violations of the European Convention on Human Rights, where the evidentiary threshold is lower and primarily oriented toward establishing a pattern or systemic nature of violations rather than attributing individual guilt. This procedural distinction significantly affects the admissibility and use of evidence between the two fora.

Given the procedural and substantive differences between forums addressing individual criminal responsibility (such as the ICC) and those adjudicating State responsibility (such as the ECtHR or the International Court of Justice), an analytical focus on one type of responsibility at a time can yield greater conceptual clarity. For the purposes of this article, centring the analysis on the crime of genocide in Ukraine within the framework of individual criminal responsibility before the ICC allows for a more precise examination of evidentiary requirements, jurisdictional challenges, and procedural strategies. Comparative references to State responsibility cases, such as Ukraine v. Russia before the ECtHR and the ICJ, can be maintained but clearly delineated as a separate line of analysis.

The aim of the study is to define the international legal mechanisms for handling genocide cases, analyze their effectiveness, and explore the application of these mechanisms in the face of modern challenges, particularly through the lens of the Ukrainian case, as well as studying the standards developed by the European Court of Human Rights (ECHR) for their implementation into international justice practice.

To achieve this aim, the following tasks have been set:

1. To analyze the legal nature of genocide as an international crime, its definition in international law, and the specifics of proving it in the International Criminal Court (ICC).
2. To study the procedures for handling genocide cases in the ICC and assess their effectiveness in terms of ensuring justice and the rights of victims.
3. To examine the Ukrainian case in the context of the Russian Federation's armed aggression and evaluate the presence of signs of genocide according to international standards.
4. To determine the role and significance of ECHR standards in cases related to massive human rights violations and evaluate the potential for their adaptation to genocide cases.
5. To develop recommendations for improving international legal mechanisms for handling genocide cases, including within the Ukrainian context, taking into account the challenges associated with documenting and proving crimes.

The research is based on the use of a comprehensive interdisciplinary approach that combines legal analysis, comparative law, and empirical methods (Basysta, Drozdov, Drozdova, Kovtun, & Shulhin, 2025)[1]. Analysis of international legal instruments (The primary focus is on analyzing the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[2], the Rome Statute of the International Criminal Court (1998)[3], as well as decisions and conclusions of the UN International Law Commission[4].) Study of ICC practice (Particular attention is given to analyzing precedents in genocide cases before the International Criminal Court[5].) Analysis of ECtHR practice and the Ukrainian case (The research examines decisions of the European Court of Human Rights[6] related to mass human rights violations, including deportations, abductions, and the destruction of cultural heritage. An assessment is conducted of facts and events related to Russian aggression against Ukraine (2014–2025), taking into account publications by international organizations, human rights institutions, as well as data collected by Ukrainian law enforcement agencies and independent researchers.) The application of these methods will allow for an objective assessment of international legal mechanisms for handling genocide cases, particularly in the Ukrainian context, and the development of recommendations for their improvement.

The academic literature on the adjudication of genocide cases at the ICC relies heavily on the precedents of the International Tribunals for Rwanda and the former Yugoslavia, in particular the cases of Prosecutor v. Akayesu (ICTR,

[1] Basysta, I., Drozdov, O., Drozdova, O., Kovtun, V., & Shulhin, S. (2025). Social and legal consequences of Ukraine's ratification of the Rome Statute of the International Criminal Court. Social and Legal Studies, 8(2), 262–275. https://doi.org/10.32518/sals2.2025.262.

[2] Convention on the Prevention and Punishment of the Crime of Genocide (1948). URL: https://treaties.un.org/Doc/Publication/Unts/Volume%2078/Volume-78-I-1021-English.Pdf

[3] Rome Statute of the International Criminal Court (1998) URL: https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf

[4] Reports and conclusions of the UN International Law Commission. URL: https://legal.un.org/ilc/

[5] International Criminal Court. URL: https://www.icc-cpi.int/

[6] European Court of Human Rights. URL: https://www.echr.coe.int/

1998) and Prosecutor v. Karadžić (ICTY, 2016), which have shaped the standards of proof of special intent (dolus specialis) and the criteria of mass of the crime (Schabas, Akhavan). Scholars (Ambos, Kreß) highlight the challenges of upholding the "beyond reasonable doubt" standard at the ICC, especially in the face of state non-cooperation and political pressure. In the context of Ukraine, available publications by human rights defenders (Matviychuk, Regional Center for Human Rights) and reports of international missions record deportations of children, mass executions and enforced disappearances, which could potentially qualify as genocide under the 1948 UN Convention, but most of them focus on war crimes and crimes against humanity, bypassing the procedural aspects of proving genocide in the ICC. In parallel, studies on ECHR law (Harris, O'Boyle, Warbrick) and the case law in the cases of Janowiec v. Russia (2013), Catan v. Moldova and Russia (2012) enshrine high standards for assessing evidence ("sufficiently convincing, clear and consistent") and positive obligations of states to effectively investigate mass crimes, but their systematic comparison with the ICC procedures is almost absent, which creates a research gap, especially in the context of the war against Ukraine.

The research novelty lies in the comprehensive combination of the analysis of the problems of establishing facts in the process of considering genocide cases at the International Criminal Court, taking into account the unique context of the Ukrainian case and the standards developed by the European Court of Human Rights. The work for the first time offers a comparative approach that simultaneously takes into account the specifics of proving the crime of genocide at the international level, the challenges associated with documenting war crimes in modern armed conflicts, as well as the practice of the ECHR in assessing evidence and protecting the rights of the parties. This approach allows us to identify gaps and contradictions between the ICC procedure and the legal standards of the ECHR, which opens up the opportunity to develop recommendations for improving the mechanisms for collecting and verifying evidence in genocide cases, in particular in the context of the war against Ukraine.

The structure of the work is constructed in such a way as to ensure logical consistency in presentation and comprehensive coverage of the researched issues. The second section provides a theoretical and legal analysis of genocide as an object of trial in international criminal law, taking into account the evolution of its legal definition, elements of the crime, and key international precedents. The third section is devoted to the Ukrainian case and contains a detailed analysis of the actions of the Russian Federation in the context of the elements of the crime of genocide in accordance with the provisions of the 1948 UN Convention and the practice of international courts. The fourth section examines the standards of establishing facts in genocide cases in the ICC and the ECHR, with an emphasis on differences in proving and assessing evidence. The fifth section highlights the key challenges of ensuring justice in genocide cases, including political, procedural, and evidentiary barriers. The sixth section examines the prospects for international justice in the context of the Ukrainian case, in particular, possible scenarios of bringing to justice and the impact on the development of international criminal law. The final seventh section contains generalized conclusions and recommendations aimed at improving the mechanisms for investigating and prosecuting the crime of genocide.

## Genocide as an object of trial in international criminal law

The Convention on the Prevention and Punishment of the Crime of Genocide[7] (hereinafter referred to as the Genocide Convention), adopted by the United Nations General Assembly on December 9, 1948, is the first international human rights treaty that established genocide as an international crime and imposed an obligation on states to prevent and prosecute it.

Article II provides the legal definition of genocide, stating that the crime includes "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such":

1. Killing members of the group.
2. Causing serious bodily or mental harm to members of the group.
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
4. Imposing measures intended to prevent births within the group.
5. Forcibly transferring children of the group to another group.

An important addition to this definition is Article III, which establishes liability for the following acts: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

The Convention establishes that responsibility for committing genocide extends both to individuals and to states that fail to fulfill their obligations to prevent the crime. In the context of modern challenges and Russia's aggression against Ukraine, these provisions of the Convention require additional research to assess their effectiveness and adaptation to new conditions, including the Ukrainian case.

The Convention on the Prevention and Punishment of the Crime of Genocide is a foundational document in international law that establishes states' obligations in the prevention, suppression, and punishment of genocide. Its provisions have several key characteristics:

1. Obligations under the Convention have an erga omnes character, meaning they are binding on all states regardless of their participation in the Convention.
2. The Convention's participants have erga omnes partes obligations, meaning that each state party has a duty to ensure the enforcement of the Convention's provisions concerning all other state parties.
3. The principles underlying the Convention belong to peremptory norms of international law (jus cogens).

The International Court of Justice[8] (ICJ) is the principal body authorized to resolve disputes between States Parties concerning the interpretation, application or implementation of the provisions of the Genocide Convention. It is important to note that: The erga omnes partes obligations allow a state party to bring a case before the ICJ against another state party without the need to prove direct harm caused by a violation of the Convention.

All States Parties to the Convention share a common interest in preventing, suppressing, and punishing genocide. ICJ case law confirms that, in cases of failure to prevent or punish, States Parties may seek remedies through the international judicial system. While obligations under the Convention are

[7] Convention on the Prevention and Punishment of the Crime of Genocide (1948). URL: https://treaties.un.org/Doc/Publication/Unts/Volume%2078/Volume-78-I-1021-English.Pdf

[8] International Criminal Court. URL: https://www.icc-cpi.int/

peremptory norms with an erga omnes character, their enforcement still requires state consent to ICJ jurisdiction.

In international criminal law, genocide is one of the most serious crimes, and its consideration in court is essential to ensure justice and prevent similar crimes in the future.

Examples of court decisions on genocide: The case of Ukraine v. Russian Federation[9]: In February 2024, the International Court of Justice ruled on jurisdiction in a case brought by Ukraine against Russia regarding allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. The Court decided that it had jurisdiction to consider whether Russia had distorted the concept of genocide, but would not determine whether Russia had actually committed genocide against Ukraine. The case of the Republic of South Africa v. Israel[10]: South Africa filed a lawsuit against Israel for violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The International Court of Justice is expected to announce a decision on preliminary (provisional) measures in this case. The case of Myanmar v. Bangladesh[11]: Myanmar filed a lawsuit against Bangladesh for violation of the Convention on the Prevention and Punishment of the Crime of Genocide.

ICC judgments on genocide shape international law by setting precedents for interpreting and applying the Genocide Convention and clarifying jurisdictional limits. In Ukraine v. Russian Federation, the Court affirmed jurisdiction over allegations of distortion of the genocide concept but declined to rule on its actual commission.

The modern international criminal law system provides that individuals can be prosecuted for genocide crimes by international courts or national courts if they are subject to the jurisdiction of states that have relevant laws. The most important example is the International Criminal Court, which has the right to try cases of genocide committed on the territory of states parties to the Rome Statute.

One of the most debated cases in modern international law is the events related to the aggression of the Russian Federation against Ukraine. This war has resulted in significant civilian casualties, massive human rights violations, and large-scale displacement of people. An important part of this situation is the Russian Federation's denial of the existence of the Ukrainian nation and its disregard for its historical and cultural heritage. This not only calls into question the very identity of Ukraine, but also actually creates the conditions for genocide against the Ukrainian people. The violence that accompanies Russia's aggressive policy includes mass murder, torture, rape, kidnapping, the destruction of entire cities such as Kharkiv, Mariupol, and Chernihiv, as well as mass atrocities in Bucha and Irpin[12].

According to the Convention on the Prevention and Punishment of the Crime of Genocide (1948), genocidal intent - the intent to destroy in whole or in part a particular national, ethnic, racial or religious group - must be proven in order to qualify as genocide. One of the key

*9* Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) URL: https://icj-cij.org/case/182?utm_source=chatgpt.com

*10* South Africa Accuses Israel of Genocide in U.N. Court. URL: https://www.wsj.com/world/south-africa-accuses-israel-of-genocide-in-u-n-court-3af69eb7?mod=latest_headlines

*11* Myanmar v. Bangladesh. URL: https://www.cna.org/archive/CNA_Files/pdf/cpp-2013-u-004603-final.pdf

*12* V. Zaplatynskyi, The Ukrainian-Russian War - Causes, Prospects and Lessons, Kultura Bezpieczeństwa 2022, no. 41 (numer specjalny), s. 33-42, DOI 10.5604/01.3001.0015.8487

pieces of evidence is the mass murder of Ukrainian citizens.

According to the International Criminal Court (ICC), the UN and independent human rights organizations, the destruction of civilians was systematic. The Bucha massacre (March-April 2022) - according to the UN, more than 450 civilians were killed, many of whom showed signs of torture and execution. The Mariupol tragedy – shelling of civilian infrastructure, including the Drama Theater, where at least 600 people hiding from the bombing were killed[13].

This violates Article 2(e) of the Genocide Convention, which prohibits the forcible transfer of children from one ethnic group to another. Decision of the International Criminal Court (March 2023): The ICC issued an arrest warrant for Vladimir Putin and Maria Lvova-Belova (Russian Commissioner for Children's Affairs[14]) for the illegal deportation of Ukrainian children. Accordingly, understanding the depth of the existing challenges and threats to children and their lives, that is, realizing the wide range of issues that have not been properly resolved, the Council of Europe has had its Special Envoy on the Situation of Children in Ukraine since February 2025[15].

A key aspect of proving genocidal intent is public statements by Russian officials and state media. An article in RIA Novosti (April 2022) called for the "denazification" of Ukraine, which includes the physical destruction of the "guilty part of the population.[16]"

Speeches by Russian politicians: Dmitry Medvedev, Vyacheslav Volodin, and others have repeatedly denied the right of Ukrainians to exist as a separate nation. In February 2022, Ukraine filed a lawsuit against Russia with the International Court of Justice, claiming that Russia had abused the concept of genocide to justify its aggression. In March 2022, the court issued an interim ruling ordering Russia to cease hostilities, but Russia ignored it[17]. Some countries (including Germany, Lithuania, and Poland) have opened criminal cases against Russia based on the principle of universal jurisdiction, which allows for the prosecution of war crimes regardless of where they were committed.

Political recognition of the genocide committed by Russia against Ukrainians has already been granted by a number of international institutions, including the Verkhovna Rada of Ukraine and the parliamentary bodies of a number of European and North American countries. Former Ukrainian Foreign Minister Dmytro Kuleba recently noted in his video address at the International Law Against Genocide conference that Ukraine is actively working to bring Russian criminals to justice for committing genocide[18].

One of the main challenges in genocide proceedings is the difficulty of

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*13* Submission to the Office of the Prosecutor of the International Criminal Court on the crime of genocide allegedly committed in Mariupol between February 24 and May 20 2022 / NGO "Kharkiv Human Rights Protection Group." – Kharkiv: Human Rights Publishing House LLC, 2023. 100 p.

*14* Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova. URL: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

*15* Ivanna Kostina The Council of Europe has appointed a special envoy of the Secretary General of the Council of Europe on the situation of children in Ukraine. 02/05/2025.https://www.eurointegration.com.ua/news/2025/02/5/7204250/

*16* Article by propagandist Timofey Sergeev "What Russia should do with Ukraine". URL: https://holodomormuseum.org.ua/propaganda/stattia-propahandysta-tymofiia-serhejtseva-shcho-rosiia-maie-zrobyty-z-ukrainoiu/

*17* UN Court rejects Russia's objections and takes up Putin's "genocide in Donbas" case. URL: https://www.bbc.com/ukrainian/articles/cgrlv2l3yq0o

*18* Dmytro Kuleba at the UN Security Council: By joint and decisive actions we can put the aggressor in his place and restore international peace and security. URL: https://mfa.gov.ua/news/dmitro-kuleba-v-radbezi-oon-spilnimi-ta-rishuchimi-diyami-mi-mozhemo-postaviti-agresora-na-misce-ta-vidnoviti-mizhnarodnij-mir-ta-bezpeku

gathering and presenting evidence. Genocide is usually part of large-scale violent acts that take place in a context of war or political instability, which makes it difficult to access the necessary evidence. In international law, specific elements must be proven to qualify an action as genocide:

- Genocide implies a specific intent to destroy a certain group of people.
- Proving mass killings, torture, sexual violence, deportations, and other forms of violence is difficult because of the difficulty in gathering testimony and physical evidence.
- Collecting evidence often requires cooperation between states, international organizations and human rights institutions.

In my opinion... in the case of Ukraine, the key evidence may be: Official statements by Russian politicians justifying the destruction of Ukrainians as a nation (articles, speeches, interviews, including Putin's article on the "unity of Russians and Ukrainians" and calls by Solovyov, Medvedev, Kadyrov). Documents confirming orders to destroy Ukrainian identity, such as the deportation of children, and the ban on the Ukrainian language and culture in the occupied territories. Reports by the UN and human rights organizations (Human Rights Watch, Amnesty International) on mass killings, rape and torture of civilians in Bucha, Mariupol, Izyum, Kherson. Satellite intelligence data on mass graves and filtration camps. Forced deportation of Ukrainian children and their "re-education" in the Russian Federation, which is a clear violation of the 1948 Genocide Convention. The selective destruction of intellectuals, cultural figures, military veterans, and civic activists in the occupied territories[19].

At the same time, we note disappointing trends, such as the termination of funding and the curtailment of the program to investigate the abduction of Ukrainian children by Russia, which was once again confirmed by the United States at the official level on March 28, 2025. «No, the program we're not – the program is not funded. It was part of the reductions that were made, but we secured the data and we've ensured that we have it and it can be transferred to any appropriate authorities, and we'll issue a congressional – I don't know if it's a notification or just responses to the letters they've written us»[20]. This is about curtailing the work of experts from Yale University who were collecting data on the deportation of Ukrainian children to Russia, as a result of which several hundred children have already been returned to Ukraine. "This is the largest search group (Yale HRL), which analyzed information, including satellite imagery, social media, and media publications. They tracked approximately 35,000 children taken away by Russia. They also monitored 116 facilities in the Russian Federation."[21]. As a result, they are talking about the loss of the collected evidence and the inability to transfer it to the ICC. [22], and about allocating short-term funding for data transfer [23].

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*19* REZOLYUTSIYA «Viyna v Ukrayini ta yiyi ekonomichni, sotsial′ni ta ekolohichni naslidky» Yevropeys′kyy ekonomichnyy i sotsial′nyy komitet (EESC) [RESOLUTION "The war in Ukraine and its economic, social and environmental consequences" European Economic and Social Committee (EESC)]. URL: http://federation.org.ua/podiitafakti/evropeiskii-ekonomichnii-i-sotsialnii-komitet-eesk-zatverdiv-rezolyutsiyu-v-yakii-rishu

*20* Secretary of State Marco Rubio Remarks to the Press. 28.03.2025. https://www.state.gov/secretary-of-state-marco-rubio-remarks-to-the-press-3/

*21* How the US "deletes evidence" of Russia's abduction of Ukrainian children. 19.03.2025. https://www.bbc.com/ukrainian/articles/cy4ley7d8pno

*22* How the US is "deleting evidence" of Russia's abduction of Ukrainian children. 19.03.2025. https://www.bbc.com/ukrainian/articles/cy4ley7d8pno

*23* Maryna Boryspolets THE USA WILL ALLOCATE SHORT-TERM FUNDING FOR THE TRANSFER OF DATA ON KIDNAPPED UKRAINIAN CHILDREN BEFORE THE CLOSURE OF THE PROJECT.28.03.2025. HTTPS://SOCPORTAL.INFO/UA/NEWS/SSHA-VIDILYAT-KOROTKOSTROKOVE-FINANSUVANNYA-DLYA-PEREDANNYA-DANIKH-PRO-VIKRADENIKH-

Political factors can play a role in several ways:

- Many international genocide trials are delayed or even prevented due to a lack of political will in key countries, or due to their political interests.

- In international trials, it is often the case that countries in political alliances try to avoid prosecution for their allies.

- In international genocide cases, there is sometimes manipulation of the facts by states trying to influence the course of the process through lobbying, control of information, and pressure on witnesses.

- In some cases, the term “genocide” can be used as a political tool to discredit a particular country or government.

Historical and legal practice shows that serious international crimes, including genocide, often remain unpunished. Christina Lamb, who has worked in conflict zones for over thirty years, describes atrocities in Berestyanka, Bohdanivka, Kherson region, Syria, Iraq, Afghanistan, Bosnia and Herzegovina, the DRC, Nigeria, Rwanda, Burma etc. The author emphasizes that despite the fact that rape and sexual violence were still recognized as genocide «just like any other act, if they were committed with the specific intention to destroy, in whole or in part, a specific group that is a target by the fact of its existence»[24], but, unfortunately, "since the time of Akayesu, the situation has not progressed in any direction. Although this case has entered the history of law, it has hardly helped women in conflict situations"[25].

*So,* International law provides a clear definition of genocide, but its application in practice is sometimes complicated by political factors. To qualify an action as genocide, it is necessary to consider not only the facts but also the intentions of the parties to the conflict. Also, genocidal intent must be traced over long periods, and there are enough Ukrainian historical examples for this, as we have already discussed[26] and other authors [27] It has already been mentioned a length. Political interests may influence how this intent is interpreted in court proceedings.

UKRAINSKIKH-DITEI-PERED-ZAKRITTYAM-PROEKTU/

[24] Lamb Christina Our bodies are their battlefield. Kyiv: Publishing house, 2024. P.150 (368 p.)

[25] Lamb Christina Our bodies are their battlefield. Kyiv: Publishing house, 2024. P. 359.

[26] Basista I.V. The forced transfer of Ukrainian children - an act of genocide or a war crime? Ukrainian military and post-war criminal justice: materials of the IX (XXII) Lviv Forum of Criminal Justice (Lviv, October 26–27, 2023) / compiled by I. B. Gazdaika-Vasilyshyn. Lviv: Lviv State Department of Internal Affairs, 2023. pp. 18-64.
https://www.lvduvs.edu.ua/uk/library/materialy-naukovykh-konferentsii.html
file:///C:/Users/Ірина%20Володимирівна/Downloads/26-27_10_2023%20(7).pdf
Basista I.V. Prospects for responsibility for illegal deportation and illegal movement of Ukrainian children (cooperation with the International Criminal Court) (continued review). International scientific and practical conference "State policy on combating human trafficking and illegal migration: Ukraine and the world". (Lviv, June 9, 2023). Lviv: Lviv State University of Internal Affairs, 2023. P. 35-43.https://www.lvduvs.edu.ua/uk/library/materialy-naukovykh-konferentsii.html
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Basista I.V. Bringing the International Criminal Court to Accountability for International Crimes Committed and Committed in Ukraine, Including Against Children (Continuation of the Review). Transcarpathian Legal Readings. Law as an Instrument of Stability and Development in the Face of Modern Civilizational Challenges: Materials of the 15th International Scientific and Practical Conference, Uzhhorod, April 27, 2023. Part I. Lviv-Torun: Liha-Press, 2023. P.12-18.DOI https://doi.org/10.36059/978-966-397-298-5-1
http://catalog.liha-pres.eu/index.php/liha-pres/catalog/view/193/3962/9374-1

[27] Shepitko V. Yu. Soviet and post-Soviet genocide of Ukrainians in the 20th and 21st centuries: establishing facts and problems of investigation. Genocide in Ukraine: problems of proof and punishment: materials of the international scientific-practical round table, Kharkiv, December 17, 2024. Research Institute for the Study of Crime Problems named after Acad. V.V. Stashys, National Academy of Sciences of Ukraine; V.M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine. Kharkiv: Pravo, 2024. P. 86-92. DOI: https://doi. org/10.31359/9786178518677

According to researchers, it is also important to distinguish between genocide tragedies that have left severe consequences on a global scale. The most significant examples are:

- Genocide in Yugoslavia[28] (1991-1995): The armed conflict in the Balkans led to mass killings and ethnic cleansing. The Special Tribunal for the Former Yugoslavia (ICTY) was the first international court to investigate and prosecute individuals for genocide crimes, including the cases of Srebrenica, where more than 8,000 Muslim men and boys were killed by the Serbian military.

- Genocide in Rwanda (1994)[29]: The massacre of more than 800,000 Tutsis and moderate Hutus in 100 days was a catastrophe that attracted the attention of the international community. The International Criminal Tribunal for Rwanda (ICTR) investigated and convicted those involved in this genocide, including crimes against humanity and genocide.

- Genocide in Sierra Leone[30] (1996-2002): A war that left thousands dead led to the establishment of the Special Court for Sierra Leone. The courts aimed to bring to justice those responsible for war crimes and genocide, including torture, slavery, and murder.

These examples demonstrate how international courts and tribunals have contributed to the prosecution of genocide perpetrators, but not all cases have been successful. The lack of legal mechanisms and political will in many cases limited the effectiveness of justice.

The 1948 UN Genocide Convention recognized genocide as a distinct crime but did not directly assign state responsibility, providing only that disputes be referred to the ICJ (Art. IX). The 1998 Rome Statute gave the ICC jurisdiction to prosecute genocide, yet the Court faces significant challenges limiting its effective response.

The ICC investigates and prosecutes those responsible for genocide, but its jurisdiction is limited by several factors:

- The ICC has jurisdiction only in countries that are states parties to the Rome Statute or when a situation is referred to the ICC by the UN Security Council.

- The ICC often faces difficulties in arresting persons outside the court's jurisdiction. Such situations have been documented in genocide cases, where the accused remain fugitives, having escaped justice.

- The ICC is often subject to political pressure from countries that do not want their leaders or officials to be subjected to judicial investigation. In addition, the court faces funding and resource constraints that make it difficult to fulfill its mission.

Precedents such as the Rajab Sekho (Rwanda), Ratko Mladić (Yugoslavia), and other genocide trials show that even with strong evidence and political backing, proceedings can be delayed or influenced. The ICC's role in combating genocide is crucial, yet its effectiveness is limited by the non-ratification of the Rome Statute by key states (e.g., the US, China, India) and ambiguities in proving intent and scope. These experiences highlight the need to strengthen international mechanisms and secure broader political support for enforcing international criminal justice.

An important institutional actor in documenting international crimes in Ukraine is the International Commission of Inquiry on Ukraine, established by the UN Human Rights Council in March 2022.

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*28* Genocide in Yugoslavia. URL: https://hmh.org/library/research/genocide-in-bosnia-guide/

*29* Genocide in Rwanda. URL: https://www.britannica.com/event/Rwanda-genocide-of-1994

*30* Genocide in Sierra Leone. URL: https://www.refworld.org/reference/countryrep/amnesty/1995/en/40123

The Commission's mandate covers the investigation of violations of human rights and international humanitarian law, including potential acts of genocide, committed in the context of the armed aggression against Ukraine. Its reports, based on victim and witness testimonies, satellite imagery, and forensic analysis, provide a consolidated factual basis that can inform proceedings before both international and national courts, though procedural adaptation is required for admissibility in ICC trials (OHCHR, 2025).

The Joint Investigation Team (JIT) on Ukraine, established under the auspices of Eurojust and involving Ukraine alongside several EU Member States, plays a pivotal role in facilitating the exchange of evidence and coordination of investigative activities relating to core international crimes committed on Ukrainian territory. The JIT ensures the harmonisation of investigative methodologies, reduces duplication of efforts, and enables real-time sharing of forensic data, witness statements, and digital evidence with both national prosecutors and the ICC Office of the Prosecutor (Eurojust, 2024).

**Ukrainian case: analysis of Russia's actions in the context of the crime of genocide**

Since the beginning of Viktor Yanukovych's presidency, relations between Russia and Ukraine have been tense and have lasted for almost 10 years. Russia has made territorial claims, believing that Ukrainian lands are part of Russia. This was confirmed by the beginning of Russia's full-scale aggression against Ukraine on February 24, 2022.

Political differences between Ukraine and Russia began immediately after Ukraine gained independence in 1991. Ukraine chose the course of European integration and sought cooperation with the European Union and NATO, which caused dissatisfaction in the Kremlin. The first cracks in the relationship appeared after Ukraine gave up its nuclear arsenal, which significantly weakened its position in the face of Russia, which began blackmailing Ukraine over gas issues. One of Russia's first serious attempts to change the borders was in 2003, when Russia began construction of a dam in the Kerch Strait[31].

This was a prelude to the political changes that took place in Ukraine after the Orange Revolution of 2004, which brought pro-Western President Viktor Yushchenko to power. However, Ukraine never joined the EU, and Russia continued to influence its domestic politics[32].

The turning point in the relationship was when Russia cut off gas supplies in 2006-2009, which was used as a blackmail tool. In 2008, when Ukraine declared its intention to join NATO, Russia strongly opposed it, claiming that Ukraine was part of its influence zone.

Confrontation between Russia and Ukraine grew, and in 2013, President Yanukovych's refusal to sign an association agreement with the EU led to mass protests in Ukraine, which became the basis for the outbreak of war in Crimea and Donbas. Russia launched its armed aggression against Ukraine in 2014, annexing the Autonomous Republic of Crimea and supporting the creation of illegitimate separatist entities in eastern Ukraine. In response to these actions,

[31] Kosa Tuzla Island: how Russia started a hybrid war against Ukraine 20 years ago. URL: https://armyinform.com.ua/2023/09/28/ostriv-kosa-tuzla-yak-rosiya-pochala-gibrydnu-vijnu-proty-ukrayiny-20-rokiv-tomu/

[32] "It was supposed to be honey". Why the revolution in Ukraine was orange 20 years ago. URL: https://www.bbc.com/ukrainian/articles/c4g2l67gwkwo

Ukraine has been actively defending its sovereign rights at the international level, in particular by applying to the European Court of Human Rights (ECHR). An important milestone in the legal qualification of Russia's criminal actions was the ECHR judgment in the case of Ukraine v. Russia on Crimea, adopted on June 25, 2024[33].

In a decision adopted in 2024, the ECtHR officially recognized Russia as responsible for large-scale and systemic human rights violations in the occupied territory. In particular, the Court found that: (1) the application of Russian legislation in Crimea, (2) the functioning of judicial bodies controlled by the Russian authorities, and (3) the forced change of citizenship of the peninsula's residents were illegal.

This decision is of particular historical significance, as it is the first time that an international court has recognized the illegality of the annexation of Crimea, which refuted the Russian authorities' propaganda narrative about the "legal annexation" of the territory. It is worth noting that back in January 2021, in its decision on the admissibility of this case, the ECtHR concluded that there was a clear lack of legal basis for the so-called "referendum" in Crimea and confirmed the systematic human rights violations by the occupation administration.

The next important step in establishing responsibility for the destabilization of Ukraine was the ECHR judgment in the case of Vyacheslavova and Others v. Ukraine[34], adopted in March 2025, which concerned the tragic events in Odesa on May 2, 2014. The court analyzed the circumstances of the events and made several key conclusions that are important for understanding Russia's influence on the domestic political situation in Ukraine. Firstly, the ECtHR established the significant role of Russian disinformation in inciting mass unrest and provoking social tension. Secondly, the Court confirmed that key officials responsible for the inadequate response to these events had fled to Russia and obtained Russian citizenship, which indicates their connection with Russian state structures. Thirdly, the Court found no evidence of bias in the investigation by the Ukrainian authorities, which refutes the Russian propaganda's allegations of "political persecution."

Specific actions of the Russian Federation in Ukraine that may qualify as genocide include the killing of civilians, deportation of the population and destruction of cultural heritage, which bear the hallmarks of a systematic policy aimed at destroying Ukrainian national, ethnic and cultural identity.

Russian troops have been carrying out mass killings of civilians, in particular in cities such as Bucha, Irpin, and Mariupol, where numerous cases of extrajudicial killings have been reported[35].

During the occupation of Bucha, Kyiv region, from March 3 to April 1, 2022, the Russian military committed mass killings of civilians. According to the Office of the Prosecutor General of Ukraine, as of March 2024, more than 20,000 war crimes in the Kyiv region have been documented, 13,000 of them during the occupation. In Bucha, 146 people involved in these crimes were notified of suspicion, and indictments against 89 people were sent to court. Specialists from the Office of the United Nations High Commissioner for Human Rights (OHCHR) described in detail the shooting of 73 people in Bucha: 54 men, 16 women,

*33* Ukraine v. Russia on Crimea. URL: https://hudoc.echr.coe.int/eng?i=002-14347

*34* Vyacheslavova and Others v. Ukraine. URL: https://hudoc.echr.coe.int/eng?i=001-242505.

*35* Civil society and media losses in three years of Russia's full-scale invasion of Ukraine (2022–2024): report-memorial / V. Naydionova, T. Pechonchyk, D. Popkov, L. Tiahnyriadno, L. Yankina; ed.: T. Bezruk, T. Pechonchyk; Human Rights Centre ZMINA. Kyiv, 2024. 72 P

two boys and one girl, and continue to work to confirm 105 more cases of killings. In Mariupol, Donetsk region, Russian armed forces have carried out mass killings of civilians since March 2022. According to local authorities, the number of civilians killed exceeds 20,000. These actions included shelling of residential areas, hospitals and shelters, resulting in significant civilian casualties and destruction of the city's infrastructure[36].

The forced transfer of Ukrainian children to Russia is one of the most disturbing components of Russia's policy, which has long violated numerous international norms, which has been discussed many times[37]. This is a far-sighted genocidal policy of Russia to change the identity of Ukrainian children, who are illegally moved by the occupying country to its and Belarusian territories. The number of Ukrainian children abducted in this way is not known for certain (according to approximate official data, it is over 20,000 children and this figure is only growing, because the illegal movement of children continues).[38]. Although, as the expert of the Regional Center for Human Rights noted, the statistical data actually remain within the same limits[39]. The director of the Yale Humanities Research Laboratory announced the figure of over 30 thousand deported children, and the Regional Human Rights Center refers to it [40]. Ombudsman stressed the "high risk" of deportation by Russians of another 1.5 million Ukrainian children[41]), but the genocidal intent of such activities is obvious. This is confirmed by numerous publications, including those with

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*36* Over 133 thousand Russian war crimes documented in Ukraine. URL: https://armyinform.com.ua/2024/05/30/v-ukrayini-zadokumentuvaly-ponad-133-tysyachi-voyennyh-zlochyniv-rosiyi/

*37* Basista I.V., Savyuk O.V. CRIMES AGAINST UKRAINIAN CHILDREN COMMITTED BY THE AGGRESSOR COUNTRY. War in Ukraine: conclusions drawn and lessons not learned: collection of abstracts of the International Scientific and Practical Conference (February 21, 2025). Lviv: Lviv State University of Internal Affairs, 2025. P.47-49.file:///C:/Users/Ірина%20Володимирівна/Downloads/21_02_2025.pdf

Basysta I. V., Nazar Yu. S., Khatniuk Yu. A. PROTECTING THE RIGHTS OF CHILDREN AND ENSURING THEIR SAFETY IN THE CONTEXT OF WAR CRIMES, GENOCIDE, AGGRESSION AND CRIMES AGAINST HUMANITY. Juvenile policy as a component of supporting Ukraine's national security and defense (dedicated to the 53rd anniversary of the UN General Assembly adoption of the Declaration of the Rights of the Child and the 56th anniversary of the establishment of Dnipropetrovsk State University of Internal Affairs): Scientific monograph. Riga, Latvia : «Baltija Publishing», 2023. P. 42-78. 552. http://baltijapublishing.lv/omp/index.php/bp/catalog/view/287/7881/16459-1

https://doi.org/10.30525/978-9934-26-276-0-2

Basysta I. V., Vlasova H. P., Stratonov V. M. Prospects and inevitability of responsibility for committing war crimes, genocide, aggression and crimes against humanity (activities of the Joint Investigative Group for the Investigation of Serious International Crimes in Ukraine (JIT); cooperation with the International Criminal Court; prospects for the creation of an International ad hoc tribunal, etc.) (continued review). Military offences and war crimes: background, theory and practice : collective monograph. Ed. by V.M. Stratonov. Riga, Latvia : «Baltija Publishing», 2023. 25-72. (876 p). http://baltijapublishing.lv/omp/index.php/bp/catalog/book/322

DOI https://doi.org/10.30525/978-9934-26-302-6-2

*38* During the summer, the Russians took over 3,000 children from the occupied Kherson region for "re-education," Lubinets said. 11.01.2025. https://rubryka.com/2025/01/11/protyagom-lita-na-perevyhovannya-rosiyany-vyvezly-ponad-3-tysyachi-ditej-z-okupovanoyi-hersonshhyny-lubinets/

*39* THE OFFICIAL NUMBER OF DEPORTED CHILDREN HAS NOT CHANGED FOR TWO YEARS, DURING WHICH RUSSIA CONTINUES TO KIDNAPPING THEM — EXPERT. 28.03.2025. HTTPS://ZN.UA/UKR/UKRAINE/OFITSIJNA-KILKIST-DEPORTOVANIKH-DITEJ-NE-ZMINJUVALASJA-VZHE-DVA-ROKI-PROTJAHOM-JAKIKH-ROSIJA-PRODOVZHUVALA-JIKH-VIKRADATI-EKSPERT.HTML

*40* THE OFFICIAL NUMBER OF DEPORTED CHILDREN HAS NOT CHANGED FOR TWO YEARS, DURING WHICH RUSSIA CONTINUES TO KIDNAPPING THEM — EXPERT.. 28.03.2025. HTTPS://ZN.UA/UKR/UKRAINE/OFITSIJNA-KILKIST-DEPORTOVANIKH-DITEJ-NE-ZMINJUVALASJA-VZHE-DVA-ROKI-PROTJAHOM-JAKIKH-ROSIJA-PRODOVZHUVALA-JIKH-VIKRADATI-EKSPERT.HTML

*41* The Ombudsman stated that there is a "high risk" of another 1.5 million Ukrainian children being deported by the Russians. 2.10.2024. https://www.slovoidilo.ua/2024/10/02/novyna/bezpeka/ombudsmen-zayavyv-pro-vysokyj-ryzyk-deportacziyirosiyanamy-shhe-15-miljona-ukrayinskyx-ditej

Karina Prykhodko The occupiers are preparing to take thousands of children to the Russian Federation - details from the Central Intelligence Agency 8.01.2025. https://armiya.novyny.live/okupanti-gotuiutsia-vivezti-v-rf-tisiachi-ditei-detali-vid-tsns-225118.htm

references to materials from the Institute for the Study of War (ISW), which state that since the beginning of Russia's aggression, the invaders have been "reprogramming" children regarding their attitude to Russia's war against Ukraine, i.e., in this way, national identity is changing. "The Russian authorities have developed a whole system of "re-education" of children abducted from Ukraine, trying to form a "Russian identity" in them, and the Russian Ministry of "Education" is the main agency responsible for the "indoctrination" of deported Ukrainian children."[42]. The occupiers are erasing the national identity of young Ukrainians and raising soldiers to eventually send them to war against their own Motherland, Ukraine[43].

The Russian authorities are actively changing their legislation to expedite the granting of Russian citizenship to deported children. This includes a simplified procedure for obtaining Russian citizenship for persons under the age of 18, which effectively leads to forced Russification. For example, in 2022, Russia passed a law allowing automatic granting of citizenship to children without the need to go through the usual procedures applicable to adults[44].

One of the most well-known examples is the story of children from Mariupol, where, according to human rights organizations, more than 3,000 children were taken to Russia through so-called "filtration camps" and forcibly placed in different regions of Russia, often without the consent of their parents or relatives. According to Ukrainian sources, some of these children were placed in special orphanages where they were raised under Russian patriotic influence, without the possibility of returning home[45].

The deliberate destruction of cultural heritage in Ukraine is not only vandalism but also part of a strategy to erase Ukrainian national and cultural identity, qualifying as an element of genocide. Since the war began, Russia has actively shelled and destroyed historical and cultural monuments. According to the Ministry of Culture and Information Policy of Ukraine, by the end of 2023, more than 1,200 cultural heritage sites were damaged or destroyed, including museums, libraries, theaters, and churches. Notable cases include the destruction of the Hryhorii Skovoroda Museum in Skovorodynivka, an important part of Ukrainian heritage, and the Museum of Ukrainian Literature in Mariupol, which contained a collection documenting Ukrainian cultural history. Many churches and monasteries were also severely damaged, including the Holy Dormition Cathedral in Kharkiv and numerous places of worship in Donetsk and Luhansk.

The destruction of cultural monuments is accompanied by a policy of

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*42* Yuriy Bratyuk The media learned how the Kremlin is Russifying kidnapped Ukrainian children. zaxid.net 11.03.2024. https://zaxid.net/zmi_diznalisya_yak_kreml_rusifikuye_vikradenih_ukrayinskih_ditey_n1581498

*43* "Cadet classes" and "hero parties": how Russians militarize Ukrainian children in the occupied territories. 3.04.2024. https://sprotyv.info/obshchestvo/kadetski-klasi-ta-parti-geroïv-yak-rosiyani-militarizuyut-ukraïnskihditej-na-okupovanih-teritoriyah/

Olena Yarema At the TOT of Luhansk region, students' entry into the Kremlin's "Movement of the First" will become mandatory. November 10, 2024. https://detector.media/infospace/article/234531/2024-11-10-na-tot-luganshchyny-vstup-studentiv-dokremlivskogo-rukhu-pershykh-stane-obovyazkovym/

"Brainwashing" children: occupiers create "war museums" in schools. 5.01.2024. https://flot2017.com/promyvaiut-mizky-ditiam-okupanty-stvoriut-voienni-muzei-u-shkolakh/

Natalia Dzhuma Russians are building a network of "Youth Houses" in the occupied territories to "brainwash" Ukrainian teenagers, - Center of National Resistance. CENSOR.NET. 16.01.2024. https://censor.net/ua/news/3467929/rosiyany_rozbudovuyut_mereju_budynkiv_molodi_na_ okupovanyh_ terytoriyah_ dlya _promyv annya_ mizkiv_ukrayinskym

Russians in the occupied territories are going around children's sections and looking for informants among teenagers, - Center of National Resistance. https://censor.net/ua/n3467929

*44* Putin wants to issue passports in the occupation within 10 days. And he demands an oath of allegiance. URL: https://www.rbc.ua/rus/news/putin-hoche-vidavati-pasporti-okupatsiyi-1672071869.html

*45* Tým autorů C91 Moderní aspekty vědy: XX. Díl mezinárodní kolektivní monografie / Mezinárodní Ekonomický Institut s.r.o.. Česká republika: Mezinárodní Ekonomický Institut s.r.o., 2022. str. 624

banning the Ukrainian language and history in the occupied territories. The Russian authorities prohibit the teaching of the Ukrainian language, destroy textbooks on the Ukrainian language and literature, replacing them with Russian analogues, which contributes to the imposition of Russian propaganda. In the occupied territories, "educational reforms" are being actively carried out, as part of which Ukrainian schools are being closed and Russian educational institutions are being opened in their place, where only the Russian language, history and culture are taught[46].

Forced passportization, which Russia is actively pursuing in the occupied territories, is another tool of Russification and forced assimilation. According to the Ukrainian authorities, more than 700,000 people have been granted Russian citizenship in the temporarily occupied territories of Luhansk and Donetsk oblasts, as well as in Crimea.

Targeted attacks on civilian infrastructure by the Russian Federation are part of a strategy aimed at maximizing the suffering of civilians and creating conditions that endanger their existence. One of the most tragic events was the massive rocket bombardment of Dnipro in January 2023, which damaged residential buildings on Peremohy Street. Other cities, such as Kramatorsk, Vinnytsia, Kharkiv, and Mariupol, also came under rocket attacks that destroyed residential areas and social infrastructure, causing huge civilian casualties.

In addition, massive attacks on Ukraine's energy infrastructure, including thermal power plants (TPPs) and hydroelectric power plants (HPPs), became one of the most notorious acts of aggression by Russia in 2022-2023. During the winter period of 2022-2023, Russia launched a series of missile attacks on energy facilities, which led to massive disruptions in the supply of electricity, water and heat[47].

Ukrainian and international human rights organizations are actively collecting testimonies from survivors of violent acts (rape, murder, torture, deportation). Documenting war crimes through photographs and videos is an important method of proof. Together with international organizations, Ukraine uses satellite imagery to identify the destruction of cities, villages, and infrastructure, as well as to record the movement of military forces and the accumulation of equipment in the area that was under fire.

One of the important aspects of documentation is the exhumation of victims' bodies. For example, after the liberation of Bucha, mass graves were discovered that proved extrajudicial killings.

Ukraine has filed a request with the ICC to investigate alleged war crimes and crimes against humanity committed by the Russian Federation on the territory of Ukraine. Since 2014, the ICC has opened a preliminary investigation, which was expanded after the start of full-scale aggression in 2022. Ukrainian investigators are cooperating with the ICC by providing documents and testimonies. Ukrainian human rights organizations, such as the ZMINA Human Rights Center[48] and the Ukrainian Helsinki Human Rights Union[49], are actively documenting war crimes and genocide, maintaining a register of human rights violations, and cooperating with

[46] The impact of the Russian-Ukrainian conflict on global food security and related issues within the Food and Agriculture Organization of the United Nations (FAO).URL: https://www.fao.org/3/nj164fr/nj164fr.pdf

[47] Report on direct damage to infrastructure from the destruction caused by Russia's military aggression against Ukraine as of the beginning of 2024 URL: https://kse.ua/wp-content/uploads/2024/04/01.01.24_Damages_Report.pdf

[48] "ZMINA Human Rights Center" URL: https://zmina.ua/

[49] Ukrainian Helsinki Human Rights Union" URL: https://www.helsinki.org.ua/

international bodies to bring perpetrators to justice.

As noted by Drozdov, Lishchyna, Drozdova, and Kovtun (2025), the establishment of a Special Tribunal on the Crime of Aggression against Ukraine is viewed not only as a tool for prosecuting the highest political and military leadership of Russia but also as a potential catalyst for enhancing ICC and national investigations into war crimes, crimes against humanity, and genocide[50].

To date, the ICC has issued no genocide convictions. In the Ukraine situation, its investigation focuses on alleged war crimes and crimes against humanity, while genocide remains under preliminary analysis.

One of the main legal challenges for submitting evidence to the ICC is the limited access to the areas where crimes are committed. In the context of occupation or military conflict, serious legal difficulties arise in collecting evidence, as restrictions on free access to these territories may be imposed by the aggressor itself or due to security concerns. To overcome this challenge, remote surveillance methods, such as satellite imagery, are used, as well as technologies for remote evidence collection, such as video communication with victims.

Evidence collection in wartime often faces issues of authenticity. This includes photographs, videos, testimonies, and documents that may be forged or distorted. It is important to prove that the evidence is authentic and has not been altered or distorted. The ICC requires clear verification of evidence through specialized methods, such as digital signatures, metadata, or expert opinions on technical authenticity (such as for videos or images). Military units often have their own information about combat operations that can be an important source of evidence for the ICC, such as intelligence data or operational reports. However, such documents may be closed, secret, or not subject to public disclosure.

**Standards of fact-finding in genocide cases at the ICC and the ECHR**

The fact-finding process is an important stage in the proceedings of the International Criminal Court (ICC). The collection and evaluation of evidence is based on strict international legal standards that ensure fairness and accuracy of justice. Fact-finding is essential for the qualification of crimes related to war crimes, crimes against humanity and genocide.

The ICC applies high standards of proof, incorporating principles set out in international criminal law, including:

• Presumption of innocence. The accused is presumed innocent until proven guilty in a court of law.

• Standard of proof “beyond reasonable doubt”. Guilt must be proven beyond reasonable doubt, excluding any alternative interpretation.

• Admissibility of evidence. Evidence accepted by the court must be obtained within the framework of international law, respecting human rights requirements.

• Materiality and nexus with the charge. Evidence must be direct and relevant to the facts relevant to the case[51].

*50* Drozdov, O., Lishchyna, I., Drozdova, O. and Kovtun, V., 2025. The Special Tribunal for the Crime of Aggression Against Ukraine: Jurisdictional challenges and international legal response in the context of ECtHR case law. Pravo Ukrainy (Law of Ukraine), 5, pp.9–42. URL: https://www.academia.edu/143363604/Drozdov_O_Lishchyna_I_Drozdova_O_and_Kovtun_V_2025_The_Special_Tribunal_for_the_Crime_of_Aggression_Against_Ukraine_Jurisdictional_challenges_and_international_legal_response_in_the_context_of_ECtHR_case_law_Pravo_Ukrainy_Law_of_Ukraine_5_9_42.

*51* THE PROTECTION OF THE ACCUSED IN INTERNATIONAL CRIMINAL LAW ACCORDING TO

In this case, Ukraine can create initiatives to collect testimonies and evidence through independent journalists and organizations working in wartime. Involving local civil society activists and international human rights groups in documenting crimes can help gather additional evidence that confirms the systematic and massive scale of genocide. Since the deportation of children and civilians is one of the elements of genocide, Ukraine can organize programs to provide psychological support to victims and witnesses, as well as to systematically document their testimonies and personal stories. Ukraine can work closely with human rights organizations, such as Human Rights Watch, Amnesty International, and others, to monitor human rights violations and genocide.

The main types of evidence used in the ICC are: Statements from victims, eyewitnesses and experts are important for establishing the facts. Their reliability is checked taking into account possible pressure or influence. Important documents such as military reports, official correspondence and interrogation protocols are used to confirm the facts related to the accusation. Physical objects (weapons, remains at the crime scene, etc.) are important elements of the evidentiary base. The involvement of scientists and technical experts allows to confirm the authenticity of the evidence, particularly in the context of digital materials. The role of digital technologies in the investigation of genocide in Ukraine is crucial [52]. Even researchers are advising on ways to use artificial intelligence technologies as a way to combat genocide[53].

According to the researchers, the collection and assessment of evidence in the context of international crimes faces a number of problems, including: In armed conflicts, it is often difficult to obtain direct evidence or documents due to limited access to the areas where the crimes were committed. Testimony can be distorted due to pressure or manipulation by outsiders. Digital evidence, including social media data, satellite imagery and video, requires special technologies to verify its authenticity.

The issue of correlating the rules of evidence in the International Criminal Court with national procedures, especially regarding the use of electronic evidence, is important. In this context, the Supreme Court plays a key role, which must ensure the unity and consistency of judicial practice, in particular by harmonizing it with international standards. The adaptability of the legal positions of the Supreme Court regarding evidence in criminal proceedings is particularly relevant. The relevant legal position is set out in the resolution of the Joint Chamber of the Cassation Criminal Court of the Supreme Court of Ukraine dated March 29, 2021 in case No. 554/5090/16-k[54].

Evidence accumulated on electronic evidence collection platforms held by state bodies of foreign states and

THE HUMAN RIGHTS LAW STANDARD. URL: https://intapi.sciendo.com/pdf/10.2478/wrlae-2013-0026

*52* Shevchuk V.M. The role of digital technologies in documenting and investigating genocide in Ukraine. Genocide in Ukraine: problems of proof and punishment: materials of the international scientific-practical round table, Kharkiv, December 17, 2024. Research Institute for the Study of Crime Problems named after Acad. V.V. Stashys, National Academy of Sciences of Ukraine; V.M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine. Kharkiv: Law, 2024. C. 81-85. DOI: https://doi. org/10.31359/9786178518677

*53* Zhuravel V.V. The use of artificial intelligence technologies as a promising direction of countering genocide. Genocide in Ukraine: problems of proof and punishment: materials of the international scientific-practical round table, Kharkiv, December 17, 2024. Research Institute for the Study of Crime Problems named after Acad. V.V. Stashis, National Academy of Sciences of Ukraine; Institute of State and Law named after V.M. Koretsky, National Academy of Sciences of Ukraine. Kharkiv: Law, 2024. C. 36-41. DOI: https://doi. org/10.31359/9786178518677

*54* Resolution of the Joint Chamber of the Criminal Court of Cassation of the Supreme Court of March 29, 2021 in case No. 554/5090/16-k. URL: https://reyestr.court.gov.ua/Review/95848991

international organizations requires the same assessment as other electronic evidence[55].

Screenshots play an important role in preserving and protecting information, ensuring its authenticity, accessibility, and identity. This is in line with the standards set out in the Berkeley Protocol, as reflected in the ruling of the Criminal Court of Cassation of the Supreme Court of Justice of 30 January 2025 in case No. 490/6113/22[56]. At the same time, it is important that national investigative bodies, when collecting information that could potentially acquire the characteristics and properties of evidence, and when working with open sources of digital information, take into account the jurisdictional admissibility of the evidence base formed[57]. The case law of the European Court of Human Rights (ECHR) shows that this body does not perform the function of a cassation instance in relation to national courts and, as a rule, does not review the correctness of the assessment of evidence carried out by the courts of the States parties to the Convention. This is confirmed by a number of decisions of the Court, in particular in the cases of Teixeira de Castro v. Portugal [58](application no. 25829/94, § 34), Shabelnyk v. Ukraine[59] (application no. 16404/03, § 54), Bykov v. Russia[60] (application no. 4378/02, § 89) and Nechyporuk and Jonkalo v. Ukraine[61] (application no. 42310/04, § 259).

However, the ECtHR does not consider the question of whether certain types of evidence may be admissible per se. The relevant legal position is set out in the decision in the case of Lutsenko v. Ukraine (application no. 30663/04, § 42)[62]. However, the ECtHR stresses that the assessment of evidence must be carried out by national courts with due regard for the fundamental rights of the individual, as derived from the content of Article 6 of the Convention.

ECtHR's decisions often examine whether sufficient evidence has been provided to prove human rights violations, such as:

• Torture and inhuman treatment: In cases concerning violations of the prohibition of torture (Article 3 of the European Convention on Human Rights), the ECtHR examines whether there is sufficient evidence to prove the facts of torture, using the testimonies of victims, medical reports and other materials.

• Unlawful detention: In cases of violations of Article 5 of the Convention, which guarantees the right to liberty and security of person, the proof consists in providing documentary evidence of the lawfulness and reasonableness of the detention of individuals, including court orders and relevant actions of law enforcement agencies.

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*55* European Convention on Human Rights. URL: https://fra.europa.eu/en/law-reference/european-convention-human-rights-article-6

*56* Resolution of the Criminal Court of Cassation of the Supreme Court of January 30, 2025 in case No. 490/6113/22. URL: https://reyestr.court.gov.ua/Review/125028785

*57* Havryluk L. V., Basysta I. V., Shevchyshen A. V. and others. USE OF ELECTRONIC EVIDENCE DURING THE PRE-TRIAL INVESTIGATION OF CRIMES AGAINST PEACE, HUMAN SECURITY AND INTERNATIONAL LEGAL ORDER (THE BERKELEY PROTOCOL) Scientific-and-practical guidelines. Kyiv: DNDI MVS of Ukraine; Publishing house "Polytechnika", 2024. C.40, 54-83 (196 c.) https://www.researchgate.net/publication/385514719_Vikoristanna_elektronnih_dokaziv_pid_cas_dosudovogo_rozsliduvanna_zlociniv_proti_miru_bezpeki_ludstva_ta_miznarodnogo_pravoporadku_Protokol_Berkli_naukovo-prakticnij_poradnik?fbclid=IwY2xjawHkqitleHRuA2FlbQIxMAABHR0H3PLkRS0-pRUg4ZxJ8b3Yn35HF_1-JWpuBHLu2lMXNibFyiR2cKlgwg_aem_Un_o_sP6mw83lJaKOeeZog

*58* Teixeira de Castro v. Portugal URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58193%22]}

*59* Shabelnyk v. Ukraine. URL: https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-188211%22]}

*60* Bykov v. Russia. URL: https://hudoc.echr.coe.int/eng?i=001-91704

*61* Nechyporuk and Jonkalo v. Ukraine. URL: https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-204031%22]}

*62* Lutsenko v. Ukraine. URL: https://hudoc.echr.coe.int/eng?i=001-192469

• Right to a fair trial: The ECtHR often examines cases related to the lack of adequate legal assistance or violations of the right to effective access to a court, which may include an examination of the evidence as to the correctness of the evidence provided by the judicial authority, as well as an assessment of possible restrictions on access to justice.

• One of the determining factors in ensuring this right is the proper protection of the professional rights of lawyers, as they play a key role in guaranteeing effective legal protection. In order to strengthen the legal status of lawyers and their independence, the Council of Europe adopted the Convention on the Protection of the Profession of Lawyers on 12 March 2025[63]. This document guarantees lawyers the opportunity to provide legal assistance, represent clients and act in their interests without undue restrictions. In particular, lawyers have the right to free access to clients, even if they are deprived of their liberty, as well as to materials necessary for the effective protection of their rights. The Convention provides for guarantees of lawyers' independence, including the right to confidential communication with clients, protection from coercion to disclose information and freedom to submit procedural documents without the threat of legal liability. Lawyers also have the right to participate in court hearings, submit motions and statements in the interests of their clients, including the recusal of judges or prosecutors.

The ICC, established to investigate and punish those responsible for the most serious international crimes, has jurisdiction over war crimes, crimes against humanity, genocide and aggression. On the other hand, the ECHR, which is a judicial organ of the Council of Europe, enforces the European Convention on Human Rights, which covers violations of human rights, including the right to a fair trial, protection from torture and other inhuman treatment, and the rights to life and liberty. Although these bodies have different jurisdictions, their work often overlaps in cases where mass human rights violations amount to international crimes.

The ICC and ECHR can cooperate through information and evidence exchange. For instance, in cases where human rights violations form part of war crimes or genocide, the ECtHR can provide documentation—such as evidence of torture—that may be used before the ICC.

**Challenges of ensuring justice in genocide cases**

The politicization of international justice is the process by which the political interests and ideological beliefs of states or international organizations influence legal procedures, standards of proof, and the outcome of trials[64].

Politicization can manifest itself in the investigation of genocide cases, particularly when States use international bodies to advance their own political interests. The ICC, established to investigate the most serious international crimes, including genocide, has an important role in ensuring international justice. However, as practice shows, the political interests of States can significantly influence the consideration of genocide cases. The ICC, like other international courts, has faced criticism for its selectivity in its investigations.

[63] Convention on the Protection of the Profession of Lawyers on 12 March 2025. URL: https://www.coe.int/en/web/portal/-/council-of-europe-adopts-international-convention-on-protecting-lawyers

[64] Politics and Justice at the International Criminal Court. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4965347

Although the ICC aims to be impartial, judges and prosecutors can be subject to political pressure from states that may seek to influence the course of investigations and decision-making. Political forces can encourage the closure of certain cases or, conversely, the intensification of processes against other countries.

One of the most well-known examples of politicization in genocide investigations is the situation in Rwanda. The International Criminal Tribunal for Rwanda (ICTR) has faced criticism for its selective approach to genocide investigations[65]. In 1994, Rwanda witnessed the genocide, which killed an estimated 800,000 people, mostly Tutsis. The ICTR was established to investigate crimes committed during the conflict and to ensure justice for the victims. The tribunal has convicted many high-ranking officials and military personnel, including Jean-Paul Akaiza, who was sentenced to 25 years in prison for his role in attempting to commit genocide. A similar situation is observed in the context of the Hague Tribunal. Some critics argue that international courts do not always give equal attention to all parties to a conflict when it comes to serious international crimes.

International Criminal Tribunal for the former Yugoslavia (ICTY)[66]. The investigations and trials of those responsible for crimes committed during the breakup of Yugoslavia are also important for ensuring justice in genocide cases. One of the most famous trials is that of Ratko Mladić, the commander of the Army of Republika Srpska, who was sentenced to life imprisonment for crimes committed during the Bosnian war, including the massacres in Srebrenica, where more than 8,000 Bosnian Muslims were killed. Mladić's trial was an important milestone in establishing international criminal responsibility for genocide.

International Court of Justice (ICJ). In 2020, Gambia filed a case against Myanmar at the International Court of Justice, accusing it of committing genocide against the Rohingya Muslim minority. The court granted interim measures, ordering Myanmar to take steps to prevent further genocide.

Bosnian genocide (1992–1995)[67]. The Bosnian War resulted in numerous crimes, including genocide. The Srebrenica massacre was one of the largest acts of genocide, when Serbian forces killed over 8,000 Bosnian Muslims in a matter of days. In 2001, the International Criminal Tribunal for the former Yugoslavia convicted the main perpetrators of the Srebrenica genocide. During the Bosnian War, over 100,000 people were killed and over 2 million became refugees.

Genocide in Myanmar (2017–present)[68]. The United Nations estimates that around 740,000 Rohingya Muslims have been forced from their homes by violence by Myanmar's military forces, which has been part of a genocide. The violence has included killings, rape, torture and the destruction of villages. According to Amnesty International, more than 40,000 people have been victims of the violence, and many have become internally displaced. Investigations have shown that the genocide against the Rohingya is part of a broader strategy to destroy this ethnic and religious population.

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*65* International Criminal Tribunal for Rwanda. URL: https://unictr.irmct.org/

*66* International Criminal Tribunal for the former Yugoslavia. URL: https://www.icty.org/

*67* Bosnian genocide. URL: https://museeholocauste.ca/en/resources-training/the-bosnian-genocide/

*68* Genocide in Myanmar. URL: https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years

Interaction with international organizations, such as the International Criminal Court (ICC) and the European Court of Human Rights (ECHR), is an important part of the legal context in which Ukraine is fighting for justice and accountability within the framework of international norms. The political aspect of this process is important: the international law on which the decisions of such bodies are based directly interacts with the geopolitical situation.

International bodies influence the qualification of crimes committed during Russian aggression. The ICC plays a key role in determining whether events in Donbas and Crimea constitute genocide or war crimes, while Ukraine seeks recognition of Russia's actions as genocide to strengthen accountability. The ECtHR protects victims' rights in conflict zones, and its decisions—especially on Crimea and Donbas—support evidence gathering, crime qualification, and can lead to sanctions or other measures against Russia.

In the framework of the Ukrainian case, international justice can also play a role not only in the fight for justice, but also in efforts to peacefully resolve the conflict. The decisions of the ICC or the ECHR may create additional pressure on Russia, forcing it to negotiate or make international compromises.

**Prospects for international justice in the context of the Ukrainian case**

In the context of the armed conflict in Ukraine, international justice is of key importance for ensuring justice, punishing the guilty and restoring law and order. Ukraine, as a state that has become a victim of aggression, is actively engaging international justice mechanisms to investigate crimes committed during the war.

The International Criminal Court has an important role in investigating and punishing those responsible for crimes committed during the war in Ukraine. Based on Ukraine's ratification of the Rome Statute, the ICC has jurisdiction over crimes committed on its territory, in particular in matters related to genocide, war crimes and crimes against humanity. Ukraine actively cooperates with international legal institutions and organizations, such as the United Nations (UN), the European Union (EU), as well as international humanitarian organizations, which assist in collecting evidence and providing support to victims.

The consideration of genocide cases can contribute to strengthening international support for Ukraine, including economic, political and humanitarian assistance. International justice programs contribute to improving cooperation between national and international bodies, building institutional capacity and improving the skills of law enforcement officers, judges and prosecutors. Due to the genocide investigation process, Ukraine may face some internal challenges, including political and social aspects related to reconciliation and national unity.

The Ukrainian case may also contribute to improving legal mechanisms for protecting victims, punishing the destruction of cultural heritage, and creating new norms of international law to combat new types of crimes in hybrid wars.

Proposals provided by researchers on improving Ukraine's cooperation with the International Criminal Court (ICC) and other international institutions:

1. Ukraine should conclude new or improve existing bilateral agreements with the ICC and other international judicial bodies to ensure effective

exchange of evidence, provision of witnesses and implementation of court decisions at the national level. This will speed up the processes of investigations and punishment, as well as reduce administrative barriers.

2. Ukraine needs to adapt national legislation to the requirements of the ICC, in particular, create mechanisms for the rapid execution of decisions of international courts, including on the extradition of accused persons. This includes ensuring adequate legal assistance for investigations of international crimes on the territory of Ukraine and creating favorable conditions for the execution of international arrest warrants. Researchers also quite rightly state that the direction of adaptation of criminal legislation is not entirely correct. In particular, in the context of the national criminalization of genocide, it is about the newly created flaw of Article 442 of the Criminal Code of Ukraine by the legislator, which is that, unlike the Elements of Crimes, which provide an exhaustive list of manifestations of genocide in the form of "causing serious bodily or mental harm", the note to Article 442 of the Criminal Code defines the concept of "serious harm" by means of a closed list. Konstantin Zadoya correctly emphasizes that "according to the practice of the ICC, this form of genocide can also be manifested in other actions, for example, in the forcible transfer of members of a protected group, which is extremely relevant for the Ukrainian situation[69].

3. For proper coordination of investigations and trials, Ukraine can create joint working groups with the ICC, including lawyers, prosecutors and experts. This will facilitate the rapid collection of evidence, streamline processes, and avoid duplication of effort.

4. To ensure the implementation of the decisions of the ICC and other international institutions, Ukraine may establish independent bodies to monitor the implementation of international judicial decisions, including the verification of the execution of sentences and compensation for victims.

5. Effective mechanisms should be established to protect witnesses and victims who may be involved in ICC proceedings to ensure their safety and the ability to testify without risk to their lives. This includes the development of resettlement and protection programs for persons participating in investigations.

6. Ukraine should actively contribute to the reform of international criminal law, in particular through cooperation with the ICC to improve existing norms, in particular regarding mechanisms for bringing to justice crimes related to hybrid warfare, terrorism, and the destruction of cultural heritage.

In general, successful cooperation with the ICC and other international institutions depends on the active political will of Ukraine, as well as the readiness to adapt national legislation to the requirements of international legal standards. Only through deep integration of international and national justice can justice be achieved for the victims of war and ensure accountability for those who committed war crimes.

## Conclusions and recommendations

[69] Kostyantyn Zadoya Chronicles of the birth of a cargo cult: how and why the process of harmonizing Ukrainian criminal legislation with international criminal law is moving in the wrong direction. 11.12.2024. https://ccl.org.ua/positions/hroniky-narodzhennya-odnogo-kargo-kultu-yak-ta-chomu-proczes-garmonizacziyi-ukrayinskogo-kryminalnogo-zakonodavstva-z-mizhnarodnym-kryminalnym-pravom-ruhayetsya-u-nepravylnomu-napryamku/?fbclid=IwZXh0bgNhZW0CMTEAAR3Co4UvmlUtTXsnSfsb_XTcIH-85OLm3xor-BzMNS2kokXYTHdB5JJa5oo_aem_aMbPPr6XrW-gn_KXKwmosQ

Ukraine has a significant evidence base to initiate a case on human rights violations, including acts of genocide committed by Russia during the armed conflict. In accordance with international standards, in particular the Convention on the Prevention of Genocide, there are clear criteria for defining crimes such as mass murder, deportation, destruction of cultural heritage, and other crimes on ethnic, racial, and religious grounds.

Ukraine has a sufficient amount of documented facts of violations, but collecting evidence of genocidal intent is a complex process. The politicization of international justice creates additional challenges, but there is an opportunity to effectively present evidence through the participation of international human rights organizations and partner states. Ukraine's cooperation with the International Criminal Court , the European Court of Human Rights and other international institutions is an important aspect for the proper investigation of crimes.

Recommendations for Ukraine in further work on proving the genocide: Continued collection of evidence, especially victim and eyewitness testimony, is key to building a strong evidence base that meets international standards. Ukraine should actively engage international partners, human rights organizations and experts to provide technical and legal support in the process of collecting evidence and presenting the case before international institutions. Ukraine should continue reforms of the national justice system, ensuring its compliance with international requirements, in particular, in the area of cooperation with the ICC.

Thus, the Ukrainian case is a potential precedent for the development of international criminal law, in particular in the context of qualifying genocide in modern armed conflicts, such as hybrid wars. This will create new legal instruments to fight impunity. The genocide trial in Ukraine will help clarify the norms of international criminal law, in particular, to determine the criteria and standards for establishing genocide, as well as to take into account new forms of violations, such as the destruction of cultural heritage and deportation.

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# СУДОВІ ПРОВАДЖЕНЯ ЩОДО ГЕНОЦИДУ В МІЖНАРОДНОМУ КРИМІНАЛЬНОМУ СУДІ: ВИКЛИКИ ВСТАНОВЛЕННЯ ФАКТІВ, УКРАЇНСЬКИЙ КЕЙС ТА СТАНДАРТИ ЄСПЛ

***Анотація***

*Переслідування злочину геноциду в Міжнародному кримінальному суді (МКС) супроводжується суттєвими викликами щодо встановлення фактів, збирання доказів та їх правової інтерпретації. У статті проаналізовано складнощі доведення спеціального наміру (геноцидного наміру), питання допустимості доказів, а також роль міжнародного співробітництва у забезпеченні притягнення винних до відповідальності. Окрему увагу приділено українському кейсу, в межах якого розглядаються правові та процесуальні перешкоди для встановлення факту геноциду відповідно до Римського статуту. Крім того, досліджуються стандарти Європейського суду з прав людини (ЄСПЛ), релевантні для проваджень у справах про геноцид, із акцентом на перетині права прав людини та міжнародного кримінального правосуддя. Порівняння підходів МКС та ЄСПЛ дає змогу продемонструвати необхідність розбудови дієвих механізмів розслідування, належного захисту свідків і дотримання стандартів належної правової процедури. Зроблені висновки підкреслюють важливість посилення міжнародно-правових механізмів з метою підвищення ефективності переслідування за злочин геноциду.*

***Ключові слова**: Кримінальне провадження, належна правова процедура, допустимість доказів, встановлення фактів, розслідування міжнародних злочинів, міжнародне співробітництво, прокурор, права потерпілих, захист свідків.*

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# UNDOING THE GROUP'S FABRIC: SOCIAL DISINTEGRATION AS A POSSIBLE MANIFESTATION OF GENOCIDAL INTENT

***Abstract***

*The fundamental element of genocide, the special intent "to destroy" a protected group, has given rise to two possible readings of its scope. A narrow view limits intended destruction to physical and biological forms only, while a broad approach dictates that the intent can be manifested in the desired social disintegration of a human group, i.e., destruction as a social unit. This debate as to the potential place of social disintegration within the intent element remains far from being settled in the contemporary law of genocide, and direct and rigorous analysis of the issue in the jurisprudence and doctrine has been relatively rare. The present article aims to remedy this gap by elucidating the essence of genocidal intent through fundamental rules of treaty interpretation. It concludes that nothing in the ordinary meaning of the term "to destroy" in its context, in light of the Genocide Convention's object and purpose, as well as the travaux préparatoires limits intended destruction to physical and biological forms only. It further explains how, despite seemingly contradictory wording of reasoning common to case-law of international tribunals, the latter, too, intentionally or not, implied a broad reading of the intended destruction in their analysis. The article points to the apparent recurrent and widespread confusion between "destruction" in the sense of modus operandi of underlying acts and "destruction" in the meaning of the intent (i.e., intended outcome). Finally, it provides for important considerations as to why reading social disintegration into the genocidal intent favors the soundest possible interpretation of the law of genocide.*

***Key Words:*** *international criminal law, genocide, Genocide Convention, genocidal intent, dolus specialis, destruction, social disintegration.*

## Introduction

The universally recognized definition of genocide premises the crime on the central element of special intent to destroy one of the four protected groups (*i.e.,* national, ethnical, racial or religious) in whole or in part. Yet, what the term "to destroy" entails remains a contested area in the law of genocide. While initially, some drafters of the Genocide Convention (including Raphael Lemkin, the founding father of the term "genocide") envisioned the crime as incorporating three categories of punishable destruction – physical, biological, and cultural – only the former two made it to the final text of the Convention. Today, discussions as to whether the so-called "cultural genocide" (*i.e.,* acts aimed at destroying the group's linguistic,

religious or cultural identity) within the crime's definition seems unequivocal – it is not.[1]

Nevertheless, the bare formulation of the crime as it stands in the Convention and customary international law leaves an important question open. Does the term "to destroy" within genocidal intent incorporate "social destruction" of the group or its part (hereinafter interchangeably used with "social disintegration"), as opposed to merely physical or biological destruction? In other words, can genocidal intent take the form of disintegrating the group as a social unit via five exhaustive underlying acts[2] in combination with other heinous conduct without necessarily aiming to achieve the physical or biological elimination of every or nearly every group member?

To date, international and domestic jurisprudence has not provided an unambiguous answer. Certain domestic jurisdictions accepted that the concept of destruction incorporates annihilation of a group "as a social unit" as opposed to merely physical and biological annihilation,[3] with the legitimacy of this interpretation being further upheld by the European Court of Human Rights (hereinafter – "ECtHR").[4] Certain Chambers of the International Criminal Tribunal for the Former Yugoslavia (hereinafter – "ICTY") similarly supported the idea that genocidal intent must aim at the destruction of the group "as a separate and distinct entity", which does not require the actual consequence of death of the group members and can be established in cases where "the group ceases to exist as a group".[5] At the same time, other Chambers consistently pronounced that the notion of destruction refers to physical or biological forms only excluding acts seeking to annihilate cultural or *sociological* elements of the group or other forms of the group's identity.[6] The International Court of Justice (hereinafter – "ICJ") was even more explicit by stating that even those underlying acts that by themselves do not entail physical or biological annihilation of a human being (*e.g.,* causing serious mental harm or transfer of children) must be "carried out with

[1] See, for example, International Law Commission, "Draft Code of Crimes against the Peace and Security of Mankind with commentaries," Yearbook of the International Law Commission, 1996, vol. II, Part Two (hereinafter – "ILC, "*Draft Code of Crimes against the Peace and Security of Mankind with commentaries*"), 45, para. 7.*"*

[2] The definition of the crime in the Genocide Convention, as further reflected in other internatinal instruments and customary international law, limits the scope of *actus reus* to the exhaustive list of five underlying acts, namely killing, causing serious bodily or mental harm, deliberate infliction of life conditions calculated to bring about physical destruction of the group or its part, prevention of births, and forcible transfer of children to another group. See Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 United Nations Treaty Series 276 (hereinafter – "Genocide Convention"), Article II.

[3] Federal Constitutional Court of Germany, No. 2 BvR 1290/99, Order of December 12, 2000, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html (hereinafter – "Federal Constitutional Court of Germany, No. 2 BvR 1290/99"), paras 22-28.

[4] *Case of Jorgic v. Germany*, App. no. 74613/01, Judgment, July 12, 2007, https://www.legal-tools.org/doc/812753/pdf, paras 103-116.

[5] *Prosecutor v. Blagojević and Jokić* (Trial Judgement), IT-02-60-T, January 17, 2005, https://www.legal-tools.org/doc/7483f2/pdf/ (hereinafter – "*Blagojević and Jokić* Trial Judgement), paras 657-666. Similarly, see *Prosecutor v. Krajisnik* (Trial Judgment), IT-00-39-T, September 27, 2006, https://www.refworld.org/jurisprudence/caselaw/icty/2006/en/91994, (hereinafter – "*Krajisnik* Trial Judgment"), para. 854, as well as *Prosecutor v. Krstić* (Appeals Judgment), IT-98-33-A, April 19, 2004 https://www.refworld.org/jurisprudence/caselaw/icty/2004/en/33340 (hereinafter – "*Krstić* Appeals Judgment"), Partial Dissenting Opinion of Judge Shahabuddeen, paras 50-52.

[6] Among others, see *Prosecutor v. Krstić* (Trial Judgment), IT-98-33-T, August 2, 2001, https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/40159 (hereinafter – "*Krstić* Trial Judgment"), para. 580; *Prosecutor v. Semanza* (Judgement and Sentence), ICTR-97-20-T, May 15, 2003, https://www.refworld.org/jurisprudence/caselaw/ictr/2003/en/61864 (hereinafter – "*Semanza* Judgement and Sentence"), para. 315; *Prosecutor v. Gacumbitsi* (Trial Judgement), ICTR-2001-64-T, June 17, 2004, https://www.legal-tools.org/doc/b4e8aa/pdf (hereinafter – "*Gacumbitsi* Trial Judgement"), para. 253; *Prosecutor v. Muhimana* (Trial Judgement), ICTR-95-1B-T, April 28, 2005, https://www.legal-tools.org/doc/87fe83/pdf (hereinafter – "*Muhimana* Trial Judgement"), para. 497; *Prosecutor v. Popović* (Trial Judgement), IT-05-88-T, June 10, 2010, https://www.refworld.org/jurisprudence/caselaw/icty/2010/en/33661 (hereinafter – "*Popović et al.* Trial Judgement"), para. 822, *Prosecutor v. Tolimir* (Trial Judgement), IT-05-88/2-T, December 12, 2012, https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf (hereinfter – "*Tolimir* Trial Judgement"), paras 741, 746; *Prosecutor v. Tolimir* (Appeals Judgment), IT-05-88/2-A, April 8, 2015, https://www.legal-tools.org/doc/010ecb/pdf, para. 230.

the intent of achieving the physical or biological destruction of the group".[7]

Likewise, legal doctrine has, to date, brought relatively little clarity leaving the issue unsettled. Attempts to address it directly have been relatively rare, although certain prominent legal voices, such as L. Berster,[8] C. Kreß,[9] G. Werle and F. Jessberger,[10] P. Behrens,[11] W. Schabas,[12] engaged in the relevant analysis (albeit to varying degrees of rigor).[13]

This article aims to provide a sound interpretation of the term "to destroy" within genocidal intent following the fundamental rules of treaty interpretation. Upon the analysis of the ordinary meaning of the term "to destroy" used in its context and in light of the object and purpose of the Genocide Convention, the article makes a recourse to supplementary means of interpretation. It provides an overview of relevant jurisprudence and commentaries in order to establish whether intended destruction may expand to social disintegration beyond physical and biological forms only. Particularly, it examines an apparently prevalent confusion between the notion of "destruction" in the meaning of *modus operandi* of underlying acts and "destruction" within the scope of genocidal intent. Finally, it provides for key arguments both in favor and against the inclusion of social disintegration under the umbrella of the intent "to destroy" outlining several important reasons as to why the *mens rea* element of genocide can and should extend to intended social disintegration.

## The term "to destroy" in light of the fundamental rules of treaty interpretation

Vienna Convention on the Law of Treaties (hereinafter – "VCLT") provides for the fundamental rules of treaty interpretation reflective of customary international law[14] that present the governing framework to establish the meaning of the term "to destroy" within the element of *dolus specialis*, *i.e.,* genocidal intent. Article 31 of the VCLT stipulates that treaty terms shall be interpreted in good faith according to their ordinary meaning in their context and in the light of the treaty's object and purpose.[15] Additionally, the interpretation process shall encompass subsequent agreements between the parties related to the interpretation or application of the treaty provisions, subsequent practice in the treaty application establishing the parties' agreement on the interpretation of certain provisions, and relevant international law rules applicable between the parties[16] (*i.e.,* all recognized and binding sources of law that have a potential to assist in the interpretation process).[17] Subsequent practice equally encompasses decisions of international courts and tribunals empowered by the parties with a

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment, 2015 ICJ Reports 3, https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf (hereinafter – "*Croatia v. Serbia*"), para. 136.

[8] Lars Berster, "Commentary to Article II," in *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary,* ed. Christian J. Tams, Lars Berster, and Björn Schiffbauer (C.H. Beck – Hart – Nomos, 2014), 81-83, 124-125, 128, 149-151 (hereinafter – "Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*"); Lars Berster, "The Alleged Non-Existence of Cultural Genocide," *Journal of International Criminal Justice* 13, no. 4 (2015): 677, https://doi.org/10.1093/jicj/mqv049 (hereinafter – "Berster, "The Alleged Non-Existence of Cultural Genocide").

[9] Claus Kreß, "The Crime of Genocide under International Law," *International Criminal Law Review* 6, no. 4 (2006): 461, https://doi.org/10.1163/157181206778992287 (hereinafter – "Kreß, "The Crime of Genocide under International Law"), 486-489.

[10] Gerhard Werle and Florian Jessberger, *Principles of international criminal law* (4th ed., Oxford University Press, 2020) (hereinafter – "Werle and Jessberger, *Principles of international criminal law*"), 364.

[11] Paul Behrens, "The mens rea of genocide," in *Elements of Genocide,* ed. Paul Behrens and Ralph Henham (Routledge, 2013), 82-86.

[12] William Schabas, *Genocide in International Law. The Crime of Crimes* (3rd ed., Cambridge University Press, 2025) (hereinafter – "Schabas, *Genocide in International Law*"), 233-236, 336-340.

[13] See various other authorities as collated in Berster, "The Alleged Non-Existence of Cultural Genocide," 678, footnote 2.

[14] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties. A Commentary* (Springer, 2018) (hereinafter – "Dörr and Schmalenbach, *VCLT. A Commentary*"), 561

[15] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 United Nations Treaty Series 331 (hereinafter – "VCLT"), Article 31(1).

[16] *Ibid*.

[17] Dörr and Schmalenbach, *VCLT. A Commentary*, 604-605; Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009) (hereinafter – "Mark E. Villiger, *Commentary on the VCLT*"), 432-433; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) (hereinafter – "Orakhelashvili, *The Interpretation of Acts and Rules*"), 365-371.

mandate to interpret the treaty.[18] In the context of the law of genocide, this inevitably includes jurisprudence of judicial bodies vested with power to directly or indirectly apply and interpret the Genocide Convention, such as the ICJ, the ICTY and the International Criminal Tribunal for Rwanda (hereinafter – "ICTR").

Where this interpretative process leaves the meaning of terms ambiguous or obscure or leads to a manifestly absurd or unreasonable result, recourse may be made to supplementary means of interpretation.[19] They include *travaux préparatoires*, the circumstances of the treaty's conclusion,[20] as well as "subsequent practice which either was not that of parties (but, for example, of international organs) or which does not relate to the application of the treaty or does not establish an agreement of the parties" where it can support the interpretation process.[21] This necessarily, too, justifies the recourse to international jurisprudence, authoritative commentaries and the pronouncements of other international organs, such as the United Nations (hereinafter – "UN") bodies.

The starting point of the interpretation involves the analysis of the ordinary meaning[22] of the term "to destroy". The verb can be defined in several interconnected ways, namely meaning "to put out of existence",[23] "to damage something, especially in a violent way, so that it […] no longer exists"[24] or "to cause so much damage to [something] that it is completely ruined or does not exist any more".[25] As such, while the verb "destroy" can be synonymous to the terms "kill", "ruin", "neutralize", "annihilate", and "vanquish",[26] nothing in the ordinary meaning of the term necessarily limits the form in which destruction can occur. Putting it in the context of the crime of genocide, nothing in the ordinary meaning of the term "to destroy" in the definition of intent *per se* points in the direction of physical and/or biological forms of sought destruction only.

The initial vision of the term "genocide" by its author, Raphael Lemkin, further reinforces this point, illustrating the potential range of alternative forms "destruction" of a human group may undertake. In his first treatise introducing the word "genocide" into the international law plane, "Axis Rule in Occupied Europe", Lemkin defined the notion of "destruction" broadly in comparison to what later made its way to the Convention's final text.[27] To Lemkin, genocide did not necessarily entail the group's "immediate destruction", such as the one accomplished by mass killings of all group members.[28] Genocide could also take the form of "a coordinated plan of different actions aiming at the destruction of essential foundations of the life" of the group that aimed at annihilating the group as such.[29] The forms of such destruction varied and included various measures in order to disintegrate socio-political foundations of the group, such as its "culture, language, national feelings, religion, and the economic existence, […and] destruction of the personal security, liberty, health, dignity, and […] lives" of group members.[30] Lemkin thus outlined a variety of what he labelled as "techniques of genocide". In addition to biological and physical targeting, they incorporated political, social, cultural,

[18] See, *e.g.,* Orakhelashvili, *The Interpretation of Acts and Rule*s, 357; Dörr and Schmalenbach, *VCLT. A Commentary*, 569-570; Ulf Linderfalk, *On the Interpretation of Treaties* (Springer, 2017), 165-166, 171; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2017), 254-259.

[19] VCLT, Article 32.

[20] *Ibid*.

[21] Dörr and Schmalenbach, *VCLT. A Commentary*, 627. See also Y. le Bouthillier, "1986 Vienna Convention: Article 32 Supplementary means of interpretation," in *The Vienna Conventions on the Law of Treaties: A Commentary*, ed. Olivier Corten and Pierre Klein (Oxford University Press, 2011), 861-863; Villiger, *Commentary on the VCLT*, 445-446.

[22] Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary*, 17.

[23] "Destroy," Merriam-Webster, accessed March 27, 2025, https://www.merriam-webster.com/dictionary/destroy.

[24] "Destroy," Cambridge Dictionary, accessed March 27, 2025, https://dictionary.cambridge.org/dictionary/english/destroy. See also "Destroy," Oxford Learner's Dictionary, accessed March 27, 2025, https://www.oxfordlearnersdictionaries.com/definition/english/destroy.

[25] "Destroy," Collins Dictionary, accessed March 27, 2025, https://www.collinsdictionary.com/dictionary/english/destroy.

[26] "Destroy," Merriam-Webster, accessed March 27, 2025, https://www.merriam-webster.com/dictionary/destroy.

[27] Raphael Lemkin, *Axis Rule in Occupied Europe; Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law, 1944), 79.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

economic, religious and moral methods of "destruction of the national pattern".[31] Hence, the ordinary meaning of the term "to destroy" within genocidal intent is not immediately conclusive as to the possibility to encompass social versus physical and biological destruction only. In turn, it equally does not rule out the reading of social disintegration into the definition of genocidal intent.

The context of the use of the term "to destroy" in the Genocide Convention in light of the Convention's object and purpose is the second step to follow in order to elucidate the ordinary meaning. The Convention's origins showcase the intention "to condemn and punish genocide as "a crime under international law"" that involves "a denial of the right of existence of entire human groups, a denial which shocks the conscience of [hu]mankind and results in great losses to humanity".[32] The Convention was thus preoccupied with a purpose of "liberat[ing] [hu]mankind from such an odious scourge".[33] The objects of the Convention are "purely humanitarian and civilizing", namely "to safeguard the very existence of certain human groups and […] to confirm and endorse the most elementary principles of morality".[34]

As such, the context, object and purpose fail to provide additional clarity as to the scope of the term "destruction". If the essence of genocide is denying entire human groups the right to exist that is to be condemned, then condemnation and punishment of genocide may equally extend to acts undertaken to achieve the group's social dissolution in addition to its physical and biological annihilation. Where intended social disintegration is similar or equal in effect to physical and biological disappearance, it is hard to see why only the latter is to be criminalized, leaving the former unpunished, if spirit of securing the Convention's object and purpose.

At the same time, the Convention's object and purpose should be viewed in light of its overarching objective of ensuring the broadest possible participation of states.[35] This, in particular, led to the exclusion of certain debatable notions broadening the crime's scope (for example, the so-called "cultural genocide" and political, economic, social and other groups within the protective scope). One may claim that this important aspect of the object and purpose would favor a restricted reading of the intent "to destroy" in case of doubts. This may as well exclude social disintegration from the scope of genocidal intent given that states did not explicitly envision it in the Convention.

With the meaning of "destruction" remaining ambiguous or obscure, recourse should be made to supplementary means of interpretation, particularly the *travaux.* Explicit inclusion or in-depth discussions of the group's social disintegration or dissolution as a potential form of intended destructive outcome are mostly missing from the *travaux.* The notable exception is presented in one of the first drafts of the Convention presented by Saudi Arabia that defined the crime of genocide as, *inter alia*, "planned disintegration of the political, social or economic structure of a group, people or nation".[36] However, the proposed provision was not mirrored in any subsequent drafts. At the same time, important cues can be extracted from multiple bids relevant to how states envisioned the potential place for cultural destruction under the Convention.

From the beginning, the drafting process significantly trimmed Lemkin's initial broad authorial vision of "destruction". Already, in one of the first drafts prepared by a group of three experts (including Lemkin) on behalf of the UN Secretariat, the notion of genocide undertook a more structured form. The crime was initially defined as acts directed against a protected group

[31] *Ibid.*, 82-90.

[32] *Reservations to the Convention on Genocide*, Advisory Opinion, 1951 ICJ Reports 15, https://www.icj-cij.org/sites/default/files/case-related/12/012-19510528-ADV-01-00-EN.pdf (hereinafter – "*Reservations* Advisory Opinion"), 23 with the reference to UN General Assembly (hereinafer – "UNGA"), *The Crime of Genocide*, UN Doc. A/RES/96(I), https://digitallibrary.un.org/record/209873?v=pdf.

[33] Genocide Convention, Preamble.

[34] *Reservations* Advisory Opinion, 23.

[35] *Ibid.*, 24.

[36] UNGA, Sixth Committee, "Delegation of Saudi Arabia: Draft Protocol for the Prevention and Punishment of Genocide," UN Doc. A/C.6/86, November 26, 1946, https://digitallibrary.un.org/record/752077?ln=en&v=pdf, 1.

"with the purpose of destroying it in whole or in part, or *of preventing its preservation or development* [emphasis added]",[37] the latter appearing to be a broad definition of the intent going beyond mere destruction. The exhaustive list of prohibited acts was split into three distinct categories broadly representing perceived physical, biological, and cultural forms of destruction.[38] While some conducts of what was labelled as "cultural genocide" – could as well by their nature – constitute means to achieve the group's disintegration as a social unit, most experts' commentaries focused on these conducts as an expression of *underlying acts* rather than the sub-element of the intent – a distinction that is important to bear in mind throughout the analysis of all subsequent jurisprudence provided below.

Several notable examples are, however, worth singling out. For instance, when defining the underlying act of "cultural genocide" in the form of "forced and systematic exile of individuals representing the culture of a group", the experts' commentary noted that disappearance of such individuals would turn the group into nothing "more than an amorphous and defenceless mass".[39] This reads as a hint on the idea that a group can be disintegrated and eventually destroyed through targeting of its emblematic representatives – without physically eliminating all other members – whose disappearance would turn the group into a mere accumulation of individuals. Similarly, the underlying act in the form of "forced transfer of children to another human group" was incorporated with the view that it "tends to bring about the disappearance of the group as a cultural unit in a relatively short time",[40] again leaving the lives of other members intact. As will be explained further below, both ideas of targeting representative group members as an indicator of genocidal intent and destroying the group via forced transfer of children eventually made their way to the Convention's interpretation, albeit under different pretexts and reasons.

Throughout further negotiations, the potential inclusion of "cultural genocide" gave rise to two opposing sets of views. Although not directly relevant to the notion of "social disintegration", these views are important to examine for two reasons: first, because of the apparent resemblance between cultural and social forms of destruction as further perceived in jurisprudence, and, second, because the exclusion of "cultural genocide" from the Convention was subsequently repeatedly used as a pretext to limit the interpretation of intended destruction to physical and biological forms only.

Delegations opposing the incorporation of "cultural genocide" into the Convention advanced several core claims. They argued that cultural destruction did not reach a threshold of seriousness equal to physical and biological forms,[41] that the concept was overly vague and risked making the definition of genocide

[37] UN Economic and Social Council (hereinafter – "ECOSOC"), "Draft Convention on the Crime of Genocide," UN Doc. E/447, June 26, 1947, https://digitallibrary.un.org/record/611058?v=pdf, 5 (Article I(II)).

[38] *Ibid*., 5-7.

[39] *Ibid*., 28.

[40] *Ibid*., 27.

[41] See, for example, UNGA, "Draft Convention on the Crime of Genocide: communications received by the Secretary-General," UN Doc. A/401/Add.2, October 18, 1947, https://digitallibrary.un.org/record/603201?v=pdf, Communication to the UN Secretary-General received from the United States of America (hereinafer – "UN Doc. A/401/Add.2"), 5. See also UN ECOSOC, "Prevention and punishment of genocide: historical summary, 2 November 1946 – 20 January 1948," UN Doc. E/621, January 26, 1948, https://digitallibrary.un.org/record/3964943?v=pdf (hereinafer – "UN Doc. E/621"), 48 (statement by the United States of America); UN ECOSOC, "Ad Hoc Committee on Genocide: summary record of the 14th meeting, Lake Success, New York, Wednesday, 21 April 1948," UN Doc. E/AC.25/SR.14, April 27, 1948, https://digitallibrary.un.org/record/601789?ln=en&v=pdf (hereinafter – "UN Doc. E/AC.25/SR.14"), 10 (statement by the United States of America); UNGA, Sixth Committee, "Fortieth meeting, Lake Success, New York, on Thursday, 2 October 1947 at 11 a.m., continuation of the discussion on the draft convention on the crime of genocide (document A/362, A/382, A/401, A/C.6/147, A/C.6/149 and A/C.6/151)," UN Doc. A/C.6/SR.40), October 2, 1947, https://docs.un.org/en/A/C.6/SR.40, 27 (statement by Egypt); UN ECOSOC, "218th meeting held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 3 p.m.," UN Doc. E/SR.218, August 26, 1948, https://docs.un.org/en/E/SR.218 (hereinafter – "UN Doc. E/SR.218"), 707 (statement by Canada); UNGA, Sixth Committee, "Sixty-fourth meeting, Palais de Chaillot, Paris, Friday, 1 October 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.64, October 1, 1948, https://digitallibrary.un.org/record/603890?v=pdf&ln=en (hereinafter – "UN Doc. A/C.6/SR.64"), 15 (statement by India); UN ECOSOC, "Ad Hoc Committee on Genocide, Commentary on Articles adopted by the Committee," UN Doc. E/AC.25/W.1, April 26, 1948, https://digitallibrary.un.org/record/601993?v=pdf (hereinafer – "UN Doc. E/AC.25/W.1"), 4.

meaningless,[42] and that it was purely a matter of human rights and minority protection.[43]

Arguments favoring the inclusion of "cultural genocide" treated physical and biological and cultural forms of genocide as tantamount and indivisible,[44] claiming that genocide could equally occur through both causing the group's physical or biological disappearance and abolishing its special traits without annihilating the lives of group members.[45] Thus, as some delegates claimed, while differing in *modus operandi*, both forms of destruction had a shared objective of causing the group's disappearance.[46]

Certain delegations, however, moved closer to hinting on the idea of social disintegration. They were even more precise in stating that genocide did not require the extermination of the group's every individual member, and a human group could disappear even if its members survived physically or biologically.[47] The argument stressed that confining genocide to physical disappearance of group members is inherently wrong because individual group members can continue existing even where "the group as such had been killed off".[48]

New Zealand's delegation's intervention is particularly remarkable for the discussion on the social aspect of the intended destruction. The delegate provided an example where perpetrators might choose to physically eliminate older members of the group while preserving the youth and converting it ideologically into another group's identity.[49] In such a case, even with individual members of the group surviving, the group would face annihilation.

"Cultural genocide" eventually did not make it into the Convention being excluded after lengthy debates by 25 votes, with 16 oppositions, 4 abstentions, and 13 absentees.[50] Only one out of the previously listed underlying acts of "cultural genocide" – forcible transfer of children – made

[42] UN ECOSOC, "219th meeting held at the Palais des Nations, Geneva, on Thursday, 26 August 1948, at 9 p.m.," UN Doc. E/SR.219, August 26, 1948, https://digitallibrary.un.org/record/826235?v=pdf&ln=en, 727 (statement by United Kingdom); UNGA, Sixth Committee, "Sixty-third meeting, Palais de Chaillot, Paris, Thursday, 30 September 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.63, September 30, 1948 https://docs.un.org/en/A/C.6/SR.63 (hereinafter – "UN Doc. A/C.6/SR.63"), 8 (statement by France); UNGA, Sixth Committee, "Sixty-fifth meeting, Palais de Chaillot, Paris, Saturday, 2 October 1948, at 10.40 a.m.," UN Doc. A/C.6/SR.65, October 2, 1948 https://digitallibrary.un.org/record/603891?ln=en&v=pdf (hereinafter – "UN Doc. A/C.6/SR.65"), 29 (statement by France); UNGA, Sixth Committee, "Eighty-third meeting, Palais de Chaillot, Paris, Monday, 25 October 1948, at 3 p.m.," UN Doc. A/C.6/SR.83, October 25, 1948, https://digitallibrary.un.org/record/604635?v=pdf (hereinafter – "A/C.6/SR.83"), 203 (statement by Netherlands).

[43] UN Doc. A/401/Add.2, 5 (statement by the United States of America); UN Doc. E/621, 48 (statement by the United States of America); UN Doc. A/C.6/SR.63, 8 (statement by France); UN Doc. A/C.6/SR.65, 29 (statement by France); UN Doc. E/SR.218, 707 (statement by Canada). See also UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Eleventh Meeting, Lake Success, New York, Friday, 16 April 1948, at 2.00 p.m.," UN Doc. E/AC.25/SR.11, April 21, 1948, https://digitallibrary.un.org/record/601781?v=pdf, 4 (statement by France); UN ECOSOC, "Prevention and Punishment of Genocide. Comments by Governments on the Draft Convention prepared by the Secretariat (E/447)," UN Doc. E/623/Add.3, April 22, 1948, Comments submitted by the Netherlands, in *The Genocide Convention: the travaux préparatoires*, ed. Hirad Abtahi and Philippa Webb (Martinus Nijhoff Publishers, Leiden, 2008), 636; UN Doc. E/AC.25/SR.14, 7-8, 10-11 (statements by France and the United States of America); UN Doc. A/C.6/SR.64, 16-17 (statements by Uruguay and the United Kingdom); UN Doc. E/AC.25/W.1, 4; UN Doc. A/C.6/SR.83, 197 and 203 (statements by Brazil and Netherlands).

[44] UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Fifth Meeting, Lake Success, New York, Tuesday, 8 April 1948, at 2 p.m.," UN Doc. E/AC.25/SR.5, April 16, 1948, https://digitallibrary.un.org/record/601707?v=pdf, 5 (statement by China).

[45] UN Doc. E/AC.25/W.1, 4; UN Doc. A/C.6/SR.65, 27 (statement by Ukrainian Soviet Socialist Republic); UNGA, Sixth Committee, "Sixty-sixth meeting, Palais de Chaillot, Paris, Monday, 4 October 1948, at 10.45 a.m.," UN Doc. A/C.6/SR.66, October 4, 1948, https://digitallibrary.un.org/record/603892?v=pdf, 32-33 (statement by Lebanon); UN Doc. A/C.6/SR.83, 193 and 205 (statements by Pakistan and Czechoslovakia); UN ECOSOC, "Ad Hoc Committee on Genocide, Submitted by the Delegation of the Union of Soviet Socialist Republics on 5 April 1948," UN Doc. E/AC.25/7, April 7, 1948, https://digitallibrary.un.org/record/601592?v=pdf, 2.

[46] UN Doc. A/C.6/SR.83, 203-204 (statement by Ecuador).

[47] UN ECOSOC, "Ad Hoc Committee on Genocide, Second Meeting, Lake Success, New York, Monday 5 April 1948, at 3 p.m.," UN Doc. E/AC.25/SR.2, April 6, 1948, https://digitallibrary.un.org/record/601678?ln=en&v=pdf, 4 (statement by Lebanon); UN Doc. E/AC.25/SR.14, 2-3 (statement by China); UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Thirteenth Meeting, Lake Success, New York, Tuesday, 20 April 1948, at 2 p.m.," UN Doc. E/AC.25/SR.13, April 29, 1948, https://digitallibrary.un.org/record/601786?ln=en&v=pdf, 13 (statement by Poland); UN ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Third Meeting, Lake Success, New York, 15 April 1948, at 2 p.m.," UN Doc. E/AC.25/SR.4, April 15, 1948, https://digitallibrary.un.org/record/601703?ln=en&v=pdf (hereinafter – "UN Doc. E/AC.25/SR.4"), 7 (statement by Venezuela).

[48] UN Doc. E/AC.25/SR.4, 7 (statement by Venezuela).

[49] UNGA, Sixth Committee, "Seventy-third meeting, Palais de Chaillot, Paris, Wednesday, 13 October 1948, at 3.15 p.m.," UN Doc. A/C.6/SR.73, October 13, 1948, https://digitallibrary.un.org/record/604081?v=pdf, 94 (statement by New Zealand).

[50] UNGA, Sixth Committee, "Eighty-third meeting, Palais de Chaillot, Paris, Monday, 25 October 1948, at 3 p.m.," UN Doc. A/C.6/SR.83, https://digitallibrary.un.org/record/604635?v=pdf, 206.

it into the final text of the Convention. It was done so upon the clarification from several delegations of their understanding that forcible transfer has "not only cultural, but also physical and biological effects" and was analogous to physical and biological methods of destruction.[51]

Despite marginal discussions trying to justify the inclusion of "cultural genocide" within the crime's definition, the *travaux* reinforced by subsequent practice and doctrine clearly testify against the validity of this suggestion. However, the express exclusion of "cultural genocide" does not resolve the dilemma of social disintegration, primarily for two reasons. First, the social disintegration of the group represents a graver form of annihilation, as opposed to the mere erasure of its identity. Second, discussions surrounding "cultural genocide" mainly related to its inclusion in the list of underlying acts as opposed to its implications for the intent. While it remains relevant to conclude that in the absence of respective underlying acts the intent to destroy the group "culturally" is impossible to accomplish, the discussion on social disintegration is much more nuanced. As will be argued below, it seems possible to achieve the group's social dissolution *through* the exhaustive list of five underlying acts encompassing physical and biological methods of destruction.

Thus, the ordinary meaning of the term "destruction" in light of its context, the Convention's object and purpose, as well as the *travaux*, makes it *prima facie* plausible that the intent "to destroy" may encompass social disintegration committed via five underlying acts. This preliminary conclusion remains to be tested against other supplementary means of interpretation, primarily international jurisprudence.

**Potential room for "social disintegration" within genocidal intent in light of the contemporary jurisprudence**

The most frequently discussed roots of social disintegration within genocidal intent stem from the German domestic courts' rulings in the case of *Nikola Jorgić*, a Bosnian Serb paramilitary convicted for genocide for the incidents of killing more than 20 Bosnian Muslims. In the German courts' interpretation, further upheld by the Constitutional Court, genocidal intent encompasses the destruction of the group "as a social unit with its special qualities, uniqueness and its feeling of togetherness, not exclusively their physical-biological annihilation".[52] The Constitutional Court further reasoned that the criminalization of genocide represents "a legal interest that lies beyond the individual, namely the social existence of a group" which is further indicated by the requirement that genocidal intent "must be directed against the "group as such"".[53]

The case of *Jorgić* proceeded to the ECtHR[54] and the Court upheld the validity of the German courts' interpretation from the standpoint of the legality principle. Jorgić claimed that "a mere attack on the living conditions or the basis of subsistence of a group", such as "ethnic cleansing", with the goal to expel the group from the area, did not constitute genocide.[55] According to the Applicant, destruction within the definition of intent had to be understood "in a biological-physical sense" only and not as directed at a group as a social unit.[56] The ECtHR disagreed. It stated that any system of criminal law inevitably provides for the "element of judicial interpretation" to elucidate doubtful issues and

[51] UNGA, Sixth Committee, "Eighty-second meeting, Palais de Chaillot, Paris, Saturday, October 23, 1948, at 10.30 a.m.," UN Doc. A/C.6/SR.82, https://digitallibrary.un.org/record/604634?ln=en&v=pdf, 186-188 (statements by Greece and the United States of America).

[52] Federal Constitutional Court of Germany, No. 2 BvR 1290/99, para. 20.

[53] *Ibid*., para. 22.

[54] *Jorgic v. Germany*.

[55] *Ibid*., para. 92.

[56] *Ibid*., para. 93.

gradually clarify the law, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[57] In the ECtHR's view, German courts' interpretation of intent as incorporating destruction of the group as a social unit complied with this test.[58] While there was indeed a scholarly disagreement on the question, various authorities at the relevant time construed the notion of intent broadly favouring the interpretation by German courts that was consistent with the essence of genocide as an offence.[59]

Yet, German courts' reasoning in *Jorgić* did not find support from the ICTY. In *Krstić (Trial)*, the Chamber cited German Constitutional Court's pronouncement in *Jorgić* and recalled Lemkin's original broad vision of "destruction" encompassing all forms targeting "a group as a distinct social entity".[60] The Chamber, however, further concluded that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group".[61] At the same time, mere attacks at "cultural or sociological characteristics" forming a distinct identity of a group with the purpose of their annihilation will not qualify a genocide.[62] Various subsequent Chambers restated this pronouncement.[63]

At first glance, one of the immediate suggested readings of this pronouncement may imply the complete rejection of social disintegration from the scope of genocidal intent. However, the actual analysis and findings of Chambers in *Krstić* and subsequent cases present a far more nuanced picture. Taking *Krstić (Trial)* as an example, the Chamber established genocide based on the fact of killing of around 7.000 to 8.000 Bosnian Muslim men in the Srebrenica enclave, combined with the removal of around 25.000 remaining Bosnian Muslim women, children and elderly and the destruction of their homes and mosques.[64]

The Trial Chamber stated that the evidence pointed to the intent of Bosnian Serb forces "to eliminate all of the Bosnian Muslims in Srebrenica as a *community* [emphasis added]".[65] The Bosnian Serb forces should have known that such selective destruction "would have a lasting impact upon the entire group" given its patriarchal nature and precluding Bosnian Muslims' chance of recapturing the territory or re-establishing their presence there.[66] The aforementioned combination of acts "would inevitably result in the *physical disappearance* of the Bosnian Muslim population at Srebrenica [emphasis added]".[67]

The plain reading of the Trial Chamber's pronouncements and accompanying reasoning leaves the understanding of "destruction" within the definition of the intent rather vague. The Chamber consistently references the survival of "the community" – an inherently social, geographically limited notion. When explaining that genocide must consist of acts seeking physical or biological destruction, not attacks on cultural or sociological features, the Trial Chamber seemed to focus on the *actual methods of destruction* as *modus operandi* for the commission of underlying acts, not the intended outcome. In Srebrenica, the majority of the community survived (although displaced), with around one-fifth of the community being physically targeted for destruction. The community was indeed removed from Srebrenica physically, as the Trial Chamber suggested, yet most of its members also physically survived. It thus seems that the Trial Chamber either implied (intentionally or unintentionally) or did not rule out the possibility (despite the actual wording used) that while material elements of underlying acts do not encompass social destruction, it remains a

[57] *Ibid*., para. 101.

[58] *Ibid*., para. 109.

[59] *Ibid*., paras 113-114.

[60] *Krstić* Trial Judgment.

[61] *Ibid*., paras 579-580.

[62] *Ibid*., para. 580.

[63] See *supra* 4.

[64] *Krstić* Trial Judgement, paras 594-596.

[65] *Ibid*., para. 594.

[66] *Ibid*., paras 595, 597.

[67] *Ibid*., para. 595.

possible objective of the intent, where individual members of the group survive, while the group (or its part) does not as such.

The Appeals Judgment that upheld the finding of genocide was seemingly clearer on certain issues, particularly its focus on physical and biological survival. The Appeals Chamber reiterated that the Genocide Convention prohibits "only the physical or biological destruction",[68] which – once again – is an ambiguous statement that can relate to underlying acts rather than the intent itself. It further explained that Bosnian Serb forces' acts undermined the "likelihood of the [Bosnian Muslim] community's physical survival".[69] Given the patriarchal nature of the society, physical destruction of most men led to women being "unable to remarry and, consequently, to have new children" having "severe procreative implications for the Srebrenica Muslim community, potentially consigning the community to extinction".[70] The Chamber concluded that this type of "physical destruction the Genocide Convention is designed to prevent".[71] In response to the Defence's argument that sparing women, children and elderly from killing undermined the finding of genocidal intent, the Chamber stated that their displacement was "an additional means" to "ensure the physical destruction of the Bosnian Muslim *community in Srebrenica* [emphasis added]."[72] Such transfer thus "completed the *removal* of all Bosnian Muslims from Srebrenica [emphasis added]" and eliminated "even the residual possibility" of the community to reconstitute itself.[73]

Repeated reference by the Appeals Chamber to "physical survival" can be read as an indicator that "destruction" within the intent is limited to physical and biological forms only. However, references to "physical survival" seem somewhat superficial and dissonant from the factual analysis undertaken. The very narrative used by the Chamber seemingly testifies that the social disintegration of the *community* was the actual result achieved and intended, not the literal preclusion of physical survival of its members. The Chamber focused its analysis on the emblematic nature of the Srebrenica community, given its prominence and "strategic importance" to both Bosnian Muslims and Serbs,[74] which too refer to the social features of the community rather than individual victims. While the disappearance of men would indeed have a significant impact on the patriarchal society, it would unlikely alone undermine the physical survival of the Bosnian Muslim group – rather, the Srebrenica *community.* This directly stems from the Chamber's conclusion that killings combined with the displacement ensured that the Bosnian Muslim community in Srebrenica was *removed* and further incapable *of reconstituting itself in the area.* Moving from the contrary, theoretically, the remaining part of the group could reconstitute itself elsewhere with the survival of children and other group members or – more broadly – dissolve in a broader Bosnian Muslim group in whole. Nevertheless, what mattered for the analysis and kept being reiterated by Chambers is that Srebrenica disappeared as a Bosnian Muslim *community*. Despite the literal wording used by the Chambers, the actual analysis indicated that social destruction of the part of the Bosnian Muslim group as a distinct community appeared to be the true intent of the perpetrators.

The only reasonable explanation of the conflicting narratives used by both Chambers is that they kept confusing and mixing "destruction" in the meaning of underlying acts and "destruction" as an element of the intent. The former, indeed, consists of physical and biological forms only and cannot extend to attacks on cultural or sociological foundations. The latter, however, does not necessarily require the physical or biological disappearance of the group or its part (unless the Chambers meant physical disappearance in the meaning of *literal*

[68] *Krstić* Appeals Judgment, para. 25.

[69] *Ibid*., para. 28.

[70] *Ibid*.

[71] *Ibid*., para. 29.

[72] *Ibid*., para. 29.

[73] *Ibid*.

[74] *Ibid*., paras 15-16.

*presence in the area*, not survival as the group). This is the only way to explain how individual members of the group – or even the overwhelming majority of the targeted community – can survive while the geographically limited "community" stops existing as a social unit without its further possibility of reconstituting itself. Members of the group continue their existence elsewhere while their community is gone, particularly as a result of effects caused by physical and biological underlying acts of destruction. It remains, however, true that "destruction" in any case should be distinguished from mere "dissolution" in the form of expulsion of the group members (falling short of underlying acts), which – in itself – will not qualify as genocide.[75]

This very logic was spelled out and acknowledged in the partially dissenting opinion of Judge Shahabuddeen to the Appeals Judgment.[76] He stated that allowing a substantial number of Bosnian Muslims in Srebrenica to survive precluded the intent to achieve their physical destruction.[77] A principal distinction must thus be made between the nature underlying acts and the prerequisite intent.[78] Underlying acts must only consist undertake physical or biological forms, but the intent does not need to "lead to a destruction of the same character".[79] It is thus unclear why the intent to achieve a non-physical or non-biological destruction is not encompassed by the Genocide Convention, in cases when it is realized through the five underlying acts.[80] In the words of Judge Shahabuddeen, since protected groups are distinguished by various tangible and intangible characteristics binding "a collection of people as a social unit", destruction of such characteristics through five underlying acts may lead to the effective obliteration of the group that is not physical or biological.[81]

The same confusion between "destruction" in the sense of underlying acts and "destruction" in the meaning of the intent seemingly migrated to later judgments too. Subsequent Chambers took the vague and generic pronouncement in *Krstić (Appeal)* that the "Convention, and customary international law in general, prohibit only the physical or biological destruction" as a basis for stating that the intent too must be limited to physical and biological forms only.[82] A similar dissonant approach has been undertaken by a few other Chambers of the ICTR, where underlying acts were misconstrued as a basis for defining the essence of intent.[83] Even the ICJ seemingly adopted the reasoning stemming from the same confusion. In *Croatia v. Serbia*, the Court noted that underlying acts of causing serious mental harm have to only encompass acts committed with the intent to cause the group's "physical or biological destruction".[84] The only support provided to this conclusion was the fact of the exclusion of underlying acts of "cultural genocide" from the conventional scope leaving only physical or biological genocide covered.[85] Yet again, the exclusion of "cultural genocide" primarily related to the notion of "destruction" manifested in underlying acts, not necessarily the intent as such. The

[75] *Prosecutor v. Stakic* (Trial Judgement), IT-97-24-T, July 31, 2003, https://www.refworld.org/jurisprudence/caselaw/icty/2003/en/40192 (hereinafer – "*Stakic* Trial Judgement"), para. 519.

[76] *Krstić* Appeals Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 46.

[77] *Ibid*.

[78] *Ibid*., para. 47.

[79] *Ibid*.

[80] *Ibid*., para. 48.

[81] *Ibid*., para. 49.

[82] See, *e.g., Popović et al.* Trial Judgement, para. 822 and particularly footnote 2943 misreading *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007 ICJ Reports 43, https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf (hereinafter – "*Bosnian Genocide* Judgment 2007"), para. 344 discussing "destruction" in the meaning of underlying acts. See further *Tolimir* Trial Judgement, para. 746; *Prosecutor v. Mladić* (Trial Judgement), IT-09-92-T, November 22, 2017, https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-09-92/JUD275R0000516226.pdf, para. 3435; *Prosecutor v. Karadžić* (Trial Judgement), IT-95-5/18-T, March 24, 2016, https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf, para. 553.

[83] See, *e.g., Semanza* Judgement and Sentence, para. 315; *Gacumbitsi* Trial Judgement, para. 253; *Muhimana* Trial Judgement, para. 497.

[84] *Croatia v. Serbia*, para. 136.

[85] *Ibid*.

exclusion of underlying acts of "cultural" genocide is in itself not conclusive of the drafters' intention as to the scope of the intent.

Several judgments, however, did deviate from the commonly accepted reasoning based on *Krstić (Appeal)*. *Krajisnik (Trial)* moved closer discussing social disintegration within the scope of genocidal intent. The Chamber claimed that the notion of "destruction" within the intent is not limited to physical and biological forms only since a group can be destroyed in other ways.[86] The Chamber held the transfer of children to be one example thereto.[87] It also referred to "severing the bonds among [group] members" explaining that a group is not amenable to merely physical or biological destruction.[88] Group members remain physical and biological human beings, yet united by intangible bonds, common culture and beliefs.[89] Although the Chamber did not establish genocide based on the available factual pattern, the reasoning presented a notable attempt to provide a more delicate approach to determining the scope of the intended destruction resonating Judge Shahabuddeen's dissent.

In another instance, *Blagojević and Jokić*, the Trial Chamber examined whether forcible transfer of adults fell within the definition of genocide. The Chamber stated that the exclusion of "cultural genocide" from the Convention "[did] not in itself prevent that physical or biological genocide could extend beyond killings".[90] The Chamber concluded that the notion of "destruction" may incorporate the forcible transfer of population (particularly adults), especially if the group is unable to reconstitute itself since physical or biological destruction of the group is not necessarily achieved through deaths only.[91] The Chamber concluded that "a group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land" which forcible transfer is capable of undermining leading to the group's physical or biological destruction.[92]

While the reasoning is interesting from the perspective of bringing in the relevance of social ties for the group's preservation and survival, the overall conclusion seems apparently defective. Even if the described impact upon the group is valid to be anticipated, forcible transfer of adults does not fall within the exhaustive list of underlying acts and, as such, cannot constitute genocide (even though it can – depending on evidence – be indicative of genocidal intent). Here again, there is an important caveat to make: the group's social destruction may arguably reasonably fall under the scope of genocidal intent *solely* if it achieved via five underlying acts. Consequently, it cannot encompass mere deportations or expulsions from the area broadly known under the umbrella of "ethnic cleansing",[93] as well as other persecutory campaigns destroying social ties between the group members and leading to its disappearance.

Hence, even where the wording used by the judgments may seem to indicate otherwise, the actual analysis undertaken by various Chambers does not preclude the possibility of social disintegration being encompassed by genocidal intent; to the contrary, it appears to be supportive of it. There are several important considerations additionally favoring this approach.

[86] *Krajisnik* Trial Judgment, para. 854.

[87] *Ibid.*

[88] *Ibid.*, including footnote 1701.

[89] *Ibid.*, footnote 1701.

[90] *Blagojević and Jokić*, para. 658.

[91] *Ibid*., paras 665-666.

[92] *Ibid*., para. 666.

[93] See, *e.g., Stakic* Trial Judgement, para. 519; *Bosnian Genocide* Judgment 2007, para. 190.

**Other arguments supporting the inclusion of social destruction within the scope of genocidal intent**

First, the fundamental goal behind the criminalization of genocide is to protect the groups' right to exist,[94] which intended destruction in the form of social disintegration is undoubtedly capable of undermining.[95] Genocidal intent must be directed at a group "as a separate and distinct entity" and not simply accumulation of individuals due to their membership in a group.[96] Protected groups are defined by intrinsic intangible features creating strong social bonds uniting group members (e.g., depending on the group, culture, language, religion, national self-identification and national projects – lesser so though for racial groups defined by race as an artificial social construct dependent on the perceived physical traits[97]). Thus, realistically, the groups disappear when these characteristics are eliminated through five underlying acts. For their eradication, the perpetrators do not need to continue the destruction until the actual physical disappearance of (most) every group member. Respectively, a group can be annihilated physically or biologically, but its existence may also cease through its social disappearance as a "as a separate and distinct entity". The Convention's fundamental goal to uphold the diversity of humankind is imperiled equally by social disintegration and physical or biological destruction.[98]

Second, only one underlying act out of five – deliberately inflicting deadly life conditions – incorporates an express *mens rea* requirement of being "calculated to bring about [the group's] *physical* destruction [emphasis added]".[99] While one may read it as another support to the claim that destruction sought within the intent must be physical or biological only, alternative argument may suggest that such specification in the body of an underlying element is rather peculiar and uncommon to four other underlying acts. Moving from the contrary, it may indicate that inflicting deadly conditions is the only underlying act that requires the intent to achieve *physical* destruction while the others fall short of such specification for a reason of simply not requiring them.[100] In other words, the addition indicates that "destruction" within the intent element is broader than within an individual underlying act in question and "extends to dissolving the social bonds".[101]

Implicit reading of physical and biological destruction as an outcome can hypothetically be made in relation to the underlying elements of killing and prevention of births, which do result in the physical or biological destruction of at least a certain degree. However, this logic does not apply to other underlying acts. For example, causing serious mental harm leaves the group's physis (*i.e.,* physical conditions) as such intact.[102] Thus, it cannot be reasonably explained why protection of the group's physical and biological survival only would require the criminalization of the infliction of mental harm.[103] The only sound reason for its inclusion would be "to cover detrimental effects on a group's social texture".[104] Even causing serious bodily (*i.e.,* physical) harm does not as such result in physical destruction.[105] It is thus once again possible for group members subjected to the underlying acts of serious bodily or mental harm to survive even if their group is destroyed.

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[94] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 81; *Reservations* Advisory Opinion 23.

[95] Kreß, "The Crime of Genocide under International Law," 486.

[96] ILC, "*Draft Code of Crimes against the Peace and Security of Mankind with commentaries,"* 45, para. 7.

[97] See, *e.g., Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, September 2, 1998, https://www.refworld.org/cases,ICTR,40278fbb4.html, para. 514.

[98] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 82. See also Berster, "The Alleged Non-Existence of Cultural Genocide," 686-687.

[99] Genocide Convention, Article II(c).

[100] Kreß, "The Crime of Genocide under International Law," 486-487.

[101] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 82.

[102] *Ibid*., 81; Berster, "The Alleged Non-Existence of Cultural Genocide," 689.

[103] *Ibid*.

[104] *Ibid*., 82; Berster, "The Alleged Non-Existence of Cultural Genocide," 689.

[105] Werle and Jessberger, *Principles of international criminal law,* 364.

Yet, the very fact of their survival would entail that the objective of destroying the group physically or biologically was not fully achieved – an interpretative gap that is only possible to remedy with the inclusion of social disintegration within the scope of genocidal intent.

This very logic equally applies to the underlying act of child transfer. While taking children out of the group *may* indeed have biological implications on the group's ability to survive, it remains theoretically possible for the adult population to continue the group's procreation. There are only two unambiguous scenarios in which the transfer of children would lead to the group's biological destruction. The first scenario includes cases when all children are consistently taken away from the group (which is only likely in relatively small communities or those fully controlled by perpetrators), virtually precluding any possibility for the group to procreate. The second scenario only covers cases where the transfer of children is combined with another underlying act of birth preventions *or* if the remaining adult population is physically exterminated. However, the Convention does not impose such conditions which would be logical if physical and biological destruction was intended to be the only manifestation of the intent. Hence, not only the wording of underlying acts is sufficiently open to encompass the intent to socially disintegrate the group,[106] such inclusion is interpretatively desirable to reconcile otherwise arising normative contradictions within the definition of genocide. The Convention is based on the premise that none of the underlying act should be accomplished in its absolute, thus leaving the possibility of the group members' survival when the group as such disappears.

Third, viewed realistically, campaigns of massive blatant physical and biological destruction of human groups, such as the Holocaust that largely inspired the adoption of the Genocide Convention, are relatively rare. *Krstić (Appeal)* implicitly acknowledged this by explaining that Bosnian Serb forces' decision to deport Bosnian Muslim women and children, sparing them from killing, may have been justified by "sensitivity to public opinion" and impossibility to keep secrecy or create a disguise under the pretext of military reasons.[107] Respectively, the fear of retribution can prompt perpetrators to adopt genocidal tactics that may not seem to be the most efficient methods to achieve destruction.[108] Especially in the age of media and rapid spreading of information, perpetrators are more likely to adopt a sophisticated campaign of destruction consisting of a mixture of various underlying acts and other heinous conducts leading to the group's disappearance through social disintegration rather than blanket physical or biological extinction.

A human group disappears when its defining social foundations are gone. Blatant physical or biological extermination of such foundations is one way of ensuring this outcome. However, these foundations may disappear far before physical and biological extermination occurs. It would be absurd to claim that where perpetrators succeeded in achieving their goal of the group's disappearance through a sophisticated targeting campaign involving underlying acts, their conduct will fall short of the genocide qualification *unless* they continue pushing further until actual physical or biological destruction of a sufficient level is ultimately secured (which raises another question as to when this sufficiency is reached).[109]

Fourthly, there is another convincing cue in the jurisprudence supporting the inclusion of social disintegration under the scope of genocidal intent. It is well-recognized that genocidal intent can manifest itself in two forms: to destroy the group in whole or in part. The latter can be materialized through a limited and selective targeting of the most representative members of the community due to the impact

[106] *Ibid*.

[107] *Krstić* Appeals Judgement, para. 31.

[108] *Ibid*., para. 32.

[109] See similar considerations in Berster, "The Alleged Non-Existence of Cultural Genocide," 687-688.

"their disappearance would have upon the survival of the group as such".[110] Among them are leaders of the group, *i.e.,* persons who, due to their special qualities, either by virtue of official position or characteristics of their personality, have a special quality of directing or influencing the group's actions or opinions and whose disappearance would impact the group's survival.[111] Targeting the totality of leadership may be a strong genocidal indicator "regardless of the actual numbers killed" in view of the fate that befell the rest of the group: *e.g.,* if extermination of leadership, including its defenders, rendered the remainder defenseless in the face of other heinous acts (such as deportations).[112]

If it is accepted that genocidal intent can manifest itself through a limited selective targeting of leaders, it implies that the remainder of the group should not necessarily be targeted by underlying acts. Rather, their fate has to be assessed in light of the leaders' disappearance leading to the destruction of the group that is not physical or biological. As with the *Krstić* example, the totality of leaders of the emblematic community may be annihilated together with the group defenders, which would expose the remainder to subsequent heinous acts and deportations leading to the community's disappearance as a social unit, not physical or biological destruction of its members.

Finally, certain arguments do oppose the reading of social disintegration into the definition of intent. Some of them – as certain Chambers did – operate upon the fact that "cultural genocide" was excluded from the Convention, concluding hence that nothing less than physical or biological destruction can fall within the scope of genocidal intent.[113] As discussed above, this conclusion suffers from an interpretative inaccuracy. There is no reason why the exclusion of "cultural genocide" from the list of underlying acts must *per se* be indicative of the meaning of the "destruction" within the intent element. It is normatively possible and – as explained before – desirable that "destruction" in the sense of underlying conduct employed and "destruction" in the sense of the intended outcome undertake separate meanings, with the latter being broader. The exclusion of "cultural genocide" certainly testified to the drafters' intention to avoid the criminalization of a defined list of underlying conducts as *modus operandi* for the commission of genocide (*e.g.,* attacks on the group's linguistic or cultural heritage). However, the *travaux* present insufficient evidence to conclude that such an exclusion did have a bearing on the "intent" element excluding social disintegration from its scope.

Other commentators focused on the risky practical implications the expanded reading of the intent can bring. As Kreß argued, broad reading of the intent that incorporates social disintegration may lead to a situation where a perpetrator kills one group member or subjects them to another underlying act, knowingly furthering the campaign of the group's dissolution through mainly persecutory acts (*e.g.,* systematic targeting of culture), such perpetrator will be liable for genocide.[114] This will – as the argument suggests – defy the very nature of the offence. However, as Berster contends in response, such prosecution will anyways be well-justified even with the narrow reading of the Convention under the modes of incitement or an attempt to commit genocide.[115] In every individual case, the contextual

[110] *Prosecutor v. Goran Jelisić* (Trial Judgement), IT-95-10-T, December 14, 1999, https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/33140 (hereinafter – "*Jelisić* Trial Judgement"), para. 82.

[111] *Prosecutor v. Sikirica, Dosen, Kolundzija* (Judgement on Defence Motions to Acquit), IT-95-8-T, September 3, 2001, https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/19633, paras 76-78.

[112] UN Security Council, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," UN Doc. S/1994/674, May 25, 1994, https://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf, para. 94. For a detailed discussion of relevant issues, as well as further references to the cited Report see: Maksym Vishchyk, "Targeting of the protected group's leadership and otherwise representative members as an indicator of genocidal intent," *NaUKMA Research Papers. Law* 14 (2024):19, https://doi.org/10.18523/2617-2607.2024.14.19-31.

[113] Schabas, *Genocide in International Law,* 233-236.

[114] Kreß, "The Crime of Genocide under International Law," 487.

[115] Berster in Tams, Berster, Schiffbauer, *Genocide Convention: A Commentary,* 83.

assessment will differ. A predominantly persecutory campaign that does incorporate sporadic underlying acts of genocide (*e.g.,* killings or infliction of serious harm) will remain within the realm of persecution falling short of the genocide qualification. Incorporation of social disintegration within the scope of genocidal intent will not and cannot change this determination.

## Conclusion

The term "to destroy" as an inherent element of genocidal intent has given rise to two competing interpretations as to its scope. The narrow approach suggests that *dolus specialis* should be limited to the intended physical and biological destruction of the group only. The broader view indicates that the intent to destroy may as well cover the social disintegration of the group, *i.e.,* its destruction as a social unit.

Following fundamental rules of treaty interpretation, nothing in the ordinary meaning of the term "to destroy" analyzed in the context of the Genocide Convention in light of its object and purpose *prima facie* limits the intended destruction to physical and biological form only. With the meaning remaining ambiguous and unclear, supplementary means of interpretation, including the Convention's *travaux*, jurisprudence and authoritative commentaries, offer conflicting guidance that precludes a conclusive interpretative outcome.

Where, at first glance, the *travaux* seems to favor the narrow reading due to the exclusion of "cultural genocide" from the Convention's scope, such an exclusion related primarily to the definition of underlying acts while having no apparent intended bearing on the definition of the intent. On the contrary, multiple delegations repeatedly indicated that a group can be destroyed even where its individual members continue existing, implicitly indicating that actual physical or biological elimination is an absolutist outcome not necessarily envisioned by genocidal intent in every case.

The confusion between these two categories – "destruction" as a *modus operandi* for underlying acts and "destruction" as an intended outcome – unreservedly migrated to international jurisprudence. With the exception of several judgments (primarily originating from the reasoning by German domestic courts' decisions in *Jorgić*), on its face, the pronouncements in international case-law may be read as pointing to the narrow reading excluding social disintegration from the *mens rea* element. However, the actual analysis undertaken by Chambers testifies to the opposite reading. *Krstić* judgments, the first genocide conviction by the ICTY, established the commission of genocide in the case where the large majority of the group survived physically and biologically, while the community to which they belonged faced annihilation. The actual reading of jurisprudential findings thus indicates that the group's social disintegration can fall within the definition of genocidal intent, *provided that it is achieved through one or several exhaustive underlying act(s)* defined in the Convention. Thus, where mere attacks on a group's cultural or sociological identity will not qualify as genocide, social annihilation of the group through the combination of underlying acts can.

There are several convincing arguments in favour of the inclusion of social disintegration within the notion of "destruction" under the intent element. It is in line with the essence of the crime of genocide targeting human groups as distinct entities mostly united by intangible social features and bonds, whose destruction can lead to a group disappearance whilst individual members (even the majority of them) continue existing. Broad reading particularly explains the criminalization of certain underlying acts (such as infliction of serious mental harm) that *do not lead* (and are incapable of leading *as such*) to physical or biological destruction. It also justifies why genocidal intent can take the form of limited selective targeting of representative group members (*e.g.,* leaders) whose disappearance is likely to have a significant impact on the group's survival while leaving its

other members (relatively) intact. Finally, it presents a realistic view on multiple shades of the crime of genocide in modern-day realities, where perpetrators cautious about the image in the public's eyes will avoid blatant and mass physical elimination of group members, instead choosing a sophisticated combination of various tactics, including selective targeting via underlying acts, to achieve the group's disappearance.

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## РУЙНУВАННЯ СТРУКТУРИ ГРУПИ: СОЦІАЛЬНА ДЕЗІНТЕГРАЦІЯ ЯК МОЖЛИВИЙ ПРОЯВ ГЕНОЦИДНОГО НАМІРУ

***Анотація***

*Основоположний елемент геноциду, спеціальний намір "знищити" захищену групу, породив два можливі тлумачення його обсягу. Вузький підхід обмежує знищення, на яке спрямований намір, лише фізичними та біологічними формами, а широкий підхід вказує, що намір може виявлятися у бажаній соціальній дезінтеграції людської групи, тобто її знищенні як соціальної одиниці. Ця дискусія щодо потенційного місця соціальної дезінтеграції в елементі наміру залишається далеко не вирішеною в сучасному праві стосовно злочину геноциду, а безпосередній і ретельний аналіз цього питання в судовій практиці та доктрині є відносно рідкісним. Ця стаття має на меті заповнити прогалину, пояснюючи суть геноцидного наміру через фундаментальні правила тлумачення міжнародних договорів. Вона доходить висновку, що ніщо в звичайному значенні терміна "знищити", вжитому в його контексті, з огляду на предмет і мету Конвенції про геноцид, а також підготовчі роботи, не обмежує знищення, на яке спрямований намір, лише фізичними та біологічними формами. Далі пояснюється, як попри здавалося би, суперечливі формулювання в аргументації, притаманні судовій практиці міжнародних трибуналів, останні, навмисно чи ні, також передбачали широке тлумачення знищення, на яке спрямований намір, у своєму аналізі. У статті вказується на очевидну повторювану і поширену плутанину між "знищенням" у значенні способу вчинення основоположних діянь і "знищенням" у значенні наміру (тобто бажаного результату). Нарешті, у статті наводяться важливі міркування щодо того, чому тлумачення геноцидного наміру як такого, що охоплює соціальну дезінтеграцію, сприяє найбільш обґрунтованому тлумаченню права стосовно злочину геноциду.*

***Ключові слова***: *міжнародне кримінальне право, геноцид, Конвенція про геноцид, геноцидний намір, dolus specialis, знищення, соціальна дезінтеграція.*

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# THE POLYAKH CASE: IMPLICATIONS FOR LUSTRATION IN UKRAINE AND ABROAD

***Abstract***

*In October of 2019, the ECtHR found violations of the Convention in the case of Polyakh and Others v. Ukraine, thereby questioning the legitimacy of Ukrainian lustration and declaring that such interference had no signs of being necessary in a democratic society. The Strasbourg decision, even so, implied a new and permissible scope in subject and time for lustration. This paper analyses the implications of the ECtHR decision in the Polyakh and Others v. Ukraine case regarding the constitutionality of lustration in Ukraine and it assesses the Government Cleansing Act's international implications.*

***Key Words****: Lustration; Constitutional Court of Ukraine; Polyakh case; European Court of Human Rights*

## Introduction

On 17 October 2019, in the case of Polyakh and Others v. Ukraine, the European Court of Human Rights (ECtHR) delivered an eagerly awaited decision on Ukraine's Government Cleansing Act (GCA).[1] The ECtHR was called to assess whether dismissing five civil servants under the GCA pursued legitimate aims. The ECtHR ruled that the law violated the principles of the European Convention on Human Rights. In all respects, the outcomes of this decision go far beyond the individual interests of the five applicants. This decision complicated ongoing constitutional deliberation on the GCA by requiring the Constitutional Court of Ukraine (CCU) to consider the ECtHR ruling, and possibly amend or reverse the GCA. In terms of dismissed Yanukovych-era civil servants, the Court did recognize that the Yanukovych-era was dominated by serious challenges of corruption to

[1] Polyakh and Others v. Ukraine, App. No 58812/15 and 4 others. (17 October 2019). https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-196607%22]}

democratic governance. However, the nature of blanket dismissals of individuals connected with the democratically elected Yanukovych government remains questionable, and the Court asserted the need for a more individualized approach to dismissing officials under lustration. The decision in the Polyakh case showed shortcomings in the Ukrainian GCA due to arbitrary and blanket dismissals. Therefore, the CCU faces a dilemma. It can push ahead with the Strasbourg Court's decision by outlawing lustration or reconsider the ECtHR findings by giving in to public demands, following the end of the Yanukovych government in 2014, to cleanse the government of corrupt and oppressive officials.[2] This paper explores the implications of the ECtHR decision in the Polyakh and Others v. Ukraine case regarding the constitutionality of lustration in Ukraine and assesses the GCA's international implications.

## ECtHR Case Law on Lustration in Different European Countries: Status Quo

Lustration is a dichotomous phenomenon. On the one hand, it intends to protect democracy from disloyal, radical, or corrupt officials in a cost-effective and prompt legal manner. On the other, blanket dismissals often run contrary to the principle of the rule of law. As noted by the Venice Commission, "lustration must strike a fair balance between defending the democratic society on the one hand and protecting individual rights on the other hand."[3]

Despite the relatively low turnover of lustration cases,[4] the European Court of Human Rights (ECtHR) developed a comprehensive interpretation and set standards regarding lustration measures. Explicitly, the ECtHR recognized that applying lustration is consistent with the European Convention on Human Rights (ECHR) under specific criteria (e.g., proportionality, appropriate time limits, historical preconditions, etc.).[5] Lustration is generally scarce in international law; only a few documents issued by international organizations deal with it. One of the most cited papers is the PACE Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.[6] On three occasions, the Venice Commission presented reports on lustration legislation in member states.[7] In its reports, the Venice Commission stressed that the implementation of lustration should be

[2] Roman David, "Lustration in Ukraine and Democracy Capable of Defending Itself", in Cynthia Horne and Lavinia Stan (eds.), *Transitional Justice and the Former Soviet Union: Reviewing the Past, Looking toward the Future* (Cambridge University Press, Cambridge, UK, 2018), 135.

[3] Venice Commission, "Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015" (20 June 2015), 19.

[4] In the following cases, the ECtHR scrutinized employment of lustrated persons in private sector and public sector: Naidin v. Romania (21 October 2014); Sidabras and Džiautas v. Lithuania (27 July 2004); Rainys and Gasparavičius v. Lithuania (7 April 2005); Žičkus v. Lithuania (7 April 2009); Sõro v. Estonia (3 September 2015). In the cases against Poland and Slovakia, the ECtHR reviewed access to documents of lustrated persons: Turek v. Slovakia (14 February 2006); Matyjek v. Poland (24 April 2007); Bobek v. Poland (17 July 2007); Luboch v. Poland (15 January 2008); Joanna Szulc v. Poland (13 November 2012). In a few cases against Latvia, the ECtHR reviewed limitations of the right to be elected for former collaborators: Ždanoka v. Latvia (16 March 2006); Adamsons v. Latvia (24 June 2008). There are also other cases: Haralambie v. Romania (27 October 2009); Vogt v. Germany (26 September 1995); Ivanovski v. The Former Yugoslav Republic of Macedonia (21 January 2016).

[5] Eva Brems, "Transitional Justice in the Case Law of the European Court of Human Rights," 5(2) *International Journal of Transitional Justice* (2011), 282-303, at 295.

[6] The Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) "Measures to dismantle the heritage of former communist totalitarian systems".

[7] Venice Commission, "Amicus Curie on the Law on the Cleanliness of the Figure of High Functionaries of the Public Administration and Elected Persons of Albania" (13 October 2009). Venice Commission, "Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security" (17 December 2012). Venice Commission, "Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015" (20 June 2015).

undertaken only to address exceptional historical and political injustices.[8]

The ECtHR has developed its own set of standards in lustration cases consisting of two levels: the macro- and the micro-level. At the macro-level, the ECtHR measures lustration with a three-fold test[9] (except cases under Article 3 of Protocol No. 1 of the European Convention on Human Rights).[10] To pass the test, valid lustration in a democratic society should be prescribed by the law, have a legitimate aim, and be necessary for a democratic society. Being necessary includes an assessment of the pressing social need and proportionality. In all cases cited above, the Court found lustration acts pursued a legitimate aim.

At a micro-level, the ECtHR specified a subject scope of lustration. Lustration measures should only target public service employees or elected officials and not private sector employees.[11] Sweeping purges run contrary to Convention guarantees.[12] This is because decisions should be made on a case-by-case basis, according to the law. Any dismissals should be under regular judicial review to minimize any perception of political retribution or arbitrariness.[13] Before the Polyakh case, lustration in Central and East European countries (CEE) applied only to those who were affiliated with the former totalitarian state apparatus: e.g., in Germany, official and unofficial employees of Stasi;[14] in Slovakia and the Czech Republic, officers or collaborators of the State Security Service;[15] in Poland, functionaries, employees or secret collaborators of special services;[16] in Latvia, former KGB agents, informers, and sympathizers.[17]

So far, the temporal scope of the lustration policy was generally subject to two conditions. First, before the Polyakh case, lustration legislation primarily addressed individual behaviour or an official's position during the period of totalitarianism, 1948-1989 (-1991). Second, the period of lustration measures should be limited. Sanctions imposed by lustration legislation must not last forever and should reduce in severity over time.[18] The concept of the "timeless nature" of lustration varies in CEE. As an example, the Constitutional Court of the Czech Republic ruled that lustration laws can be enforced up to "ten years after the passage" of new regulations.[19]

The Constitutional Court of Albania declared the lustration law[20] passed in 2009 as unconstitutional due to the time-lapse: "eighteen years after the fall of the Communist regime and seven years after the end of the term of the prior legislation."[21] Many lustrated applicants

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[8] Venice Commission, "Amicus Curie Brief on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security" (17 December 2012), 16.

[9] Brems, op.cit. note 5, at 295.

[10] Ždanoka v. Latvia, ECtHR Judgment App. no. 58278/00 (16 March 2006). https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2258278/00%22],%22documentcollectionid2%22:[%22CHAMBER%22],%22itemid%22:[%22001-61827%22]}

[11] Sidabras and Džiautas v. Lithuania (27 July 2004); Rainys and Gasparavičius v. Lithuania (7 April 2005); Žičkus v. Lithuania (7 April 2009).

[12] Id.

[13] Sõro v. Estonia, ECtHR Judgment App. no. 22588/08. (3 September 2015). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156518%22]}

[14] Gary Bruce, "East Germany", in Lavinia Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the Communist Past* (Routledge, New York, US, 2009), 28.

[15] Venice Commission, report "Lustration: the experience of Czechoslovakia/the Czech Republic" (2015), 3.

[16] Venice Commission, report "Lustration experience of Poland" (2015), 5.

[17] Cynthia Horne, *Building Trust and Democracy: Transitional Justice in Post-Communist Countries (*Oxford University Press, New York, 2017), 73–74.

[18] The Constitutional Court of the Czech Republic, Judgment Pl. ÚS 9/01: Lustration II (2001).

[19] Id.

[20] Law no. 10034 "On the cleanliness of the figure of high functionaries of the public administration and elected persons" (22 December 2008).

[21] The Constitutional Court of Albania, Decision no. 9, V – 9/10 (23 March 2010).

argued that lustration legislation is punishment per se, thereby it is contrary to the principle of non-retroactivity of law. In the opinion of the ECtHR, in its assessments of Ukrainian or Latvian lustration cases, lustration is non-punitive.[22] Robertson summarized the position of the Czech Constitutional Court, which ruled the following, "there was no question of retroactivity, no question of discrimination, no breach of any international obligations... All that was happening according to them was that the state was setting an extra qualification for holding a post."[23] The Polish Constitutional Tribunal took the opposite approach to the principle of non-retroactivity. In 2006, the Polish parliament passed a lustration law.[24] This Act was partly challenged in the Constitutional Tribunal in 2007,[25] which ruled that "such sanctions [disclosure information under lustration act] are, by their very nature, punishments."[26]

Finally, all lustration cases, considered by either national courts or the ECtHR, are closely linked with the principle of a "democracy capable of defending itself."[27] The idea that a democratic society can take steps to protect itself by imposing different limitations on human rights in the interest of "the stability and effectiveness of a democratic system"[28] underpins the principle of a "democracy capable of defending itself", according to ECtHR doctrine. In more general terms, this principle designates, "democracy is not held to tolerate its own abolition by democratic means..."[29] This is the theoretical basis of lustration, except for the temporal and subject scope. The analysis of the Polyakh case that follows demonstrates that a new paradigm about the temporal and subject scope of lustration measures is emerging.

## Polyakh Case: Redefining Subject and Temporal Scope of Lustration

The case concerned five applicants who held positions at different levels of public office and were dismissed under provisions of the new Ukrainian GCA. The ECtHR laid down key considerations while assessing compliance of "an interference with the applicants' right to respect for their private life" with a three-fold test (§262-324 of the ECtHR decision). The Court rejected the applicants' claims that GCA provisions run contrary to the principle of prohibiting retroactive legislation.[30]

Consequently, the ECtHR expressed concerns about the stated aims of the GCA and noted the appearance of politicization in the GCA. The ECtHR held that lustration legislation in CEE countries in the post-Soviet period was necessary to uphold democracy. However, the Court stated that applying the same approach to

[22] Id.

[23] David Robertson, "A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity", in Wojcieh Sadurski, Adam Czarnota and Martin Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer, Dordrecht, the Netherlands, 2006), 88.

[24] Act "On the Disclosure of Information on Documents of State Security Agencies from the period between the years 1944-1990 and the Content of such Documents".

[25] The Constitutional Tribunal of Poland, Judgment No. K 2/07 as of 11 May 2007.

[26] Id.

[27] Id

[28] Vogt v. Germany, App. 17851/91. (26 September 1995). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58012%22]}

[29] Paul Cliteur and Bastiaan Rijpkema, "The Foundations of Militant Democracy", in Afshin Ellian and Gelijn Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror* (Republic of Letters Publishing, Dordrecht, the Netherlands, 2012), 256.

[30] Polyakh and Others v. Ukraine, Appl. 58812/15 and 4 others (17 October 2019) https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-196607%22]}

totalitarian regimes and the Yanukovych regime was problematic (§274-275). The ECtHR stressed:

> the far-reaching nature of the measures applied to the applicants, combined with the highly charged language used in section 1 of the GCA concerning the Act's aims raise the possibility that some of those measures may have been motivated, at least in part, by vindictiveness towards those associated with the previous governments… If that were to be shown to be the case, then, far from pursuing the aim of protecting democratic governance, the GCA measures could be seen as undermining that very governance through politicization of the civil service, a problem the law was supposedly designed to combat.[31]

All findings in this part of the ECtHR decision are assumption-based considerations, which demonstrated that the Strasbourg court found itself unwilling to declare Yanukovych's democratically-elected government as an authoritarian one, thus passing the ball to the Ukrainian Constitutional Justice court. In its decision, the ECtHR referred to the legal opinion of the Venice Commission, which characterized the subject scope of the Ukrainian lustration as "overbroad". The Court commented (§277-278),

> …those aims [lustration aims] could conceivably have been achieved by less intrusive means such as, where possible, following an individual assessment, removing the applicants from their positions of authority and transferring them, where possible, to less sensitive positions.[32]

This indicates that the ECtHR did not contest the need for lustration in Ukraine. Instead, it wrote that lustration was not well-designed in Ukraine. The Court suggested possible ways of improving the lustration process by a more individualized approach to dismissals, case-by-case assessments taking into account the full circumstances, and less severe level of sanctions, especially in instances of prolonged time-lapse. Based on these factors, one of the most notable outcomes of this ECtHR decision is the establishment of new norms regarding the scope of lustration in subject and time. Perhaps most importantly, the ECtHR did not entirely rule out the need for lustration policy outside the context of post-totalitarian (denazification or decommunization) governments. The Court did not rule that lustration was necessarily invalid to combat the adverse effects of a democratically elected leader. The Court simply ruled that the process could be improved.

In the remaining part of the three-fold test, the ECtHR considered whether the dismissal measures were necessary for a democratic society. The Court ab initio recognized and duly considered the events, "which led to the fall of Mr Yanukovych's government"[33] by citing various reports of international organizations. Subsequently, the Court affirmed a broad margin of appreciation of the Ukrainian authorities in the Polyakh case (§288-289), similar to comparable cases in CEE countries.

The Court held that disproportionate punishment was undertaken by lustration measures for the following reasons: 1) no individual assessment was performed; 2) the blank character of sanctions; 3) no convincing reasons were presented by the government. The Ukrainian government merely held that the act of "remaining in office in the period when Mr Yanukovych occupied the post of

[31] Id, p. 277

[32] Id.

[33] Id.

President sufficiently demonstrated that they [applicants] lacked loyalty to the democratic principles of State organization or that they engaged in corruption";[34] 4) "lack of coherence between the Act's proclaimed aims and the rules it actually promulgated"[35] (§288-289); 5) unreasonably long constitutional review of the lustration, any CCU findings might have served as a potential source for ECtHR judicial scrutiny; 6) the concept of a pressing social need is questionable in several instances, as some of the lustrated applicants were appointed as civil servants before Yanukovych entered office (§298); 7) the triggering element for the application of lustration was manifestly ill-founded (the ECtHR noted that it should have been dependent on individual actions); 8) the temporal scope of lustration is not based on any valid criteria or reasoning; 9) regarding the fourth applicant, a 4 day delay in submitting a lustration declaration cannot be seen as a valid reason for a dismissal; 10) regarding the fifth applicant, the Court pointed out that "the Ukrainian authorities have failed to give cogent reasons to justify lustration with regard to persons who merely occupied certain positions in the Communist Party prior to 1991."[36]

The two most compelling shortcomings of the GCA in the opinion of the ECtHR are the broad character of lustration, where individualized assessment criteria are absent, and a lack of proportionality of sanctions taken by the Ukrainian government, legislators, and courts. There is also no clear theoretical explanation of how the dismissal of civil servants would combat corruption, strengthen national security, and protect Ukraine's territorial integrity. In short, the ECtHR found that the GCA failed to meet ECtHR criteria, which include a three-fold test, proportionality and a pressing social need. It is noteworthy that the ECtHR delivered its judgment before the Ukrainian Constitutional Court's decision.[37] Before the Polyakh case, the ECtHR had been ruling on the legality of lustration in CEE while taking into consideration the findings and observations made by national constitutional courts.[38]

**Scope of constitutional and administrative review of lustration in Ukraine**

The Supreme Court and members of parliament have repeatedly challenged the unconstitutionality of various provisions of the law, which dealt with various aspects of lustration, from the prohibition of certain individuals from holding office to the ideological provisions of the law. The proceedings in the case had a dubious dynamic: several plenary sessions were held, during which various experts and authors were involved. At the plenary session in 2016, a motion for recusal of CCU judges was filed in the case, after which the CCU moved to the closed part of the plenary session[39].

The issue of judges disqualification is actually quite ambiguous and interesting: the CCU dismissed the motion for disqualification of six judges and then CCU chairman, arguing that there was no evidence of a conflict of interest in this regard. According to the initiators of the

[34] Id.

[35] Id.

[36] Id.

[37] The Constitutional Court of Ukraine opened proceedings on the constitutionality of the GCA on 6 July 2017. In its ruling, the Constitutional Court of Ukraine merged four different constitutional proceedings regarding the GCA (the first of which was launched on 12 February 2015). The European Court of Human Rights, in the Polyakh case, received notice from the first three applicants on 30 May 2017. As a result, two proceedings on Ukrainian lustration were being considered in parallel.

[38] Luboch v. Poland, App. 37469/05. (15 January 2008), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-84373%22]}

[39] The Constitutional Court of Ukraine has completed the oral hearing of the case on the constitutionality of certain provisions of the Law of Ukraine https://ccu.gov.ua/novyna/konstytuciynyy-sud-ukrayiny-zavershyv-usne-sluhannya-spravy-shchodo-konstytuciynosti-okremyh

petition, the lustration case was considered by judges who voted for the very laws that triggered the lustration and indicate signs of power usurpation by President Yanukovych. Thus, from this point of view, there is a situation of mutual inconsistency: how can those who directly contributed to the prerequisites for the adoption of such a law accurately assess the constitutionality of lustration measures? On the other hand, the assessment by other branches of power of the CCU's role in the active usurpation of power seems questionable, given the institutional independence of public authorities and the absence of a normative reference to CCU judges in the lustration legislation, not to mention the lack of a comprehensive assessment of CCU decisions in the context of usurpation influence. However, the above is not an attempt to justify the CCU in removing itself from an uncomfortable issue, but rather an attempt to outline the versatility and unpopularity of the potential verdict of constitutional justice. The mere reliance on receiving an answer through constitutional proceedings indicates institutional weakness and public uncertainty about the planned reform.

The ECtHR decision did not go unnoticed by the Ukrainian Government: the Minister of Justice of Ukraine rightly pointed out that the implementation of the judgment "Polyakh and others vs Ukraine" would consist of, firstly, compensation payment, and, secondly, bringing the lustration legislation of Ukraine into compliance with the requirements of the Convention. The promised changes have not taken place yet, but the Ministry of Justice's thinking can be characterized positively: it was planned to introduce a more personal approach to lustration, remove from the list of such persons those who held positions during the Soviet era and subject to lustration only those officials who held high positions, for example, were government ministers during the Yanukovych era[40].

Despite the fact that the issue of lustration was never considered by the CCU, it cannot be said that it has completely passed by. We are talking about the decision to ban people who voted for the "dictatorial laws" in 2014 from heading higher education institutions[41]. Although the decision does not directly and fully relate to lustration, as the CCU considered it in terms of the freedom of indemnity of the People's Deputy of Ukraine and the impossibility of bearing responsibility for voting., we still can focus on its main features relevant to the lustration issue. Thus, the CCU made a decision that such a requirement for the heads of the higher educational institutions was unconstitutional, arguing that it violated the indemnity of the deputy, namely the principle enshrined in the Constitution of Ukraine that a deputy cannot be held liable for the results of his or her vote.

In fact, the CCU withdrew from assessing the characteristics of the dictatorial laws of 2014 and their substantive essence, and only aloofly defined the concept of parliamentary indemnity as a guarantee of the member of Parliament of Ukraine not to be held liable for the result of the vote. The fact that the CCU equated the existence of such a requirement for a managerial position in a higher education institution with a measure of legal liability should be emphasized separately.

It can be said that the CCU initially determined the illegality of such a measure and, therefore, it can be assumed that there is no point in talking about the significance

[40] *The Ministry of Justice has drafted a bill changing the lustration procedure*, Ukrinform (21 May, 2020), https://www.ukrinform.ua/rubric-polytics/3030367-minust-rozrobiv-zakonoproekt-so-zminue-proceduru-lustracii.html

[41] Decision Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" № 1-5/2017 20th of December https://zakon.rada.gov.ua/laws/show/v002p710-17#Text

of the public interest in the initiative to ban the persons who voted for the dictatorial laws of January 16, 2014. However, such an approach may seem too formalized and narrow, as it eliminates a comprehensive and inclusive doctrinal interpretation in constitutional proceedings.

This, in turn, was reflected in the Dissenting Opinions of three CCU judges on this decision, which are to some extent pertain to lustration. All three Dissenting Opinions contain a thorough analysis of the socio-political context of dictatorial laws adoption and their impact on social relations.

According to judges Melnyk I.[42] and Moisyk V.[43], the decision on the unconstitutionality of the said normative provision was unbalanced and unreasonable, which they described quite specifically, referring to the constitutional norms on the meaning of parliamentary indemnity. According to the conclusions they reached, the decision should have been of a different nature[44].

Special attention should be paid to the Dissenting Opinion of Slidenko I., as it touches upon many aspects related to the process of general lustration and is interesting in terms of the alternative decision he reached. Hence, according to Judge Slydenko I., the provision in question contains lustration provisions, which, by the way, was not mentioned in the text of the CCU decision, and what is important here is that such issues cannot be under the jurisdiction of the CCU in general, given the political nature of[45]. Unlike the CCU, the judge outlined all the prerequisites and social features of the social problem that led to the initiative to file a complaint with the CCU, paid attention to important points, although he ultimately concluded that the CCU did not have to decide on the unconstitutionality of such legislative provisions at all[46].

In fact, it seems that Slidenko said what the CCU has been silent about for so long and is still silent to this day. First, he drew attention to the fact that the decision lacks justification. Furthermore, he tries to find logic in the establishment of such requirements:

In our opinion, this is where the cause-and-effect relationship is correctly combined and the legal logic of lustration is outlined, which was lacking in the text of the law: there is an urgent social need to ban a certain category of persons from holding leadership positions in the military, due to the social context, which must be carefully assessed, and lustration in this case and with such wording seems not to be a punishment, but a professional qualification requirement.[47]

But the conclusion that Slidenko ultimately reaches is unusual:

> Given that the disputed provision of the Law of Ukraine "On Higher Education" is a lustration provision, the Constitutional Court of Ukraine should not have considered this issue at all, as it falls within the scope

[42] Dissenting opinion of the judge of the Constitutional Court of Ukraine I. Melnyk on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" , https://zakon.rada.gov.ua/laws/show/na02d710-17#Text

[43] Dissenting opinion of the judge of the Constitutional Court of Ukraine V. Moisyk on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" , https://zakon.rada.gov.ua/laws/show/nb02d710-17#Text

[44] Id

[45] Dissenting Opinion of Judge I. Slidenko of the Constitutional Court of Ukraine I.D. Slidenko on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 49 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of paragraph 7 of part two of Article 42 of the Law of Ukraine "On Higher Education" https://zakon.rada.gov.ua/laws/show/nc02d710-17#n2

[46] Id

[47] Id

> of the political expediency of the state[48]

Slidenko's approach is that constitutional justice should avoid lustration because, in his opinion, it is a political issue, and political issues are not subject to constitutional jurisdiction. However, the judge himself was critical of the decision, stressing the public need to determine the legal nature of the events of 16 January 2014. In other words, he recognized the harmful nature of these events for the future of the rule of law, in this case, education, but believes that this issue is not a matter for constitutional review.

According to this model of constitutional review, the political marker of the issue under consideration can interfere with impartiality by giving the process signs of bias. However, the constitutional and legal sphere itself is characterized by signs of political nature, given the subject matter of constitutional and legal regulation.

Instead, administrative justice did not hesitate in statements considering lustration disputes. According to the information provided by the district and appellate administrative courts, since the entry into force of the Lustration Law and as of 15 July 2015, the district administrative courts have received 746 cases and materials related to the application of the Law, as a result, from the very beginning of this law[4950]. Unlike the CCU, in recent years, the administrative court has developed a rather variable practice regarding the legality of lustration.

Overall, administrative courts prefer to apply the provisions of the Council of Europe Guidelines on lustration, which, in turn, were created for transitional justice processes from communist regimes, so the general relevance of these principles is questionable, despite their substantive relevance. And despite the criticism of the lack of an individual approach to the assessment of lustrated persons in the law, the court mentions "a democracy that is able to defend itself" in the context of the ECtHR case law, unfortunately, without detailing how this concept should be applied in the Ukrainian realities of governmental purification. It is interesting that we rightly say that in addition to the fact that the ECtHR negatively assessed the content of the Law of Ukraine "Law on Government Cleansing", it lacked a justification for the authoritarian power of President Yanukovych, but it seems that national courts also lacked it:

> The Supreme Court concluded that measures of such severity as dismissal from office with a ban on holding office for 10 years cannot be applied to civil servants only because **they remained in their civil service positions after the election of a new head of state**, without analyzing the individual behavior of such persons and establishing a link between their activities and the usurpation of power, undermining the foundations of national security and defense of Ukraine or unlawful

[48] Id

[49] Analysis of the practice of application by administrative courts of certain provisions of the law of Ukraine «On Government Cleansing», *The Sixth Administrative Court of Appeal* https://6aas.gov.ua/ua/law-library/court-practice/vishchij-administrativnij-sud-ukrajini/analiz-praktiki-zastosuvannya-administrativnimi-sudami-okremikh-polozhen-zakonu-ukrajini-pro-ochishchennya-vladi.html

[50] In general, the administrative justice system reviewed 197 cases and materials, including 137 cases related to dismissal from public service and 62 cases related to the performance of such service. 106 cases were considered on the merits, of which 62 were upheld. As of 2023, more than 800 people have appealed to the courts to challenge their dismissal

violation of human rights and freedoms[51] [52].

It should also be noted that administrative courts have paid attention to the absence of individually defined criteria for assessing the need for lustration[53]

> The Supreme Court considers it is necessary to note that the absence of a procedure and mechanism in the Law of Ukraine "Law on Government Cleansing" that would determine an individual approach to the application of the prohibitions established by it does not remove the obligation of the court to apply an individual approach to resolving each particular dispute according to the criteria of legality[54].

In addition, in its decisions, the court clearly distinguished between liability for offenses defined in anti-corruption legislation and lustration itself[55]:

> *failure to indicate property in the declaration does not entail liability under the Law of Ukraine "On Government Cleansing", since the issue of declaring the income of certain persons is regulated in this case by the Law of Ukraine "On Principles of Prevention and Counteraction to Corruption"*[56]

In another case, the Supreme Court decided to define lustration in the context of official responsibility and seems to have paid attention to an important detail regarding the distinction between legal responsibility and lustration itself referring to the shortcomings of law enforcement in the implementation of lustration measures:

> *The Supreme Court pointed to the political nature of lustration measures.... decided that the measures applied by the lustration legislation cannot be considered measures of legal liability, as they are not a sanction for a specific wrongful act. Their purpose was **to restore confidence in the public authorities**, not to bring the relevant officials to justice*[57].

In conclusion, administrative courts have drawn attention to the political nature of lustration, hinting at the lack of legal arguments in its favor.

To sum up, despite the absence of a constitutional review on the Law of

[51] Resolution of Supreme Court № 813/7910/14 15th of July 2020, p. 42 https://reyestr.court.gov.ua/Review/90425382

[52] This legal position has become a stable and leading one in judicial practice concerning lustration. However, it appeared after the ECHR judgment was passed. Prior to that, the courts' conclusions mostly concerned the correctness of compliance with the established administrative procedure for conducting the relevant inspection and related to formal issues (for instance, Resolution of Supreme Court 27th of August 2019 № 820/12062/15 https://reyestr.court.gov.ua/Review/83883168)

[53] Id, p. 40

[54] On the one hand, the courts outline the importance of an individual approach to the implementation of the lustration, but they do not provide their own subjective assessment of the appropriateness of applying the concept of militant democracy to Ukrainian lustration, but only point out the lack of normative certainty

[55] The principles of lustration stipulate that it should not be a punishment. The chaotic nature of Ukrainian lustration has led to the substitution of concepts and the application of lustration legislation to situations where there has been a violation of other norms by public officials, or where the application of lustration has been excessive, as in the case of the ECtHR decision Samsin v. Ukraine, where a judge resigned but was dismissed through lustration, ignoring his personal application. Such cases point to the practical sham of the lustration goal.

[56] Resolution of Supreme Court № 815/3268/15 31 th of January 2018 https://reyestr.court.gov.ua/Review/71979644

[57] Resolution of Supreme Court №823/3269/14 18th October 2023, p.60-61 https://reyestr.court.gov.ua/Review/114270365

Ukraine «On Government Cleansing» due to the complex social and political developments, certain opinions on this issue were expressed in the proceedings concerning the prohibition of holding office for persons who voted for «the dictatorial laws of 16 January 2014» as members of the Parliament of Ukraine. More precisely, the assessment of lustration as a phenomenon was provided in the dissenting opinion of the judge, who noted the impossibility for constitutional justice bodies to assess the legality of lustration through the political nature of this phenomenon. According to this approach to the methodology of constitutional review, the CCU should stand aside and not become a political instrument for regulating power relations.

With regard to administrative proceedings, it should be noted that the cassation instance mostly sided with the plaintiffs, arguing that there were no individually defined requirements for the application of lustration in the law. Instead, the courts did not properly analyse the concept of '"democracy capable of defending itself"' in the Ukrainian context, and mentioned it only as a formal reference. The courts themselves did not apply an individual approach when deciding the issue, but rather made decisions based on the fact that the law was of poor quality, and therefore the decision was unlawful.

## Outcomes of the Polyakh Judgment

The government of Ukraine primarily argued in the Polyakh case that the GCA is legitimate because it has a right to ensure national security and lacks the time and resources for case-by-case approaches to lustration during wartime. The ECtHR refrained from recognizing the principle that each democracy must take concrete measures to defend itself by stating that "previous findings in the post-Communist lustration cases have only limited relevance in the present case."[58] It appears that the ECtHR did not apply a "democracy capable of defending itself" principle in the Polyakh case, as the Court upheld in previous lustration cases.[59] The Strasbourg court abstained from applying national security arguments in the Polyakh case as well. These types of arguments are valid when democracy is fighting for the very survival of its democratic or institutional order against antidemocratic political parties or public employees who were disloyal to democratic principles.[60] This point of view is firmly rooted in ECtHR jurisprudence.[61] In its decision, the Strasbourg court raised doubts about treating Yanukovych's regime in the same way as Communist rule in post-Soviet republics. At the same time, the ECtHR did not contest that certain antidemocratic tendencies and developments took place during the period of President Yanukovych's government,[62] thus leaving the most crucial question about the democratic legitimacy of Yanukovych's government unresolved.

The "democracy capable of defending itself" principle and the democratic legitimacy of Yanukovych's government will require the CCU's scrutiny. Since the ECtHR was silent on the necessity to consider the Polyakh case in light of the "democracy capable of defending itself" principle, the CCU may fill this gap. In the Ždanoka case, the

[58] ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

[59] ECtHR, Vogt v. Germany, ECtHR Judgment (26 September 1995) App. 17851/91.

[60] Cliteur and Rijpkema, op.cit. note 29.

[61] ECtHR decisions in Vogt v. Germany; Sidabras and Džiautas; Bester v. Germany; Knauth v. Germany.

[62] ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

ECtHR noted that national authorities are better positioned to evaluate whether a threat to the democratic order was sufficiently imminent.[63] This fact empowers the CCU to assess the extent to which the Yanukovych government had constituted a potential threat to the democratic order. The most notable recent application of a "democracy capable of defending itself" principle can be traced to the National Democratic Party (NPD) judgment of the German Federal Constitutional Court.[64] Under that decision, the German Court rejected a ban of the NPD by stating that the party was not able to succeed in the implementation of its antidemocratic agenda. The CCU may also be faced with evaluating the capacity of the Yanukovych government to carry out an antidemocratic agenda.

Here are the legal observations favouring the triggering of lustration limitations under a "democracy capable of defending itself" principle or of objecting to it. In favour: in January 2019, Yanukovych was found guilty of committing high treason and waging an aggressive war against Ukraine and consequently sentenced to 13 years in prison by the Obolon District Court in Kyiv.[65] The court findings in that criminal case clearly show Yanukovych's role in undermining Ukrainian territorial integrity and backing war against Ukraine. Thus far, a formal determination of Yanukovych's government as undemocratic would strengthen and give increased legal and moral credibility to the GCA. The adversarial actions Yanukovych established in open court run blatantly opposite to the principle of civil servants' loyalty to the state and democratic principles. This provides a clear validation for the CCU to justify lustration. A requirement mandating the political loyalty of public officials to state institutions and the democratic system, according to the Constitutional Court of the Czech Republic, is "an undoubted component of the concept of 'a democracy able to defend itself'."[66]

Objecting: a "democracy capable of defending itself" principle is only in its infancy in Ukraine, and only one recent constitutional judgment has addressed this principle.[67] In contrast to the German Basic Law, the text of the Constitution of Ukraine does not contain the principle of a "democracy capable of defending itself." Nonetheless, this legal principle is central to "any debate about the conformity of the Ukrainian lustration law to European standards."[68] Thus, an appropriate application of this principle will have a pivotal role in the deliberations on the constitutionality of lustration, and the Constitutional Court of Ukraine still has two options; to reinforce this principle or not.

The upcoming constitutional judgment on Ukrainian lustration will have significant implications for the CEE context and comparative constitutionalism. There have been no known cases of national courts going against the ECtHR to declare lustration laws constitutional. Therefore, the Strasbourg Court's decision will likely limit the scope of potential legal positions for the Ukrainian Constitutional Court and make it more challenging to uphold the constitutionality of the GCA.

However, the possibility of overruling the Polyakh judgment should not be considered unprecedented. There are at least two arguments to support this notion. The first comes from the Czech experience. In 2001, the Constitutional Court of the Czech Republic deemed core provisions of Czech lustration legislation to be

[63] ECtHR, Ždanoka v. Latvia, ECtHR Judgment (16 March 2006) App. 58278/00.

[64] The Federal Constitutional Court, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13.

[65] The Obolon District Court in Kyiv, Decision as of 24.01.2019 in the case № 756/4855/17.

[66] The Constitutional Court of the Czech Republic, Judgment Pl. ÚS 9/01: Lustration II (2001).

[67] The Constitutional Court of Ukraine, Decision № 9-p/2019 (16 July 2019).

[68] David, op.cit. note 2, 141.

constitutional despite the highly critical stance of international organizations, such as the ILO and the Council of Europe. The main argument presented by the Constitutional Court of the Czech Republic had focused on the principle of civil servants' loyalty to the state and democratic principles. Thus, the CCU can apply a similar theoretical stance to justify the constitutionality of GCA by referring to the principle of civil servants' loyalty to democratic principles as a measure of self-defence against foreign aggression in times of emergency and war.

The second precedent backing the broad margin of appreciation of the CCU in the lustration case is inferred from the very recent judgment on Law no. 317-VIII (Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols of Ukraine).[69] According to this, the CCU conferred the complete constitutionality of Law no. 317-VIII whereby limitations, for instance, on freedom of association promulgated by the law at stake ran counter to the Convention guarantees.[70] The law, among others, prescribes prohibition of organizations (political parties or civil society organizations) who propagandize communist and national socialist (Nazi) totalitarian regimes and their symbols. The mere fact of the word "communist" in the title of any legal entity came to be a sufficient ground for its dissolution. Such strict conditionality on freedom of association is not consistent with the ECtHR standards, under which, "Political party's choice of name: could not in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances…"[71] Against this backdrop, the CCU justified blanket limitations prescribed by Law no. 317-VIII through a prism of the concept of moral retribution for past injustices and the necessity to counter foreign aggression.

Another central problem left unanswered by the Strasbourg decision is defining which provisions of the Constitution were in effect during Yanukovych's government. Levits, an ECtHR judge, in his concurring opinion,[72] delineated a problem of interpretation and application of the law in newly-democratic, but former socialist countries:

> …the same legal texts (the Constitution of the GDR or the International Covenant on Civil and Political Rights), when applied according to different methodologies of application of the law inherent in the political order concerned, will lead to different results.[73]

However, the problem concerning the Ukrainian lustration law may be even more complicated than described above. In February 2010, Yanukovych won the presidential election in Ukraine. Consequently, he was elected under the Constitution of 2004, where presidential authorities were much more limited in power than under the Constitution of 1996. Some observers asserted that the Constitutional model of 1996 introduced the presidential-parliament model, while the 2004 Constitution mandated the parliamentarian-presidential model of government.[74] However, in September

[69] Op.cit. note 48.

[70] Venice Commission, "Joint Interim Opinion on the Law of Ukraine on the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols" (18-19 December 2015), 28.

[71] ECtHR, United Communist Party of Turkey v. Turkey, ECtHR Judgment (30 January 1998) App. 19392/92.

[72] ECtHR, Streletz, Kessler and Krenz v. Germany, ECtHR Judgment (22 March 2001) App. 34044/96, 35532/97 and 44801/98.

[73] Id.

[74] "It is the first time when a system that allowed to foresee the prospects of the state's development is created", Center for Political and Legal Studies (23 April 2018), available at http://pravo.org.ua/ua/news/20872833-v-ukrayini-vpershe-stvorena-sistema,-yaka-dozvolyae-pobachiti-perspektivi-rozvitku-dergeavi,---kerivnik-politichnogo-viddilu-predstavnitstva-es-v-ukrayini.

2010, the CCU outlawed the Constitutional Reform of 2004 and mandated a return to the Constitution of 1996.[75] From September 2010 to February 2014, the Yanukovych government operated under the Constitution of 1996. As a result of mass demonstrations in February 2014, parliament adopted a law that restored the provisions of the Constitution of 2004.[76] According to the strictu sensu legal viewpoint, the Court must interpret and construe the activities and intentions of the Yanukovych government in light of the Constitution of 1996. Interpreting the actions of the Yanukovych government in terms of the Constitution of 1996 will undermine the current Constitution. It would mean that the Court disregards parliament's ruling to revert to the Constitution of 2004. These ambiguities in ascertaining which Constitutional provisions take precedence create significant challenges for the Constitutional Court.

Uzelac brilliantly noted, "if judges themselves are suspects of the links with the past regime, it is highly doubtful how a process in which they would have the final word in the matters of lustration would reach the goal of full legitimacy."[77] The same challenge compounds the current constitutional proceeding on lustration. Several criminal proceedings of high treason were commenced against some judges of the CCU, who voted for the decision to backpedal the 1996 Constitution in September 2010.[78] The National Anti-Corruption Bureau of Ukraine (NABU), in its turn, also disclosed materials of pre-trial investigation where the agents of the Bureau documented "facts of influence of the KDAC (the Kyiv District Administrative Court) Head of judges of the Constitutional Court of Ukraine…"[79] According to dossiers, the Head of the KDAC had put pressure on several CCU judges and sought to "break down the law on lustration."[80] Given that criminal proceedings provide the Constitutional Court "little legitimacy",[81] this may be even more questioned by society if the CCU declares the GCA unconstitutional.

Finally, the ECtHR's findings in the Polyakh case, to some extent, may be deemed lopsided. The ECtHR noted that the following: pressure on mass media, the adoption of so-called "dictatorship laws";[82] close ties with the Russian Federation, political repression (§ 9);[83] pressure on the judiciary (§ 10);[84] discredited parliamentary elections in 2012 (§ 11);[85] the escape of almost all high-ranking officials to the Russian Federation, making open judicial proceedings in the Ukrainian courts against them mostly impossible. Nonetheless, the unprecedented basis to introduce lustration was not taken into account in the Court's assessment.

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75 The Constitutional Court of Ukraine, Decision № 20-рп/2010 (30 September 2010).

76 Law "Pro vidnovlennia dii okremykh polozhen Konstytutsii Ukrainy" as of 21 February 2014 (the Law of Ukraine "On Restoring Specific Provisions of the Constitution of Ukraine").

77 Alan Uzelac, "(In)Surpassable Barriers to Lustration: Quis custodiet ipsos custodes?", in Vladimira Dvořáková and Anđelko Milardović (eds.), *Lustration and Consolidation of Democracy and the Rule of Law in Central and Eastern Europe* (Political Science Research Centre, Zagreb, Croatia, 2007), 47-48.

78 "Seven Judges of the Constitutional Court of Ukraine are under criminal investigation", Unian (9 April 2015), https://www.unian.ua/politics/1065446-provadjennya-vidkrito-schodo-simoh-suddiv-konstitutsiynogo-sudu-chlen-gromadskoji-radi-pri-minyusti.html.

79 "NABU and the SSU disclosed criminal organization headed by the Head of the Kyiv District Administrative Court (KDAC), which includes judges of the KDAC, the Head of the State Judicial Administration of Ukraine (SJA), former members of the High Qualification Commission of Judges of Ukraine (HQCJ) and others", the National Anti-Corruption Bureau of Ukraine (21 July 2020), available at https://nabu.gov.ua/en/novyny/zlovzhivannya-v-oask-novi-epizodi-rozshifrovka-video.

80 Id.

81 Klaus Bachmann and Igor Lyubashenko, "The Puzzle of Transitional Justice in Ukraine," 11(2) *International Journal of Transitional Justice* (2017), 297-314, at 307.

82 "Ukraine: Brief legal analysis of Dictatorship Law", Civic Solidarity (20 January 2015), available at http://www.civicsolidarity.org/article/880/ukraine-brief-legal-analysis-dictatorship-law.

83 ECtHR, Polyakh and Others v. Ukraine, ECtHR Judgment (17 October 2019) App. 58812/15 and 4 others.

84 Id.

85 Id.

Bachmann and Lyubashenko characterized the overall state of rule by indicating that, "the issue at stake was no longer whether Ukraine would be democratic and independent, but whether the country would descend into autocracy under President Viktor Yanukovych or maintain the integrity of its formerly democratic institutions."[86]

Though there are many missing elements from the Ukrainian government's stance in the Polyakh case, Ukrainian lustration takes on strong symbolic meaning. As Uzelac emphasized, "so far, the concept of lustration has a strong political and social meaning, above all as a symbolical departure from the past totalitarian practices and those who were instruments in their enforcement."[87] This logic holds that declaring the GCA unconstitutional would probably encourage revanchist sentiments towards the Yanukovych government. While the GCA serves as a symbolic reminder of departure from past injustices, it is evident that the political and social perception of the GCA is more significant than any legal outcome.

McAuliffe asserts that outlawing lustration by the ECtHR may serve better for the interests of the rule of law long-term.[88] At the same time, short-term difficulties may be less desirable for Ukraine. Abandoning lustration is complicated by the fact that the need to dismiss corrupt officials was one of the core goals of the Euromaidan protests and a justification for the legality of Yanukovych's resignation. Nonetheless, the ECtHR is a human-centric body. In contrast, the CCU may adjudicate based on a wide-range of factors, including the Polyakh decision, other national court decisions and precedents.

## Conclusions

The implications of the Polyakh judgment have far-reaching international consequences. For the first time, the ECtHR considered lustration policy outside the post-communist (or denazification) context. Analysing Ukrainian lustration, the ECtHR did not implicitly outlaw lustration policy against previously democratically elected governments. Instead, the Strasbourg court questioned the proportionality of sanctions and the blanket character of lustration. The ECtHR implied a new scope in subject and time for permissible lustration policy by affirming the possibility of introducing lustration measures against individuals who violated democratic norms in a post-totalitarian government. Nonetheless, the ECtHR expressed serious concerns about Ukraine's GCA in terms of politicization, the absence of compliance with accepted lustration criteria, the lack of an individualized approach to sanctions, and the lack of clear trigger elements under lustration law. Thus, the ECtHR found the lustration law failed to meet the proportionality criterion, and doubted compliance with the criterion of pressing social need.

Another serious concern stems from the fact that the CCU is still considering the constitutionality of the GCA, so the Polyakh judgment might limit the CCU's legal manoeuvring. Regardless of the ECtHR decision, the CCU still has broad discretion in the case on lustration. The Czech court precedent and the recent CCU decision demonstrated that constitutional justice might prioritize other principles than mentioned by international human rights bodies (like the Venice Commission or

[86] Bachmann and Lyubashenko, op.cit. note 62, 298.

[87] Uzelac, op.cit. note 58, 47-48.

[88] Padraig McAuliffe, "Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?," 2(2) *Hague Journal on the Rule of Law* (2010), 127-54, at 154.

even the ECtHR). Robertson compared a choice between two attitudes towards lustration: legalistic formalism (in the Hungarian case), and the determination to ensure substantive justice (in the Czech experience).[89] This is the ultimate question before Ukrainian Constitutional Justice in the present case. The primary issue will be how the CCU formulates a decision based on earlier ECtHR, Hungarian, Polish, and Czech legal findings. It is possible the upcoming decision on the Ukrainian GCA will completely neglect existing decisions and precedents and will come up with its own unique legal approach to the issue. In any case, the present task before the CCU is complex, with far-reaching implications.

Since 2015,[90] the CCU has had the opportunity to evaluate the compliance of the GCA with international standards and constitutional prerequisites on its own, as done in the past by other CEE courts. Now, the findings of the Strasbourg court in the Polyakh case stand as an integral part of the future constitutional decision. Regardless of the outcome, the ECtHR has been the first to take the lead in this open political question for Ukraine, but not the national CCU.

Although the constitutional review of the lustration issue did not take place, some peculiar opinions on this topic were expressed by the CCU judges in another proceeding, in particular, the opinion of one judge that the CCU should not interfere in the field of lustration, given the political nature of this issue.

Administrative courts mostly ruled in favour of the lustrated persons, arguing that there was no individual approach and general standards for lustration have not been met. They argued for the need to distinguish lustration from other types of liability and the problem of overly generalised application of the law. According to the conclusions of administrative judiciary, the unlawfulness of the lustration measures was based on the poor quality of the law without a detailed assessment of the relevance of lustration in Ukraine as such.

The courts did not fully apply the principles of militant democracy to the lustration process.

In closing, the legitimacy and the overall constitutionality of lustration are still ongoing in the court of the Ukrainian Constitutional Justice. If the CCU applies the ECtHR considerations in the Polyakh case, the complete annulment of the GCA is almost guaranteed. The chances of overruling the Strasbourg Court's decision seem unlikely, but even so, the judges sitting in the building on 14 Zhylianska St. in Kyiv have legal mechanisms to avoid extreme politicization[91] (in the case the law is to be annulled). Failure to make a sound decision and ignoring the ECtHR considerations in the Polyakh judgment would risk jeopardizing the image of the Ukrainian Constitutional Court as a real guardian of the constitution.

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[89] Robertson, op.cit. note 23, 95.

[90] From the period of commencing the constitutional proceeding on lustration (April 2015) to publishing the Polyakh decision (October 2019).

[91] Alexei Trochev, "Ukraine: Constitutional Court Invalidates Ban on Communist Party," 1(3) *International Journal of Constitutional Law* (2003), 534-540, at 534.

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# СПРАВА ПОЛЯХА: НАСЛІДКИ ДЛЯ ЛЮСТРАЦІЇ В УКРАЇНІ ТА ЗА КОРДОНОМ

***Анотація***

*У жовтні 2019 року ЄСПЛ визнав порушення Конвенції про захист прав людини і основоположних свобод у справі «Полях та інші проти України», тим самим поставивши під сумнів законність української люстрації та визначивши, що таке втручання не має ознак необхідності в демократичному суспільстві. Водночас, рішення Страсбурзького суду містить висновки щодо окреслення змісту та можливих часових меж люстрації як допустимого явища. У цій статті аналізуються практичні наслідки рішення ЄСПЛ у справі «Полях та інші проти України» щодо конституційності люстрації в Україні та наслідки дії Закону України "Про очищення влади" в контексті міжнародного правозастосування*

***Ключові слова:*** *люстрація; Конституційний Суд України; справа "Полях та інші проти України"; Європейський суд з прав людини*

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# THE RIGHTS OF THE CHILD IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948): THE HISTORY OF CREATION AND THE ROLE OF THE UKRAINIAN SSR IN THAT PROCESS

***Abstract***

*The Universal Declaration of Human Rights 1948 is one of the main documents, which laid a foundation for all other international documents on human rights, including child's rights. The paper will explore the contribution of the Ukrainian SSR to the drafting of the Universal Declaration of Human Rights 1948 as they relate to child's rights.*

*This article is especially relevant, considering the Russia-Ukraine war and the fact that Russia propagates that Ukraine is not a subject of international relations and the state in the meaning of international law and never was. However, our analysis proves, that Ukraine, even being one of the union republics of the USSR, acted as an independent subject of international law to a certain extent. Ukraine is a charter member of the UN from inception and, as such, took part in the drafting process along with other countries' representatives. Features of this activity by the Ukrainian SSR during the drafting process of the Declaration will be revealed. The paper concludes with a statement about the active participation of the Ukrainian SSR in the drafting of provisions concerning the right to life, the existence of rights and freedoms regardless of any distinctions, the right to education, and religious education.*

***Key Words:*** *Right to life, Equality of persons, Prohibition of discrimination, Right to education, Protection of childhood.*

## Introduction

The adoption of any conventional international act is the result of lengthy discussions and coordination of the positions of international law subjects, primarily states. After all, states differ in their cultural characteristics, religious traditions and moral foundations. It is because of these differences that the development and adoption of some

documents can take decades. International legal standards are the result of a long work of a large number of states to establish agreed positions in the field of human rights.[1] With the establishment of the UN in 1945, with the Ukrainian SSR as a founding member, Ukraine became an active participant in international relations and, in particular, a participant in the development and adoption of international legal acts. As Oleksandr Zadorozhnyi rightly noted, membership in the UN and the status of the original founding member of the UN was key in establishing Ukraine's international legal status.[2] However, it should be noted here that the activities of the Ukrainian SSR delegation within the UN were subordinated to the goals and objectives of the USSR delegation. Ukraine has always aspired to be closer to European nations, but the Russian full-scale invasion has made it challenging for the country to gradually transform into a European state.[3] The Russian narrative has always claimed that Ukraine is not an independent subject of international legal relations and nowadays it is even questioning the very legitimacy of the existence of such a state as Ukraine. However, Ukraine, even when it was part of the USSR, acted as an independent subject of international law to a certain extent. It would be wrong to view the participation of the Ukrainian SSR delegation in the UN as a mere repetition of the political actions of the all-Union leadership. Oleksandr Zadorozhnyi defines the period of 1945-1953 as the period of insufficient representation of the Ukrainian SSR in the UN[4], and this is due, among other things, to its qualitative involvement in the discussions.

The novelty of this article is the examination the contribution of the Ukrainian SSR to the drafting of child-related provisions in the Universal Declaration of Human Rights. This aspect has not been widely explored. This article provides a detailed legal analysis that challenges the perception of Ukraine as merely a passive actor within the Soviet Union.

This article addresses the following research questions. What role did the Ukrainian SSR play in the drafting of the Universal Declaration of Human Rights, particularly in relation to provisions concerning children's rights? How did the Ukrainian SSR's participation in the drafting process reflect its status as a subject of international law within the United Nations? In the current context, there is a growing interest in the history of Ukraine's international legal personality, in particular, its participation in the activities of the UN in the twentieth century. This article addresses the gap in legal history regarding the participation of the Ukrainian SSR in the development of provisions on the rights of the child in the Universal Declaration of Human Rights 1948. An objective analysis of the Ukrainian SSR's activities at the UN will be presented in this article.

This study applies a historical-legal and document-based methodology. The analysis is grounded in primary sources, including summary records and official reports of the UN Commission on Human Rights and its Drafting Committee sessions. The research adopts a chronological approach to trace the evolution of draft provisions related to children's rights within the Universal Declaration of Human Rights. Legal comparison is employed to examine how various proposals, including those by the Ukrainian SSR, influenced the final wording of the relevant articles. This method allows for both contextual and textual analysis of the drafting process and its legal implications.

## Debates about the nature of the document

[1] Oleh Nalyvaiko and Nataliia Bratishko, "Concepts and Features of International Legal Standards of Human Rights," *Analytical and Comparative Jurisprudence*, no. 2 (2023): 412, https://app-journal.in.ua/wp-content/uploads/2023/05/73.pdf.

[2] Oleksandr Zadorozhnii, *Mizhnarodne pravo u vidnosynakh Ukrainy ta Rosiiskoi Federatsii* [International Law in the Relations between Ukraine and the Russian Federation] (Doctor of Legal Sciences diss., Taras Shevchenko National University of Kyiv, 2016), 89.

[3] Mykhaylo Shepitko, "Criminal Policy of the European Union and Ukraine: Issues and Prospects of Rapprochement," *Archives of Criminology and Forensic Sciences* 1, no. 5 (2022): 45, https://doi.org/10.32353/acfs.5.2022.02.

[4] Oleksandr Zadorozhnii, *Heneza mizhnarodnoi pravosubiektnosti Ukrainy* [The Genesis of Ukraine's International Legal Personality]: *Monograph* (Kyiv: K.I.S., 2014), 577.

The Universal Declaration of Human Rights 1948 is the first international legal document to proclaim the fundamental rights and freedoms of an individual regardless of his/her legal status in the state and society.[5] Although all the provisions of this Declaration are related to the rights of the child in one way or another, there are several that in our opinion directly relate to the rights of the child: Article 1 – equality of persons from birth, Article 2 – prohibition of any discrimination in the exercise of rights and freedoms, Article 3 – right to life, liberty and security of person, para. 2, Article 25 – special protection of motherhood and childhood; equal social protection for all children; para. 1, Article 26 – right to education; free and compulsory primary education, access to technical and professional education; para. 3 Article 26 – priority right of parents to choose education for their minor children.

Johannes Morsink pointed out the significant role of the Ukrainian SSR in the development of the Universal Declaration of Human Rights 1948.[6] Yulia Bilenkova notes that participation in the development and adoption of the Universal Declaration of Human Rights was the most important contribution of Ukrainian delegates during the work of the Commission on Human Rights.[7] It was the representative of the Ukrainian SSR, M. Klekovkin, who, at the 27th meeting[8] of the UN Commission on Human Rights, proposed that the Commission begin work on the draft Declaration and postpone the development of a convention (which would become covenants in the future) for the time being. The discussion of this proposal was continued at the 29th meeting[9] of the Commission with the active participation of the Ukrainian SSR. Thus, efforts were focused on the draft declaration, and work on the draft covenant intensified after the adoption of the Declaration.

The question in the air was whether delegations from different countries, cultures and traditions would be able to reach a compromise on the provisions of the future document that would enshrine universal human rights. The main author of the Declaration, John Humphrey, noted that it was the result of the work of hundreds, thousands of people and a synthesis of the ideas and beliefs of millions of people of different races and nationalities who spoke through them.[10] At the beginning of the discussions, countries could not even reach a compromise on the form of the document itself: a convention or a declaration. Since nations can derogate from the provisions of a declaration much more easily than from those of a convention, most of the smaller states that were members of the UN in 1948 wanted the document to be adopted in the form of a convention, which would bind both small and large nations, rather than a mere declaration. The wishes of these smaller nations were thwarted, as at crucial moments during the debate either the US or the USSR, or both, delayed or blocked progress on the convention. The most persistent opponents of a simple declaration were the delegates of Great Britain and Australia.[11] Chile, Egypt, France and Uruguay took an intermediate position. They did not oppose a binding convention, but believed that a declaration would be more realistic at this stage. And in fact, their strategy of 'declaration first, convention second' won out, and at the second session of the Commission on Human Rights

[5] Oleksandr Lysoded, "Zahalna deklaratsiia prav liudyny i mizhnarodni standarty povodzhennia iz zasudzhenymy," [The Universal Declaration of Human Rights and International Standards for the Treatment of Convicted Persons] in *Problems of Legality, no 99 (1999): 140*, https://library.nlu.edu.ua/POLN_TEXT/PROBLEM/Pr_zak99.pdf.

[6] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 2.

[7] Yulia Bilenkova, *Uchast polityko-pravovykh subiektiv Ukrainskoi RSR v rozrobtsi ta utverdzhennі osnovnykh instytutiv novoho mizhnarodnoho prava (1944–1991 rr.): Istoryko-pravove doslidzhennia* [Participation of Political and Legal Entities of the Ukrainian SSR in the Development and Consolidation of the Main Institutions of the New International Law (1944–1991): A Historical and Legal Study] (PhD diss., Lviv, 2019), 127.

[8] United Nations, *Summary Record of the Twenty-Seventh Meeting of the Second Session of the Commission on Human Rights*, E/CN.4/SR.27, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.27&Language=E&DeviceType=Desktop&LangRequested=False.

[9] United Nations, *Summary Record of the Twenty-Ninth Meeting of the Second Session of the Commission on Human Rights*, E/CN.4/SR.29, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.29&Language=E&DeviceType=Desktop&LangRequested=False.

[10] John P. Humphrey, "The Universal Declaration of Human Rights," *International Journal* 4, no. 4 (Autumn 1949): 356.

[11] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 15.

in December 1947, they emphasized parallel work on three documents: a declaration, a convention (which would later become covenants) and implementation measures.[12] Of course, John Humphrey drew attention to these confrontations in his article, noting that whatever the legal force of the Declaration, there is now a jurisprudence on human rights and fundamental freedoms within the UN.[13] The result of these confrontations was the decision to formalize an international document on universal human rights in the form of a declaration.

However, even in this form, the Soviet bloc of UN member states ultimately did not endorse the Universal Declaration of Human Rights, and in the USSR its text was first published only in 1958 in the UNESCO Courier magazine and in a brochure by A.P. Movchan for official use. In Ukraine, the text of the Declaration was distributed through the so-called *samizdat*, and it was possible to go to jail for keeping the text.

Only in independent Ukraine can one truly appreciate the role of Ukrainian diplomats in the development of this great document, which, among other things, became the basis for the formation of international child rights law.

**Article 1 — equality of persons from birth and Article 3 — right to life**

At the beginning of the discussion of the draft, Article 1 of the Declaration had the following wording: 'All men are brothers. Being endowed with reason, members of one family, they are free and possess equal dignity and rights.'[14] The word 'men' has become the most controversial word in this article of the Declaration. From the very beginning, the representative of India defended the position of a separate mention of women in this article, but the word 'men' still remained in the text of the draft Declaration and in the report of the second session of the Commission on Human Rights in 1947.[15] However, the change of the word 'men' to 'human beings' was proposed by the representative of Belgium at the 50th meeting of the third session of the Commission on Human Rights in 1948.[16]

On December 12, 1947, at a meeting of the working group[17], the issue of abortion sparked a lively discussion. The representative of Chile disagreed with the proposal to establish a rule to prevent the birth of children to mentally ill parents. With regard to pregnancy as a result of rape, he cited his experience that most women who sought abortion used rape as a pretext. In response to the Chilean representative's remarks on therapeutic abortion to prevent the birth of a mentally ill child, the representative of the United Kingdom stated that this was still a very controversial issue. With regard to children born to parents with mental disorders, it was found that the parents' condition affected many such children, and while there may have been exceptions where these children became geniuses, these exceptions did not prove the rule. He also noted that the argument that women used rape as an excuse did not prove that all such claims are false. In other words, even if someone abuses this argument, it does not mean that there are no genuine cases of rape that lead to pregnancy. The representative of the United Kingdom emphasized that the working group did not try to define cases where abortion could be permitted, but left this

[12] Åsbild Samnøy, "The Origins of the Universal Declaration of Human Rights," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur S. Alfreðsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 10, https://archive.org/details/universaldeclara0000unse_m5y0/page/10/mode/2up.

[13] John P. Humphrey, "The Universal Declaration of Human Rights," *International Journal* 4, no. 4 (Autumn 1949): 359.

[14] United Nations, *Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights*, E/CN.4/AC.1/W.2, https://digitallibrary.un.org/record/628788?ln=en&v=pdf.

[15] United Nations, *Report to the Economic and Social Council on the Second Session of the Commission on Human Rights*, E/600, https://undocs.org/Home/Mobile?FinalSymbol=E%2F600(SUPP)&Language=E&DeviceType=Desktop&LangRequested=False.

[16] United Nations, *Summary Record of the Fiftieth Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.50, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.50&Language=E&DeviceType=Desktop&LangRequested=False.

[17] United Nations, *Summary Record of the Thirty-Fifth Meeting of the Second Session of the Commission on Human Rights*, E/CN.4/SR.35, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.35&Language=E&DeviceType=Desktop&LangRequested=False.

issue to national legislation. That is why the representative of Uruguay proposed to add to the text a provision on the inviolability of human life (*note: the wording "human life is inviolable" was proposed*) and state protection of all people born or suffering from incurable diseases, as well as people with physical or mental disabilities. These proposals were prompted by the horrific practice of killing the elderly, insane, and incurable in Nazi Germany.[18] However, in the report of the second session of the Commission on Human Rights in 1947, both documents retained the wording that everyone has the right to life (Art. 4 of the Draft Declaration) and that deprivation of life of any person is unlawful except in pursuance of a court sentence finding him guilty of a crime for which such punishment is prescribed by law (Art. 5 of the Draft Covenant).[19] Article 3 of the Declaration (the right to life, liberty and security of person) did not cause much discussion during the third session of the UN Commission on Human Rights in 1948 and the wording that is in the final version of the Declaration was left.[20] As Lars Adam Reboff notes[21], the right to life in Art. 3 of the Declaration has two meanings, namely biological (*inter alia* the right and ability to survive) and in a broader human sense (protection from inhuman conditions).

**Article 2 — prohibition of any discrimination in the exercise of rights and freedoms**

An analysis of Art. 2 of the Declaration makes it clear that its intention is purely to condemn any legal system that does not meet the standards set out in the Declaration,[22] which can be seen quite well in the discussion of this article. For example, the meaning of the word "birth" in the list of anti-discrimination grounds in Art. 2 means the prohibition of discrimination on the basis of inherited legal, social and economic differences. The discussion of Art. 2 of the Declaration took place at the 52nd meeting of the 3rd session of the UN Commission on Human Rights in 1948.[23] During the discussion of the provision that everyone is entitled to all the rights and freedoms set forth in the present Declaration without distinction of any kind, M. Klekovkin (the representative of the Ukrainian SSR) proposed to add to the list of distinctions the *soslovnyi* status of the person, but no equivalent was found in English. That is why he proposed to add the words 'or other' after the words 'property' and 'status' and this addition was adopted. As for part two of the article, the phrase 'arbitrary discrimination' was actively discussed. M. Klekovkin proposed to delete the word 'arbitrary'. This proposal was supported by the representatives of Chile, France and the USSR. The representative of the Philippines proposed to use the phrase 'without any discrimination', which was supported by many representatives of countries, including the representative of the Ukrainian SSR. This article was actively discussed at the next meeting of the UN Commission on Human Rights.[24] The representative of Australia proposed to replace the word 'discrimination' with 'distinction'. Opinions on this proposal were divided. The representative of the Ukrainian SSR noted that this substitution is a change in the essence of the article. Johannes Morsink highlighted that '…the inclusion of anti-discrimination provisions in the text of the Declaration was

18 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 40.

19 United Nations, *Report to the Economic and Social Council on the Second Session of the Commission on Human Rights*, E/600, https://undocs.org/Home/Mobile?FinalSymbol=E%2F600(SUPP)&Language=E&DeviceType=Desktop&LangRequested=False.

20 United Nations, *Summary Record of the Fifty-Third Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.53, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.53&Language=E&DeviceType=Desktop&LangRequested=False.

21 Lars Adam Rebof, "Article 3," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur S. Alfreðsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 89, https://archive.org/details/universaldeclara0000unse_m5y0/page/10/mode/2up.

22 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 92.

23 United Nations, *Summary Record of the Fifty-Second Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.52, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.52&Language=E&DeviceType=Desktop&LangRequested=False.

24 United Nations, *Summary Record of the Fifty-Third Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.53, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.53&Language=E&DeviceType=Desktop&LangRequested=False.

largely due to the persistence of the Soviet delegation, which is such a prominent feature of the document. More than any other voting bloc, the Communists insisted from the outset on the inclusion of explicit anti-discrimination language in the Declaration. This non-discrimination stamp is their mark on the document.'[25] Thus, analyzing the discussion of Article 2 of the Declaration, we can conclude that the provisions of this article are the achievement of the fruitful work of the Ukrainian SSR in the first place.

However, it should be noted here that despite the progressive nature of Art. 2, it was still too early to talk about full compliance with the principles laid down in it. In this case, we are talking about discrimination against minorities, persons on the basis of race, women, religious minorities, poor people, etc., which is all too common in the modern world, as well as preventing the revival of racist movements in the industrialized world.[26] That is why we can say that the foundation laid during the development of the Declaration and later developed in the relevant conventions (e.g., the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, etc.) still needs to be further consolidated and implemented, as it was with the complete elimination of the apartheid system.

**Article 25 — special protection of motherhood and childhood; equal social protection for all children**

As Asbjørn Eide and Wenche Barth Eide argue, it seems that the authors of the Declaration in para. 2 Art. 25, consider motherhood and childhood as a transitional period and women and children are seen as objects rather than subjects of legal relations for whom something needs to be done.[27] Taking into account the vulnerable state of women during pregnancy, childbirth, breastfeeding and childcare until the child reaches the age of independence (or when someone else can provide this care), as well as the vulnerable state of children, especially at an early age, does indeed give grounds to provide them with greater protection. However, we still cannot agree that the authors viewed them exclusively as objects; rather, as subjects who, due to certain temporal features, require special attention/protection.

Paragraph 2 of Art. 25 in the draft Declaration was shorter than it is in the final version, as it did not contain a provision on equalization of rights of children born in and out of wedlock (this provision appeared in the report of the Third Committee of December 7, 1948 on the draft Declaration[28] and, in fact, this provision later became a rule of customary law due to the widespread recognition by states of the binding nature of the Declaration[29]). The actual content of this provision was as follows: 'Mother and child have the right to special care and assistance'.[30] In the report of the drafting committee to Commission on the Human Rights (May 21, 1948)[31] this paragraph had the

[25] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 93.

[26] Sigrun Skogly, "Article 2," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur S. Alfreðsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 87, https://archive.org/details/universaldeclara0000unse_m5y0/page/10/mode/2up.

[27] Asbjørn Eide and Wenche Barth Eide, "Article 25," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur S. Alfreðsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 543–544, https://archive.org/details/universaldeclara0000unse_m5y0/page/10/mode/2up.

[28] United Nations General Assembly, *Draft International Declaration of Human Rights: Report of the Third Committee. Third Session*, A/777, https://digitallibrary.un.org/record/622107?ln=ru.

[29] Olena Vinglovska, *Implementatsiia mizhnarodnykh standartiv prav dytyny v natsionalnomu zakonodavstvi Ukrainy* [Implementation of International Standards of Children's Rights in the National Legislation of Ukraine] (PhD diss., Taras Shevchenko National University of Kyiv, Institute of International Relations, 2000), 40.

[30] United Nations, *Report of the Third Session of the Commission on Human Rights*, E/800, https://digitallibrary.un.org/record/600120?ln=en&v=pdf.

[31] United Nations, *Report of the Drafting Committee [on an International Bill of Rights] to the Commission on Human Rights*, E/CN.4/95, https://digitallibrary.un.org/record/564246?ln=en&v=pdf.

following wording: 'Mothers shall be granted special care and assistance. Children are similarly entitled to special care and assistance'. During the discussion of Art. 25 at the UN Commission on Human Rights on June 9, 1948[32], the representative of India proposed to include in her joint statement with the representative of Great Britain the words 'Mothers and children shall be given special care and assistance'. As Geraldine Van Bueren[33] aptly points out, the Declaration does not actually recognize the role of men (fatherhood), and this combination of the exclusive role of women and children is still a narrative in international law.

The analysis of the discussion of the draft Declaration suggests that these provisions were not controversial and there was still some unanimity among the members of the delegations regarding Art. 25. Therefore, it would be an exaggeration to speak of the special participation of the Ukrainian SSR. It is safe to say that these provisions of Art. 25 of the Declaration were the precursor to the separate protection of the rights of women and children (which manifested itself in the form of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and the Convention on the Right of the Child 1989). These conventions further developed the provisions of the Declaration, some of which we analyzed earlier.[34]

**Article 26 — the right to education**

As is well known from the history of the USSR, education was used as one of the means of ideological indoctrination of the population. It is not surprising that during the discussion of the draft Declaration, representatives of the Soviet bloc countries paid quite a lot of attention to the articles on the right to education. However, other countries also understood the importance of education for the formation of a personality, which resulted in an active discussion of the formulations of the right to education. The Ukrainian SSR's support for the USSR's policy in the international arena can be confirmed by the report of the third session of the Commission on Human Rights[35], according to which the representative of the Ukrainian SSR, together with representatives of the Byelorussian SSR, the USSR and Yugoslavia, abstained from voting in support of the draft International Declaration of Human Rights (*note – this was the name of the document at the draft stage*). It was at this session that the representative of the USSR requested that a statement be added to this report regarding the draft of the International Declaration of Human Rights he had prepared. The statement stated as the reason for abstaining from voting that the draft was unsatisfactory, not designed to guarantee human rights and freedoms and their observance. It was noted that the declaration was to define not only the rights but also the duties of citizens towards their country, people and state. A list of USSR proposals that were not adopted by the Commission on Human Rights at its third session was attached to this statement. Of the articles analyzed in this article, this is an addition to Art. 23 'Access to education shall be open to all without any distinction as to race, sex, language, material status or party affiliation.' This statement was added as an appendix to the report of the third session of the Commission on Human Rights. Representatives of the Byelorussian SSR, the

[32] United Nations, *Summary Record of the Sixty-Sixth Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.66, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FSR.66&Language=E&DeviceType=Desktop&LangRequested=False.

[33] Geraldine Van Bueren, *Mizhnarodne pravo v haluzi prav dytyny*, trans. H. Ye. Krasnokutskyi, scientific ed. M. O. Baimuratov (Odesa: AO BAKHVA, 2006), 37.

[34] Aisel Omarova and Serhii Vlasenko, "International Standards of Juvenile Justice: Its Creation and Impact on Ukrainian Legislation," *Access to Justice in Eastern Europe* 1, no. 13 (2022): 116–126, https://doi.org/10.33327/AJEE-18-5.1-n000101; Aisel Omarova, "Preparation of the UN Convention on the Rights of the Child and the participation of the Ukrainian delegation in it," *Law and Society*, no. 2 (2024): 38–47, https://doi.org/10.32842/2078-3736/2024.2.5.

[35] United Nations, *Report of the Second Session of the Commission on Human Rights*, E/600, https://digitallibrary.un.org/record/220221?ln=ru&v=pdf.

Ukrainian SSR and Yugoslavia joined this statement.

The question of education was one of the most controversial. Enshrining any provisions in the Declaration meant creating minimum international standards for the implementation of a particular subjective right. As Lyudmila Deshko rightly notes, in this case, education had to meet certain quality criteria, analyzing which in totality it is possible to conclude whether the state is fulfilling its international obligations in good faith or not, and, accordingly, any person who suffers a violation of their right to education can apply for the restoration of their violated right using the internal mechanism of legal protection and international.[36] In general, it can be argued that the article on education is one of the most clearly shaped by the experience of World War II, and paragraphs 2 and 3 of Art. 26 were included as a way of condemning what Hitler did to German youth and ensuring that it would never happen again. Paragraph 3 of Art. 26 is a direct reaction and counteraction to the Nazi abuse of state power, and this paragraph was especially necessary precisely because of the use in para. 1 of Art. 26 of the phrase 'compulsory education'.[37] Moreover, education, especially primary and fundamental, lays the foundation for the development of the individual, his worldview, the ability to be useful to society, as well as the ability to continue the development of society in its own spirit in accordance with the traditions and customs of the development of this state. It was this circumstance that caused heated discussions about the provisions of education in the Declaration.

During the first session of the drafting committee, the United States delegation proposed making fundamental education compulsory[38], which was reflected in the document of the drafting committee of June 12, 1947[39]. Comparing the original draft of the Declaration with the proposals of the United States and Great Britain. Instead, France proposed a provision that primary education is compulsory for all children and should be free of charge[40], which was included in the draft Declaration approved by the first session of the drafting committee in 1947[41]. The draft Declaration of the second session of the Commission on Human Rights contained a provision that everyone has the right to education and fundamental education is free and compulsory (Art. 27)[42]. In the text of the project as revised in 1948[43] it was slightly different from the final version, namely, the compulsory nature of not only elementary, but also fundamental education was fixed. There was no norm regarding the right of parents to priority in choosing the type of education for their minor children. During a discussion at a meeting of the Commission on Human Rights on June 10, 1948[44] Art. 26 the representative of Lebanon noted that parents should be given the freedom to determine in what spirit they want their children to be brought up. This opinion was also supported by the representative of the International Union of Catholic Women's Leagues, noting that this article did not indicate the fundamental right

[36] Liudmila Deshko, "The Right to Education and the Principle of Equality: From an Idea in the Works of Professor Hersch Lauterpacht to Enshrining in the Universal Declaration of Human Rights," *Scientific Bulletin of Uzhhorod National University. Series: Law*, no. 77 (2023): 299, https://visnyk-juris-uzhnu.com/wp-content/uploads/2024/01/50-1.pdf.

[37] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000), 90.

[38] United Nations, *United States Suggestions for Redraft of Certain Articles in the Draft Outline*, E/CN.4/AC.1/3; E/CN.4/AC.1/8, https://docs.un.org/en/E/CN.4/AC.1/8.

[39] United Nations, *Textual Comparison of the Draft Outline of International Bill of Rights (Prepared by the Secretariat), the United Kingdom Draft Bill of Rights (Document E/CN.4/AC.1/4), United States Proposals (Document E/CN.4/AC.1/8)*, E/CN.4/AC.1/11, https://docs.un.org/en/E/CN.4/AC.1/11.

[40] United Nations, *Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights*, E/CN.4/AC.1/W.2/Rev.2, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2FAC.1%2FW.2%2FREV.2&Language=E&DeviceType=Desktop&LangRequested=False.

[41] United Nations, *Report of the Drafting Committee to the Commission on Human Rights*, E/CN.4/21, https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.4%2F21&Language=E&DeviceType=Desktop&LangRequested=False.

[42] United Nations, *Report to the Economic and Social Council on the Second Session of the Commission on Human Rights*, E/600, https://undocs.org/Home/Mobile?FinalSymbol=E%2F600(SUPP)&Language=E&DeviceType=Desktop&LangRequested=False.

[43] United Nations, *Report of the Third Session of the Commission on Human Rights*, E/800, https://digitallibrary.un.org/record/600120?ln=en&v=pdf.

[44] United Nations, *Summary Record of the Sixty-Seventh Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.67, https://docs.un.org/en/E/CN.4/SR.67.

and obligation of parents to raise their children conveniently at their own discretion. The representative of the Ukrainian SSR did not support the proposal to grant the right to higher education on the basis of abilities, since, according to him, in the Ukrainian SSR everyone could get higher education and the only thing that was necessary was the student's desire to study. That is why he did not support any restrictions on higher education. During the continuation of the discussion of the right to education[45], discussions were held regarding the use of the words "elementary" and "fundamental" education in the text of the Declaration. All delegations agreed that fundamental education contained a newer and much broader concept of adult education. That is why there were lively discussions about the compulsory education, as some delegations believed that it would be a kind of coercion to education, the imposition of public education (India, Great Britain, Australia, China), others in the concept of obligation saw the child's opportunity to receive education without restrictions from the family/state, as well as the elimination of illiteracy (France, USSR, Chile, Belorussian SSR, Lebanon, Uruguay). Due to such disagreements regarding the compulsory education, the representative of Lebanon proposed a compromise amendment to the text of the project that parents have the primary right to determine the education of their children. The idea of including this amendment was supported by the United States, the Ukrainian SSR and Belgium. The representative of the Ukrainian SSR M. Klekovkin noted that the word ‘compulsory did not exclude the right of the family to choose the school in which its children will study, and it makes sense to include the Lebanese amendment in the second part of the article under discussion. Although at the 68th meeting of the Commission on Human Rights Lebanon's proposal was rejected, in the final version of the Declaration this norm is already present. In the report of the third committee of December 7, 1948[46] regarding the draft Declaration, the article on education already contained a rule on the priority right of parents to choose the type of education for their children.

In fact, the provision for compulsory education is the only such provision in the Declaration (other than Art. 29) where a person is obliged, in this case in the form of an implicit obligation to participate in education[47]. At the same time, parents are given the right to choose education for their children. However, one should not understand this right as such that parents can choose education that contradicts human rights, this right should be considered in conjunction with other provisions of Art. 26. This means that parents can choose the quality of education, including the religious direction of education.

## Summary and Conclusions

Thus, the Universal Declaration of Human Rights contains articles enshrining the rights of children, and these provisions became the basis for future international legal and national instruments concerning the rights of children. Because of the international recognition of the Declaration’s norms in the constitutions of more than 120 states of the world, the list, content and permissible restrictions on the rights and freedoms contained in it have become universally recognized customary norms of international law, that is, international standards of human rights.[48] Alla Fedorova quite accurately

[45] United Nations, *Summary Record of the Sixty-Eighth Meeting of the Third Session of the Commission on Human Rights*, E/CN.4/SR.68, https://docs.un.org/en/E/CN.4/SR.68.

[46] United Nations General Assembly, *Draft International Declaration of Human Rights: Report of the Third Committee. Third Session*, A/777, https://digitallibrary.un.org/record/622107?ln=ru.

[47] Pentti Arajärvi, "Article 26," in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur S. Alfreðsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 554, https://archive.org/details/universaldeclara0000unse_m5y0/page/10/mode/2up.

[48] Valerii Kononenko, "Rol Zahalnoi deklaratsii prav liudyny v interpretatsii Yevropeiskym Sudom Konventsii 1950 r.," [The Role of the Universal Declaration of Human Rights in the Interpretation of the 1950 Convention by the European Court] in *Problems of Legality,* no.99 (1999): 213, https://library.nlu.edu.ua/POLN_TEXT/PROBLEM/Pr_zak99.pdf.

noticed that the Declaration turned out to be a compromise between the opposite positions of the states of the Soviet-socialist camp, which demanded the inclusion and recognition of the group of socio-economic human rights, and the states of Western Europe and the USA, which, in turn, defended the priority and sufficiency of civil and political rights.[49] The debate on provisions that directly or indirectly concerned the rights of children was mainly about the right to life, equality and freedom of all people from birth, the existence of rights and freedoms independent of any signs (gender, race, color, etc.) and the right to education. The active participation of the Ukrainian SSR was at the discussions on most of these provisions, namely the right to life, the existence of rights and freedoms independent of any signs, the right to education and religious education. The delegation of the Ukrainian SSR categorically refused to support the inclusion in the text of the Declaration of any circumstance that would make it possible to legalize the deprivation of life. Another significant contribution of the Ukrainian SSR to the debate was promoting the adoption of provisions that education should be free and accessible to all without discrimination, support for the freedom of choice of education by parents, as well as objections to restrictions on access to higher education on the basis of abilities, based on the belief that the student's desire is sufficient for learning. It was the representative of the Ukrainian SSR who proposed to leave the list of discriminatory provisions in the part that everyone has all rights and freedoms in the text of the Declaration open. From this analysis we can conclude that the priority issues for the delegation of the Ukrainian SSR and the Soviet Union as a whole.

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[49] Alla Fedorova, "Mizhnarodnyi Pakt pro ekonomichni, sotsialni ta kulturni prava yak skladova universalnoi systemy zakhystu prav liudyny," [The International Covenant on Economic, Social and Cultural Rights as a Component of the Universal Human Rights Protection System] *Actual problems of International Relations*, no. 96(1) (2011): 105, http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=apmv_2011_96%281%29__17.

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## ПРАВА ДИТИНИ У ЗАГАЛЬНІЙ ДЕКЛАРАЦІЇ ПРАВ ЛЮДИНИ 1948 РОКУ: ІСТОРІЯ СТВОРЕННЯ ТА РОЛЬ УКРАЇНСЬКОЇ РСР У ЦЬОМУ ПРОЦЕСІ

***Анотація***

Загальна декларація прав людини 1948 р. є одним з основних документів, що заклав основу для всіх інших міжнародних документів з прав людини, включаючи права дитини. У статті буде розглянуто внесок Української РСР у розробку Загальної декларації прав людини 1948 р. в частині, що стосується прав дитини.

Ця стаття є особливо актуальною з огляду на війну між Росією та Україною і той факт, що Росія пропагує, що Україна не є суб'єктом міжнародних відносин і державою в розумінні міжнародного права і ніколи не була такою. Однак наш аналіз доводить, що Україна, навіть будучи однією з союзних республік СРСР, певною мірою діяла як незалежний суб'єкт міжнародного права. Україна є одним із засновників ООН і, як така, брала участь у процесі розробки проекту разом із представниками інших країн. У статті розкриваються особливості діяльності Української РСР під час розробки проекту Декларації. Наприкінці статті робиться висновок про активну участь Української РСР у розробці положень, що стосуються права на життя, існування прав і свобод незалежно від будь-яких відмінностей, права на освіту та релігійне виховання.

***Ключові слова:*** право на життя, рівність осіб, заборона дискримінації, право на освіту, захист дитинства.

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# SHAKAL-EXPRESS AS A POLITICAL-AFFECTIVE TECHNOLOGY: CANCEL CULTURE, MORAL JUDGMENT, AND DIGITAL ACTIVISM AMONG UKRAINIAN GENERATION Z DURING WARTIME

***Abstract***

*This article conceptualizes the "Shakal-Express" – a wartime term from Ukrainian Twitter – as a localized form of digital moral sanctioning and a political-affective technology. Rather than simple online outrage, it functions as a mechanism of horizontal moral governance, blending reputational control, affective mobilization, and non-institutional political signaling.*

*Analyzing seven cases from Ukraine's public sphere (2022–2025), the article explores how Generation Z draws symbolic boundaries of acceptable behavior during crises. Each case is examined through four criteria: trigger, affective frame, response strategy, and consequences. This framework reveals how online judgment is structured and evolves.*

*The study offers four hypotheses on the motives, impacts, and shifts within "Shakal-Express" as a practice of informal digital justice. It also highlights its dual nature – positioned between cancel culture and bullying, empathy and cruelty.*

*Ultimately, the article proposes "Shakal-Express" as a useful model for examining new forms of youth political participation in an age of digital affect, symbolic violence, and social upheaval.*

***Key Words:*** *Shakal-Express, Cancel Culture, Digital Publics, Political Participation, Generation Z, Influencers, Affective Politics, Moral Economy*

## Introduction

In today's digital space, the boundary between civic activism, moral judgment, and online harassment is becoming increasingly blurred. The "Shakal-Express" (Shakaliachyi ekspres) – a phenomenon that emerged within the Ukrainian Twitter community during the full-scale war –illustrates this ambiguity. It arises amid heightened sensitivity to public behavior, symbolic gestures, and expressions of loyalty, transforming into a rapid, horizontal, and emotionally charged reaction. This phenomenon demands rethinking within political science–as an indicator of transformed mechanisms of public accountability in times of crisis.

This study interprets the "Shakal-Express" as a specific Ukrainian form of digital moral response, emerging on social media in reaction to perceived violations of a value or symbolic order. The term, which appeared in 2022 within the ironic discourse of Ukrainian Twitter, denotes a wave of collective online condemnation that includes

memes, boycotts, demands for apologies, and public shaming.

Unlike classical interpretations of cancel culture, where institutional exclusion (firing, blocking, banning) plays a central role, the "Shakal-Express" does not necessarily aim at "cancellation". More often, it functions as an act of symbolic signaling, horizontal control, or emotional retribution. It operates through affect, algorithmic visibility, and public solidarity, and its effects fluctuate between reputational justice and moral coercion.

This study considers the "Shakal-Express" not as a meme or a one-off emotional surge, but as a political-affective technology–a mechanism of digital moral signaling based on emotional reaction, memes, and collective condemnation. It is a form of non-institutional moral governance that operates through affective response, digital visibility, memetic coding, and symbolic marking of what is permissible/impermissible in the public space.

By "political-affective technology", we mean: an informal mechanism of collective action functioning outside institutions, mobilizing affects (anger, shame, betrayal, compassion), realized through horizontal actions (reposts, shaming, flash mobs), and yielding political effects (reputational impact, norm changes, symbolic exclusion).

This approach allows us to view the "Express" not as deviance, but as a specific form of digital normativity, where affect serves as a tool of social arbitration.

## Theoretical Framework

### *Political-affective technology as a mechanism of informal governance*

To comprehend the "Shakal-Express" as a political phenomenon, it is essential to view it not merely as an emotional outburst or a memetic reaction, but as a political-affective technology–a mechanism through which digital communities exercise moral governance beyond institutional frameworks. This technology has four key features:

- it operates through affect (anger, shame, indignation);
- it is realized horizontally (without centralized leadership);
- it has symbolic consequences (inclusion/exclusion from publicity);
- it is based on a collective notion of justice.

One of the key concepts for analyzing the "Shakal-Express" is symbolic power[1] – the capacity to impose meanings as legitimate while concealing the mechanisms of coercion. It is the power to impose particular interpretations, to define the social boundaries of the permissible, all while hiding domination through cultural legitimization.

In the digital age, such power ceases to be exclusively institutional: it is delegated to influencers, communities, and anonymous users. Participants in the "Express" claim moral legitimacy by constructing the boundaries of acceptability through public shaming, boycotts, or calls to action.

This process resonates with Jürgen Habermas's concept of communicative power, whereby the public sphere serves as an arena of democratic influence beyond institutions. In the Ukrainian wartime context, this publicity assumes the role of a reputational tribunal, where every action or utterance is potentially evaluated through the lens of collective vulnerability, war ethics, and a sense of solidarity.

At the same time, the phenomenon of the "Express" is rooted in the logic of affective politics, described by Zizi Papacharissi[2]: digital publics are formed around emotions rather than ideologies;

[1] Pierre Bourdieu and John B. Thompson, Language and Symbolic Power (Harvard University Press, 1991)

[2] Zizi Papacharissi, Affective Publics: Sentiment, Technology, and Politics, Oxford studies in digital politics (Oxford University Press, 2015)

political participation occurs through reactions rather than programs.

Affective publicity, in this context, is a dynamic network of participants united not so much by rational positions, but by shared emotional experiences that become the basis for political articulation. In this article, affective publicity is understood as a politically active digital community formed around shared emotional experience rather than ideological platforms.

Here, we are dealing with what Bennett and Segerberg called connective action[3] – a decentralized, personalized, and memetic form of engagement, where moral intuition and visual symbols replace formal structures. This is a form of digital mobilization based not on common organizational frameworks, but on individualized modes of participation, memes, hashtags, and personal emotional motives that are technologically synchronized.

Within this logic, Ronald Inglehart's theory of post-materialist values[4] also becomes relevant: Generation Z in its digital participation is guided not by ideologies but by values –authenticity, equality, responsibility. For them, participation in the "Shakal-Express" is not apolitical hate, but a form of moral declaration: who has the right to be present in the public space during wartime.

Thus, the "Shakal-Express" performs a regulatory function: it delineates the social boundaries of the permissible, identifies violations of the moral order, and initiates mechanisms of reputational action. This directly correlates with the hypotheses presented, which consider digital moral sanctioning as a tool of justice and/or symbolic violence.

To explain the ambivalence of the "Shakal-Express", it is also worth referring to the concept of digital vigilantism[5], which describes informal digital reactions as a form of self-governance through public exposure. Participants in such actions "weaponize visibility", creating moral pressure and sanctions without the involvement of institutions. This leads their actions into the realm of moral economy–an informal social contract in which public actions are assessed not only by their content but by their emotional resonance, context, and expected community response.

In this sense, the moral economy of publicity is a system of expectations and symbolic exchanges where even silence or excessive emotion can be interpreted as a moral stance or its violation. It determines which actions trigger the "Express", which pass unnoticed, and which transform the object of sanction into a figure of support.

Hence, the "Shakal-Express" functions as a regulatory mechanism: it sets the boundaries of social acceptability, identifies breaches in the moral order, and initiates reputational responses.

## Analytical Hypotheses of the Study

Based on the research objective and prior analysis of digital publicity, we propose the following hypotheses:

H1. Generation Z engages in digital moral sanctioning not with a destructive aim of "cancellation" of individuals or brands, but with the aspiration to restore moral order in the public space.

H2. The "Shakal-Express" serves as an informal mechanism of democratic accountability, but in certain cases, it may assume features of horizontal symbolic violence.

[3] W. L. Bennett and Alexandra Segerberg, "THE LOGIC of CONNECTIVE ACTION," Information, Communication & Society 15, no. 5 (2012), https://doi.org/10.1080/1369118X.2012.670661

[4] Ronald Inglehart, Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies (Princeton University Press, 1997)

[5] Daniel Trottier, "Digital Vigilantism as Weaponisation of Visibility," Philosophy & Technology 30, no. 1 (2017), https://doi.org/10.1007/s13347-016-0216-4

H3. The effectiveness of the "Express" depends not only on the nature of the violation but also on the level of moral capital and public authority of the object (person, brand, institution).

H4. The dynamics of the "Shakal-Express" indicate a shift from classical forms of political participation (elections, petitions, rallies) to expressive politics based on emotion, visibility, and collective interpretation of symbols–especially during wartime.

This formulation of hypotheses enables the construction of an analytical framework that encompasses both the normative and political dimensions of youth digital participation. These hypotheses will subsequently be correlated with the conceptual field of symbolic power, affective publicity, and the post-materialist value orientations of Generation Z.

## Methodology of the Study

This study employs qualitative case analysis as the primary method for reconstructing the dynamics of the "Shakal-Express." The choice of method is determined by the complexity and contextual saturation of the phenomenon, which does not lend itself to formalized quantitative verification but demonstrates stable patterns within the digital culture of wartime.

The analytical material consists of seven high-profile cases from the Ukrainian digital space (2022–2025), selected based on the following criteria:

- **Massiveness of the reaction** – widespread discussion on Twitter, Facebook, Telegram, Instagram over 24–72 hours;
- **Affective intensity** – manifestation of clearly expressed emotions (outrage, shame, offense, anger);
- **Symbolic significance** – presence of themes touching on war, morality, public behavior;
- **Diversity of consequences** – from reputational damage to the rethinking of social norms.

The source base includes:

- open social media posts (Twitter, Facebook, Telegram, YouTube);
- reactions from influencers, journalists, and public figures;
- official responses from brands, individuals, or institutions;
- commentary and analytical materials in the media (Texty.org.ua, Detector Media, MediaSapiens, Babel, etc.).

Each case was analyzed using a standardized structure:

- **Trigger** (what initiated the "Express");
- **Affective frame** (dominant emotions and narratives);
- **Response strategy** (reaction of the object);
- **Consequences** (reputational, institutional, cultural).

Within the analysis, four analytical hypotheses (H1–H4) were proposed concerning the motives, functions, and effectiveness of the "Shakal-Express." Their relevance is examined through the case materials, and confirmation/refutation is assessed in the final discussion.

## Case 1: Yakaboo and Moral Retribution for Symbolic Inequality (*H1, H2, H3*)

1. **Trigger.** In September 2022, the CEO of Ukraine's largest online bookstore Yakaboo, Ivan Bohdan, stated in an interview: "According to our statistics, women buy more books. Well, of course – as usual, they spend the money earned by men"[6]. This comment, reproducing a sexist

[6] Kovalska, "Ukrainian Book: After the War, Away from Moscow." Kudryavka Meetup #2 (2023), https://youtu.be/bnr0Os4mSI0

stereotype, provoked a wave of digital outrage–especially among feminist activists, cultural communities, and youth. The statement was perceived not merely as a careless remark but as a devaluation of women's contributions–including in the context of war. This triggered the "Shakal-Express": calls for a boycott, memes, hashtags, and demands for resignation.

2. **Affective frame**
   Outrage, shame, and betrayal became the dominant emotional drivers. The public interpreted the statement as symbolic devaluation of female agency–particularly painful at a time when women serve on the frontlines, volunteer, and lead institutions. A collective sentiment formed within the digital public: this was not a "trifle" but a violation of the moral order that required a response.
3. **Response strategy.**
   Initially, the company attempted to defuse the blow by framing the phrase as an "unfortunate joke." This response was perceived as an evasion of responsibility. Later, the CEO resigned, and Yakaboo published an extended apology, including promises of transformation, value-based dialogue, and policy revision.
4. **Consequences.**
   In the short term – a deep reputational crisis. In the long term – internal reform: changes in HR approaches, rebranding, partnerships with women's NGOs. Public reputation was partially restored thanks to openness to change.

**Analytical Summary.**

This case vividly confirms H1 – Generation Z engages in digital sanctioning not to destroy but to restore moral order. At the same time, it illustrates the risk of transforming legitimate indignation into symbolic violence (H2) if the institution's response is delayed or vague. Finally, H3 is reflected in the fact that the moral capital of the object (in this case, the bookstore's cultural mission) enabled the company to recover from the crisis. Thus, the "Shakal-Express" here performed the function of an informal reputational tribunal characteristic of digital publicity.

**Case 2: Klavdiia Petrivna and the Hate Against Visibility** (*H1, H3, H4*)

1. **Trigger.**
   At the beginning of 2024, Ukrainian singer Solomiia Opryshko, known by her stage name *Klavdiia Petrivna*, appeared on stage for the first time revealing her face after a long period of anonymity. Instead of the expected recognition, this act of self-revelation provoked a wave of public aggression: users widely discussed her appearance, age, style, and even questioned the very idea behind her art. The "Shakal-Express" was launched not due to a violation of values, but because of aesthetic rejection.
2. **Affective frame.**
   Emotions of disgust, ridicule, and frustration dominated. Many users openly attacked the singer's image as "not young enough," "not feminine," "irritating." Aesthetics became politicized: a woman who does not conform to the standards of youth and glossy beauty was perceived as a violator of an invisible moral contract. At the same time, a counter-campaign of support emerged on social media, where influencers, fans, and artistic communities applauded her courage and originality.
3. **Response strategy.**
   Klavdiia Petrovna did not respond directly–her silence became an act of position. This, in turn, mobilized support: video duets, art illustrations, and posts with hashtags appeared. Thus, public hate was transformed into an affective field of resistance.
4. **Consequences.**

In the short term – a wave of digital aggression and psychological pressure. In the long term – the strengthening of Klavdiia's brand as a figure of alternative visibility: dedicated to art, gender-free, outside the canon. She became a symbol not only of aesthetic resistance but also of reputational resilience.

**Analytical Summary.**

This case clearly illustrates H1 – digital publics of Generation Z sanction not only violations of wartime or patriotic etiquette but also deviations from visual and gender norms, which are likewise perceived as moral deviance.

Simultaneously, H3 demonstrates how the object's moral legitimacy (in this case– artistic sincerity, courage, and aesthetic consistency) can activate a counter-public. Finally, H4 is evident in the way participation in public discussion became a form of expressive politics: both hate and support functioned as political gestures in the battle for visibility. This case exemplifies how the *moral economy of publicity* responds to violations not only of ethics but of style.

**Case 3: Portnikov and the Fragment Taken Out of Context** (*H2, H3, H4*)

1. **Trigger.**
   In early 2024, a fragment of an interview with prominent publicist Vitalii Portnikov went viral on social media. From the phrase "In a democratic state, it is ordinary people who die for the country, not MPs," users concluded that he was allegedly justifying civilian casualties. The quote was taken out of its historical context, but anonymous channels presented it as cynical.
   The "Shakal-Express" was triggered immediately: Twitter attacks, accusations of heartlessness, and assumptions about pro-Russian sympathies.
2. **Affective frame.**
   Social media was flooded with reactions of anger, disappointment, and betrayal. The public perceived the comment as a rationalization of inequality, as the stance of an intellectual detached from suffering. This was especially painful in the context of national trauma. The fragment acted as a reputational micro-bomb–difficult to neutralize even with explanations.
3. **Response strategy.**
   Portnikov promptly explained on Facebook that he had referred to a historical parallel between different political regimes. However, "visibility had already been weaponized": emotional condemnation continued. Only a portion of the intellectual community came to his defense, while the broader audience remained trapped in cognitive disinformation.
4. **Consequences.**
   There were no formal consequences – but his moral reputation was damaged, especially among younger and more radical online audiences. His name became a symbol of the rift between "analytical discourse" and "wartime emotional truth." In part of the public consciousness, this interpretation persisted despite clarifications.

**Analytical Summary.**

This case illustrates H2 – even statements that do not violate ethical norms can, in wartime, be perceived as moral transgressions if they do not fit the affective logic of public thinking. H3 is evident in the fact that high moral capital of the intellectual does not always offer protection–on the contrary, it can make the figure more vulnerable. H4 is traced in the dynamics of the "Express": from a rational statement to affective condemnation–an example of the shift to expressive politics, where reputation is formed beyond content, at the level of emotional resonance.This case also

demonstrates the danger of fragmentary perception in digital space–reputation, like text, can be cut out and transformed beyond the author's intention.

**Case 4: Readeat and the Cultural Conflict Around a Brand** (*H3, H4*)

1. **Trigger.**
   In September 2023, a bookstore-café called Readeat opened in Kyiv. Even before its launch, it became embroiled in scandal due to outrage over the low payment to authors–4 UAH for short texts. The situation escalated after marketer Andrii Fedoriv claimed that "Ukrainians don't read much", and that Readeat aimed to "change the industry". This was perceived as a condescending dismissal of the publishing community. The digital "Express" began with accusations of commodifying culture, elitism, and devaluation of creative labor.
2. **Affective frame.**
   The outrage was grounded in ressentiment–a sense of injustice caused by symbolic inequality. The bookstore positioned itself as a place of beauty, aesthetics, and change, while ignoring labor and cultural contexts. The public responded to the gap between the visual façade and the value content–something perceived during wartime as moral blindness. A segment of the public–especially Gen Z youth–interpreted it as a symbol of capitalist deafness to cultural labor.
3. **Response strategy.**
   Readeat did not apologize. On the contrary, it intensified its media presence, using the scandal as an informational hook. The launch was accompanied by public events, celebrity appearances, and influencer reviews. The brand positioned itself as a disruptor–ambitious, provocative, confident in its mission.
4. **Consequences.**
   Paradoxically, Readeat sold 1.6 million UAH worth of books during its first weekend. The scandal became a form of cultural marketing that worked not for the critics but for a broader audience unaffiliated with the professional book sector. The class divide between "content creators" and "aesthetic consumers" emerged as a critical pressure point.

**Analytical Summary.**

This case clearly confirms H3 – the public's moral reaction depended on the level of symbolic capital held by the brand, but also on its willingness to engage in open dialogue.

The high aesthetic status of *Readeat* did not translate into moral legitimacy–on the contrary, it provoked rejection. Within the scope of H4, the case illustrates a new form of political participation: not through ideological platforms, but through affective interpretations of storefronts, tone, and behavior. Symbolic consumption here becomes a battleground not just over style, but over meaning. As a result, the "Shakal-Express" served not merely as a sanction, but as an indicator of class-cultural division within the moral economy of war.

**Case 5: Telebachennia Toronto and the Reverse Express** (*H2, H4*)

1. **Trigger.**
   In September 2024, the satirical media outlet Telebachennia Toronto (Toronto TV) released a video titled "They F*cked Off," which listed Ukrainian public figures who had left the country during the war. Among them were individuals who had departed legally – or had not left at all. The video was laced with irony and sarcasm, provoking a wave of outrage –not against the subjects of the video, but against its authors. A public debate emerged over the limits of satire during national trauma.
2. **Affective frame.**

The public reaction was built on offense, shame, confusion, and later – counter-aggression. Viewers interpreted the video as baseless shaming, exploiting painful themes of escape, loss, and moral ambiguity. At the same time, a "reverse Express" was activated – against the critics of Toronto. These critics were accused of "not understanding satire" and of excessive sensitivity. This mutual condemnation evolved into digital turbulence without a clearly defined enemy.

3. **Response strategy.**
   The Telebachennia Toronto team did not apologize. They stated that the video was satire aimed at privilege, not condemnation of individuals. However, part of the cultural community questioned the appropriateness of the tone. Society became polarized: for some, the video was exposure; for others–disrespect.
4. **Consequences.**
   There were no formal sanctions or loss of partnerships. However, trust among parts of the audience–especially within cultural and media circles–was partially eroded. "One's own" came under fire from their own public. This showed that moral legitimacy in digital space is dynamic, regardless of past achievements.

**Analytical Summary.**

This case confirms H2 – even those traditionally seen as "ethical watchdogs" can become targets of moral reaction. The "Express" here took on a mirror effect: what was sanctioned was not an act, but an attempt to sanction. Within the framework of H4, this case illustrates the limits of expressive politics: a satirical statement is interpreted not as a political position but as a moral attack, especially under collective stress. It signals an erosion of the boundaries between critique, mobbing, and reflection–a hallmark of the political-affective landscape of wartime.

**Case 6: Lata and the Hatred for Joy** (*H1, H2*)

1. **Trigger.**
   In January 2025, military medic and veteran Yevhen "Lata" posted a photo from a trip to the Carpathians. The image was emotional: gratitude for life, a smile, a landscape. In the comments, someone wrote: "In the context of war, this looks inappropriate." This triggered a wave of similar reproaches: some accused him of untimely joy, others of "provoking" pain, and still others of "faking" it. This was an "Express" not for an action, but for an emotion.
2. **Affective frame.**
   The societal response consisted of projected pain, harsh moral demands, and veiled envy. In the public imagination, the war had created a new moral norm: a hero must be suffering, serious, and endlessly modest. A smile became a sign of frivolity–perhaps even betrayal. This exemplifies the so-called zero empathy syndrome: the emotions of another are perceived as a personal offense.
3. **Response strategy.**
   Yevhen posted a sincere response, explaining that smiling is also a way to survive, and that among those who hike the mountains are veterans, volunteers, doctors. His post gained wide circulation and became a viral counter-narrative. A portion of the public, previously silent, expressed active support: "Thank you for the right to joy".
4. **Consequences.**
   Unlike many cases, this one did not result in prolonged condemnation–the public's protective mechanism worked, and the narrative shifted. Still, the very fact of hating a veteran for joy exposed a profound deformation of the moral landscape.

A sense emerged that even heroes are not safe from the Express if they display an unexpected emotion.

**Analytical Summary.**

This case is a clear illustration of H1 in a distorted form: the public believes it is preserving moral order by punishing not for a crime, but for an "inappropriate" emotion. H2 is revealed in how moral accountability transforms into moral radicalism–where even happiness is interpreted as betrayal. This is an example of affective politics where the right to vulnerability or joy is not part of the socially acceptable behavioral repertoire. The "Shakal-Express" here acts as a tool of coercion into a singular model of heroism, where the subject is stripped of human complexity. And at the same time–as a space in which the norm can be redefined through the power of a public counter-voice.

**Case 7: Babel and the Limits of Emotional Journalism** (*H2, H3, H4*)

1. **Trigger.**
   In April 2024, the media outlet *Babel* published an article with the headline: *"Bloggers on X hinted something terrible was happening at the front. It turned out Pavlo Petrychenko had died. Was it emotion or hype?"* Although the text addressed an important ethical issue–how emotions are "dosed" in blogs during times of tragedy–the headline sparked a sharp audience reaction. It was perceived as a devaluation of a soldier's death, even though the content did not explicitly express this.
2. **Affective frame.**
   The explosion of outrage was driven by grief, mourning, and protective anger. The emotionally charged public interpreted the headline as cold, almost cynical–as if death were merely "noise" in the social media feed. Friends of the deceased, soldiers, and influencers immediately launched a wave of criticism. Notably, the target was not a politician or a brand, but a newsroom usually associated with progressive journalism.
3. **Response strategy.**
   The editor-in-chief explained on Facebook that she had lost loved ones herself, and that the article aimed to spark an ethical discussion about how losses are communicated. But the tone had already been set–the justification seemed too late. Some readers unsubscribed from the outlet, while others demanded a rethinking of editorial practices.
4. **Consequences.**
   Formally–no staff changes or legal repercussions. But the outlet's credibility suffered moral damage–not because of a factual error, but due to a failure to meet public expectations of tact. *Babel* found itself in a political trap: either remain independent or yield to the affective norms of the time.

**Analytical Summary**

This case clearly confirms H2 – the digital public can sanction not for content, but for tone, especially in situations of collective grief. H3 is evident in the fact that even the high symbolic capital of the outlet did not protect it, as legitimacy is shaped not only by knowledge, but also by emotional tonality. Finally, H4 is illustrated in how the headline became a political act–even if it was not intended as such. In wartime, emotional precision is as important as factual accuracy: a word loses neutrality and becomes a signal. This case shows that the affective politics of Generation Z includes a strict ethics of language–and that the "Shakal-Express" can act as a mechanism for publicly correcting norms of journalistic sensitivity.

*Table 1. Hypotheses and Their Empirical Confirmation Across Cases*

| ***Hyp.*** | ***Essence*** | ***Confirmed by Cases*** | ***Comment*** |
|---|---|---|---|
| H1 | Gen Z applies the "Express" to restore moral order, not to destroy | Yakaboo, Klavdiia Petrovna, Lata | Fully confirmed: the Express is initiated as a reaction to breaches of moral consensus |
| H2 | The Express oscillates between accountability and moral violence | Portnikov, Toronto, Lata, Babel | Partially confirmed: in a number of cases, the boundary between justice and bullying was blurred |
| H3 | The effect of the "Express" depends on the moral capital of the object | Yakaboo, Klavdiia Petrovna, Readeat, Portnikov, Babel | Fully confirmed: objects with high legitimacy had chances for reputational recovery or resistance |
| H4 | Participation shifts to expressive politics through affect, memes, and aesthetics | All cases (especially Toronto, Readeat, Babel) | Fully confirmed: responses are based not on programs or ideologies but on emotional interpretation and symbolic representation |

## Discussion

### The "Shakal-Express" as a Flexible Political-Affective Technology

Case analysis shows that the "Shakal-Express" is not a homogeneous phenomenon. Its nature is hybrid, dynamic, and situationally determined. Some reactions appear as fair moral retribution, others–as aesthetic rejection, still others–as cultural *ressentiment* or as a form of traumatic regulation of public emotions. All of these manifestations exist within the space of digital morality, where actions are often judged not by legal or rational criteria, but by emotional signals, visibility, and the cultural context of war.

To systematize the empirical material, we propose a typology of "Shakal-Express" scenarios based on the type of trigger, affective dynamics, purpose of the response, and potential consequences.

*Table 2. Typology of "Shakal-Express" Scenarios*

| ***Scenario Type*** | ***Case Example*** | ***Main Trigger*** | ***Affective Reaction*** | ***Purpose of Reaction*** | ***Potential Effect*** |
|---|---|---|---|---|---|
| Moral retribution | Yakaboo, Portnikov | Violation of public values (gender, justice, war) | Outrage, betrayal | Demand for punishment or apology | Reputational loss, policy change |
| Aesthetic punishment | Klavdiia Petrovna | Nonconformity with visual/gender expectations | Disgust, mockery | Removal from public space | Polarization, counter-public mobilization |
| Class-cultural rupture | Readeat | Symbolic inequality, sense of superiority | Ressentiment, anger | Rejection of brand legitimacy | Partial rebranding or conversion into |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | marketing gain |
| Regulation of emotions and mourning norms | Lata, Babel | Emotion that contradicts expectations (joy, "insufficient grief") | Offense, moral dissatisfaction | Behavioral alignment to "ethically acceptable" | Tone shift in discourse, redefinition of sensitivity |
| Reverse moral failure | Toronto | Attempt at moral control misaligned with audience expectations | Confusion → aggression at initiator | Sanctioning the "sanctioner" | Trust erosion, symbolic collapse of legitimacy |

This typology allows us to see the "Shakal-Express" not as a uniform form of bullying but as a multilayered tool of affective regulation of public behavior.It serves simultaneously as an indicator of changes in public norms and as a mechanism of their reproduction. Affect here is not a side effect–it is the main mediator of public judgment, especially under wartime morality, where the line between institutional authority and civic action becomes blurred.

**The Algorithmic Logic of Affective Acceleration**

A distinct role in the dynamics of the "Express" is played by the algorithmic amplification of emotional reactions. On social networks such as X, Instagram, or Telegram, moral outrage quickly receives priority through reposts, hashtags, and reactive memes.

As a result, even a fragment taken out of context (as in the Portnikov case) or an ambiguous emotion (as in the Lata case) becomes more prominent in media than actual deeds–precisely due to the algorithmic mechanism of affect amplification.

This elevates the "Express" beyond mere reaction and transforms it into a media technology that combines moral judgment with the logic of reach.

**Public Norm as an Unstable Construction**

Another important aspect is that the public moral boundary is not fixed–it is formed in real time through conflict, affect, and memes. What is perceived as acceptable today may provoke outrage tomorrow.

This is why the same actions–such as expressing joy (Lata) or offering analytical commentary (Babel)–can, in one context, be interpreted as normal, and in another–as ethical violations.

This indicates that the "Shakal-Express" not only reveals the norm but also constantly redefines it, creating an ongoing moral cartography of society.

**The Limits and Risks of Political-Affective Action**

The key conclusion lies in recognizing that the "Shakal-Express" is not merely a meme or a trend, but a new form of civic presence within the space of digital morality. It is political–even if it does not explicitly claim to be so.

However, it also carries risks. In situations where moral clarity substitutes for complexity, and speed outweighs analysis, the Express may transform into a form of horizontal violence.

Therefore, the task of the researcher is not only to classify cases but to trace the boundary between political emotion and ethical disorientation.

## Conclusions

This article has analyzed the phenomenon of the "Shakal-Express" as a localized form of non-institutional sanctioning in the Ukrainian digital space during wartime.By applying the concept of political-affective technology, we examined how Generation Z–the primary participant in digital publicity–exercises moral governance through outrage, sarcasm, memes, visibility, and symbolic gestures.Such participation does not fit within classical models of political behavior, yet it has real consequences–from reputational destruction to the transformation of public norms.

### Theoretical Summary

The conducted study confirmed the analytical usefulness of viewing the "Shakal-Express" through a combination of several approaches: the theory of *symbolic power*[7], *affective publicity* [8], *moral economy*[9,10], *connective action*[11], and *post-materialist values*[12].

From this perspective, the "Express" appears as a novel form of digital politics based not on programmatic content, but on affect; not on ideology, but on sensitivity; not on systems, but on reactions.

All four proposed hypotheses were confirmed:

- **H1:** Generation Z does not act out of destructiveness – instead, it seeks to restore moral order in response to violations of symbolic consensus.
- **H2:** The Express oscillates between normative sanctioning and affective violence, depending on the trigger, the legitimacy of the target, and the dynamics of public sensitivity.
- **H3:** Symbolic capital (reputation, mission, authenticity) determines the outcome of the Express: destruction or re-signification.
- **H4:** We are dealing with *expressive politics*, where participation is not action but emotion, not debate but meme, not partisanship but moral representation.

Thus, we are witnessing a phenomenon that redefines the very nature of the political in the digital age: public action acquires the character of an emotional gesture, and the moral economy becomes the principal instrument of influence.

### Rethinking the Political Through Affect

Under the influence of war and the digital environment, political action increasingly takes the form of emotional gesture. The "Shakal-Express" demonstrates that the political subjectivity of Generation Z is not limited to elections or protests. It manifests through meme language, indignation, and collective sensitivity to symbols and feelings.

This is a form of everyday politics, where each like, repost, or outcry becomes a tool of affective governance–not through a political program, but through resonance. It is precisely at the intersection of humor and anger, style and ethics, that a new politics is born–emotional, unstable, but deeply real.

### Practical Implications of the Findings

The results of this study have implications for several sectors:

- For journalists and media professionals, the Babel case demonstrates that even a correctly written article may be perceived as an ethical violation solely due to its headline. This highlights the need for new standards of sensitivity regarding

7 Bourdieu and Thompson, Language and symbolic power

8 Papacharissi, Affective publics

9 E. P. Thompson, "THE MORAL ECONOMY of the ENGLISH CROWD in the EIGHTEENTH CENTURY," Past and Present 50, no. 1 (1971), https://doi.org/10.1093/past/50.1.76

10 Luc Boltanski and Eve Chiapello, The New Spirit of Capitalism, English-language edition, trans. Gregory Elliott (Verso, 2018)

11 Bennett and Segerberg, "THE LOGIC OF CONNECTIVE ACTION"

12 Inglehart, Modernization and postmodernization: Cultural, Economic, and Political Change in 43 Societies. Princeton University Press, 1997.

linguistic framing and the affective load of headlines in situations of public grief.

- For businesses and brands, the Yakaboo and Readeat cases clearly show that marketing devoid of a moral compass and sensitivity to the social context is inevitably exposed to reputational crises. In today's digital environment, a brand is not just a product or service–it is, above all, a value signal that must resonate with public expectations.
- For public intellectuals and opinion leaders, the Portnikov case revealed a particular vulnerability to fragmentation of meaning and decontextualization.

  In an age of emotional politics, complexity, rationality, and intellectual integrity do not guarantee protection–on the contrary, they can be easily delegitimized through affective distortion.
- For civil society, it is important to understand that the "Shakal-Express" is not always an expression of injustice–it can perform a function of collective moral correction. However, without proper reflection and awareness of boundaries, such practice can transform into a form of horizontal repressive pressure.
- For educators, activists, and political communicators, it is crucial to realize that the new generation already acts politically–though not in the classical sense of participation. The politics of Generation Z is a micro-politics of interpretations, symbols, memes, and public emotions that demands a rethinking of traditional analytical frameworks and interaction strategies with youth audiences.

## Research Perspectives

The results of this study open several avenues for further interdisciplinary analysis. First and foremost, a promising direction involves conducting comparative studies: examining how similar forms of moral pressure, symbolic condemnation, and digital sanctioning operate in other post-conflict or hybrid democracies, such as Poland, Georgia, or Lithuania. This would allow scholars to identify universal traits of such phenomena–or, conversely, highlight their cultural specificity.

The second promising vector involves algorithmic studies: analyzing how platforms like Telegram, TikTok, or X (formerly Twitter) amplify affective reactions, form "chain" dynamics of Expresses, and influence their speed, reach, and duration. Can such dynamics be modeled? Are there points of intervention that might mitigate the harm from uncontrolled waves of outrage?

The third direction involves gender and class-based analysis of vulnerability to the Express. It is essential to explore which social groups more frequently become targets of digital critique, how symbols triggering moral response are activated, and whether the Express reproduces existing asymmetries and biases.

The fourth direction pertains to the use of mixed methods–specifically, combining content analysis and discourse analysis with in-depth interviews and digital ethnography. This approach would help reconstruct the internal motivations of Express participants, their understanding of justice, the boundaries of the permissible, and their sense of collective responsibility.

Finally, a critical direction lies in the attempt to formalize what might be called an "ethical contract of publicity": developing principles of public communication that account for the emotionality of digital environments while avoiding censorship or repression.Such an approach would enable not only documentation of the consequences of the Shakal-Express but also critical rethinking of the rules of engagement in the new informational society.

Ultimately, the phenomenon of the "Shakal-Express" demands from political science not only descriptive or instrumental approaches, but a deeper reconsideration of the very concept of publicness in times of

crisis. It functions as a magnifying lens that reveals the dynamics of moral tension, emotional coordination, and informal governance in the digital era.

It combines trauma, solidarity, algorithmic logic, and interpretive struggles over meaning –and it is precisely in this combination that the new quality of the political emerges.This is no longer just protest or loyalty–it is what constitutes everyday political subjectivity in the space of emotional response.

In the context of wartime crisis and media hyperreality, the "Shakal-Express" is not a deviation from the norm – but one of the ways in which the norm is formed. It is not deviance, but a mechanism of moral governance without institutions, in which affect and memes become the language of collective judgment. It exposes where the boundary lies between justice and vindictiveness, between participation and mobbing, between publicity and humiliation.

It is a phenomenon that compels political science to move beyond traditional formal structures–and turn to the micro-dynamics of emotion, visibility, identity, and risk. Because it is precisely there–at the crossroads of anger and humor, shame and solidarity–that a new form of political subjectivity is now emerging.

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## «ШАКАЛЯЧИЙ ЕКСПРЕС» ЯК ПОЛІТИКО-АФЕКТИВНА ТЕХНОЛОГІЯ: КЕНСЕЛ-КУЛЬТУРА, МОРАЛЬНЕ СУДЖЕННЯ ТА ЦИФРОВИЙ АКТИВІЗМ СЕРЕД УКРАЇНСЬКОГО ПОКОЛІННЯ Z У ВОЄННИЙ ЧАС

### Анотація

*У статті пропонується концептуалізувати "Шакалячий експрес" – термін, що виник у Twitter-спільноті України під час війни – як локалізовану форму цифрового морального осуду та політико-афективну технологію. Це не просто онлайн-обурення, а механізм горизонтального морального врядування, який поєднує репутаційний контроль, емоційну мобілізацію та неінституційне політичне сигналізування.*

*На основі аналізу семи кейсів з української публічної сфери (2022–2025), дослідження показує, як покоління Z формує символічні межі допустимого у кризовий час. Кожен кейс розглядається за чотирма критеріями: тригер, афективна рамка, стратегія реагування та наслідки. Це дозволяє простежити структуру й динаміку онлайн-осуду.*

*У статті сформульовано чотири гіпотези щодо мотивів, ефектів і трансформацій "Шакалячого експресу" як практики неформального цифрового правосуддя. Також виявляється його амбівалентність – між "кенселінгом" і цькуванням, емпатією та жорстокістю.*

*"Шакалячий експрес" пропонується як аналітична модель для вивчення нових форм політичної участі молоді в умовах соціальних зрушень і цифрової емоційної економіки.*

***Ключові слова**: шакалячий експрес, культура скасування, кенселінг, цифрові спільноти; політична участь; покоління Z; зумери, інфлюенсери; афективна політика; моральна економіка.*

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# UNMANNED AERIAL VEHICLES DURING FIRST WORLD WAR AND INTERWAR PERIOD (1914-1939): MILITARY EXPERIMENTS, ORIGINS OF INTERNATIONAL LEGAL REGULATION

***Abstract***

*An analysis of emergence and development of unmanned aerial vehicles (UAVs), or drones, during the First World War and in the interwar period (1914-1939) has been made. The authors have examined the first military experiments in the United States, Great Britain, France and the USSR that laid the grounds for the future use of UAVs in military. Particular attention has been paid to such prototypes as the American Kettering Bug and the British Aerial Target, and the first production models, in particular the OQ-2 Radioplane. The beginning of international legal regulation of the use of military aviation (the Paris Convention, the Hague Rules of Air Warfare), which also became the basis for the future regulation of the use of UAVs, has been also studied. It has been emphasized that despite technological limitations this period was key to the formation of engineering concepts and legal approaches that influenced the further development of drones.*

***Key Words:*** Unmanned aerial vehicle, UAV, Drone, First World War, Military experiment, International law, Military aviation

## Introduction

The First World War was a turning point in the history of military equipment, particularly in the development of aviation. Along with the appearance of manned aircraft over the battlefield, an idea emerged of drones that could perform similar tasks without risk to humans. Although the technological limitations of the early XX century did not allow for fully autonomous systems, numerous military experiments in the United States, Great Britain, France and other countries laid the basics for future developments in unmanned aircraft.

In the interwar period (1919-1939) interest in unmanned technologies only grew. This was due to both the war experience and the development of radio control and automatic guidance systems. It was then that the first remotely piloted aircraft were tested,

being initially seen primarily as targets for anti-aircraft gunners and pilots, but later acquired other qualities as the design evolved.

Simultaneously with technological development the process of international legal regulation of the use of aviation (including drones) began. The agreements concluded after the First World War were supposed to regulate air operations and prohibit certain types of weapons, but there were no clear rules for UAVs.

This article explores attempts to create UAVs, their technical features and military use in 1914-1939 and analyzes the emergence of international legal norms that could have influenced the further development of unmanned technologies.

**Literature review and methodological approaches**

The development of drones during the First World War and the interwar period (1914-1939) was characterized by a series of experiments that laid the foundation for the future use of UAVs (primarily in military affairs).

The authors of the methodological recommendations "Peculiarities of the use of unmanned aerial vehicles by police authorities and units"[1] presented their own vision of the history of the creation and development of unmanned aviation

Also noteworthy is a proposal of periodization of UAVs' use by the nature of the tasks assigned to them – from reconnaissance (at the first stage) to combat support tasks and strikes on ground targets at the second and third stages made by A. Feshchenko[2].

S. Casey-Maslen, M. Homayounnejad, H. Stauffer and N. Weizmann reviewed the development of UAVs and their legal status[3]. Among the first effective attempts to create drones, they mention the Kettering Bug, an experimental development of 1918 that could have become the first "bomb drone" (a gyroscopically controlled biplane capable of carrying explosives and remotely guided to the target). In addition, an analysis of international legal aspects of arms development has been made, which makes it possible to trace the first attempts to control new types of military equipment. For example, the Briand-Kellogg Pact of 1928 has been mentioned, which formally prohibited war as a mean of solving international conflicts. This is an important moment for understanding how the international community was beginning to comprehend the need to regulate the latest weapons, although no specific agreements on UAVs existed at the time. At the same time, it should be emphasized that the authors focus on the events of the second half of the XX century and the impact of the first experiments on the development of drones is somewhat superficial. There is also a lack of analysis of the experience of other countries in this area (for example, the Great Britain and France). Similarly, the legal aspect is presented mainly from the perspective of the present which is certainly interesting for understanding the current regulation of UAVs, but does not provide a complete picture of the formation of the first rules and restrictions for such technologies.

The work of M. Hasian covers a wide range of issues related to the use of drones in warfare (primarily political and moral and ethical aspects, as well as legal regulation of their use)[4]. The author made in-depth analysis of the evolution of military technology and strategy, providing a history of experiments with automated control systems in military aviation and referring to the role of the latter in the colonial policy of Great Britain in the interwar period.

D. Hambling studies the development of UAVs in detail, starting with the very first

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[4] Hasian, M. *Drone Warfare and Lawfare in a Post-Heroic Age*. Tuscaloosa: The University of Alabama Press, 2016. 280 p.

experiments[5]. For example, during the First World War the British worked on the Aerial Target project, hoping to create the first radio-controlled aircraft, but due to technical difficulties this was never realized. The Americans, in turn, developed the Kettering Bug, an early version of a cruise missile). This demonstrates that the drone concept had prospects even then, but due to low reliability the experiments were delayed and the war ended before they could be used. The interwar period was a time of stagnation for UAVs as the military viewed them mostly as guided targets. For example, in the 1930s, the British tested the Fairey Queen and although it proved to be quite effective, it was used only for exercises. The military command remained skeptical about the actual combat use of this model. Overall, the author successfully demonstrates the difficulties faced by the first drone developers and allows us to understand why they were not taken seriously for a long time. He also briefly mentions that the issue of legal regulation of the use of military aviation was already raised: there were discussions about whether it complied with international law but the fighting quickly (and drastically) changed these ideas.

The research of L. Pazmiño is a valuable source for researching the development of UAVs in the military sphere, covering both technical experiments and international legal initiatives to regulate their use[6]. One of its key strengths is the detailed overview of early drone experiments. The author highlights the first documented case of their combat use – the launch of 200 explosive-laden balloons by the Austrians during the siege of Venice in 1848. This experiment showed not only the prospects of the UAV, but also the difficulties associated with its controllability, as wind changes forced some of the balloons to return. Later, during the First World War, Germans developed the Torpedo Gleiter – an early version of a guided air weapon launched from airships and controlled through a thin wire. In the United States of America, in 1917, Elmer Sperry and Peter Hewitt created the Automatic Aeroplane – the first American UAV that became a prototype for future cruise missiles. Details of the development of international legal regulation in the field of aviation are also extensively covered. As the Paris Convention of 1919 established the principle of air sovereignty of states, its additional Protocol of 1929 prohibited the crossing of the airspace of another state by an "unmanned aircraft" without special permission. Author states that this is the first international legal act in the field of UAVs[7].

A study by M. Schulzke examines moral, legal and political aspects of the use of drones in modern conflicts[8]. The author analyzes how UAVs affect the way warfare is conducted and considers their relevance to the theory of just war, beginning from outlining the key issues related to the use of drones, explaining their role in transforming modern warfare and then going to explore the history of UAVs development and their gradual introduction into military operations. Special attention is paid to the ethical dilemmas arising from remote warfare. The author analyzes the arguments both in favor of and against the use of drones, in particular with regard to the issue of responsibility for strikes. He also considers whether the use of UAVs meets the criteria for a just war, such as proportionality, legality and necessity of the use of force.

As of the problem of compliance with international humanitarian law, it is considered in the context of the ability of drones to distinguish between combatants and civilians, and the level of proportionality of the use of force is assessed. A significant part of the book is devoted to the prospects of creating autonomous combat systems and the risks associated with the lack of human control over them. Meanwhile the political aspects of the use of UAVs are examined in terms of mechanisms that can limit their use

[5] Hambling, D. *Swarm Troopers: How Small Drones Will Conquer the World*. South London: Popular Science, 2015. 340 p.

[6] Pazmiño, L. *The International Civil Operations of Unmanned Aircraft Systems under Air Law (Aerospace Law and Policy)*. Springer, 2020. 217 p.

[7] Pazmiño, L. *The International Civil Operations of Unmanned Aircraft Systems under Air Law (Aerospace Law and Policy)*. Springer, 2020. P. 21.

[8] Schulzke, M. *The Morality of Drone Warfare and the Politics of Regulation*. New Security Challenges. Palgrave Macmillan, 2017. DOI: https://doi.org/10.1057/978-1-137-53380-7.

in wars. The author also researches possible ways to reduce the damage caused by the use of drones and to raise the standards of their use in military conflicts. The book concludes with a summary of the main conclusions regarding the ethical and legal issues of drone use and suggests possible directions for further research and regulation of this technology, which makes it a valuable resource for researchers of international law, military ethics and security policy, helping to understand both the potential benefits of drones in reducing military casualties and the risks associated with their uncontrolled use.

Monograph by M. Karau[9] is a thorough research of the activity of German Navy in Flanders waters during the First World War. The author pays considerable attention to naval operations, the role of submarines, and strategic decisions of the command. For the analysis of the development of unmanned aerial vehicles and the international legal regulation of their use in 1914-1939 the book provides a general context for understanding the military experiments of that time. It also contains a detailed description of the air component of naval operations, including the use of aircraft for reconnaissance, coastal patrols, in defence of the ports of Ostend, Zeebrugge and Brugges, as well as to fight British submarines and naval forces. Importantly, the study examines the impact of British aviation, which in 1918 began actively patrolling the English Channel, leading to the increase of losses of German submarines. This is important for understanding early military experiments with the use of aviation in naval operations and although UAVs in the classical sense have not yet been used, the provided picture of the use of aviation in naval warfare allows tracing the origins of future unmanned technologies.

J. Perry focused on the history of drones' development and testing in the U.S. Navy, starting with the First World War[10]. He suggests that the U.S. Navy was probably right to refuse to invest heavily in UAVs research (particularly carrier drones) until the beginning of the last decade of the twentieth century, given their technological imperfections, low performance and questionable operational need (compared to manned aircraft).

M. Hirschberg substantiates the view that UAVs in the World War I and until the very beginning of World War II were developed primarily to destroy enemy ships, fortifications and other well-protected important targets. Thus, drones were actually cruise missiles as their design level did not yet allow them to direct the warhead to the target and return the delivery system to the base. As a result, technological advances have made the use of UAVs to hit such targets more efficient and affordable than manned aircraft[11].

This topic was previously studied also by the authors of this paper – M. Akimov[12] and I. Pokhylenko[13] – however, given the constant development of drones and the significant impact of the ongoing Russian-Ukrainian war on this process, there is a need for further analysis of key stages of development, assessment of the latest trends and forecasting of future directions of the use of UAVs.

[9] Karau, M. *Wielding the Dagger: The MarineKorps Flandern and the German War Effort, 1914-1918.* Contributions in Military Studies. Praeger, 2003. 280 p.

[10] Perry, J. *Navy Unmanned Air Systems, 1915–2011*. AIAA Centennial of Naval Aviation Forum "100 Years of Achievement and Progress", 2011.

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[13] Pokhylenko, I. The Role and Significance of Unmanned Aerial Vehicles in Aviation Activities. *Almanac of Law. Legal Principles of Lawmaking: National and Foreign Experience: On the Occasion of the 75th Anniversary of the V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, 1949–2024*. Vol. 15. Kyiv : V. M. Koretsky Institute of State and Law of the NAS of Ukraine, 2024. P. 399–404.

## Research methodology

The methodology for studying the development of UAVs during the First World War and the interwar period is based on an interdisciplinary approach. The main methods include:

Historical and chronological analysis – for study of the main events and technological achievements in the development of unmanned aircraft.

Comparative analysis – for comparing the development of unmanned aviation in different countries, including the United States of America, the Great Britain, France and the USSR.

Legal analysis – for studying international agreements and treaties that could affect the regulation of unmanned aerial vehicles.

Technical analysis – for evaluation of engineering solutions used in unmanned systems of that period.

## The period of the First World War and the interwar years (1914-1939): military experiments and developments

This period in question was a key stage in the development of drones. It was then that the first real successes in the development of UAVs (including radio-controlled aircraft) and air projectiles took place. Wars and technological advances always gave impetus to the active improvement of unmanned systems, but the First World War brought mechanization and automation in military affairs to unprecedented heights (and along with it, the causing of human losses to an industrial level). It was then that military commanders began to seriously consider the use of drones for reconnaissance, bombing, and training purposes.

One of the ambitious projects was the development of an army of unmanned aircraft, which was announced in 1918 by French Prime Minister Georges Clemenceau. Although this project was not completed after the end of hostilities, it demonstrated interest in technologies that would reduce human losses during hostilities.

The signing of the Armistice in Compiegne and later the Treaty of Versailles did not put an end to the development of drones. The world's leading aviation powers continued to experiment with remote control and automatic systems. In 1923, the French engineer Maurice Percheron developed and tested the first military drone, the design of which provided for the possibility of autonomous flight with a number of specific tasks. In 1935, British-born engineer Reginald Lee Dugmore developed the first remotely piloted target aircraft, the OQ-2 Radioplane, and offered it to the U.S. Army. This UAV became the first mass-produced model to be used for training of the anti-aircraft gunners during the Second World War.

At the same time, the experiments with automated versions of the DH.82 Queen Bee aircraft took place in the Great Britain. It was from this aircraft that the nickname "drone" originated due to the characteristic sound of the engine, which resembled the humming of a drone; the term became so common that the U.S. Army has officially used it as a common name for UAVs since 1941.

The Soviet Union was no exception. Despite being delayed by the devastation and chaos of the Civil war and 1920s, the Soviet aviation industry was rapidly making up for lost time. Already in the early 1930s, the Special Technical Bureau (Ostekhburo) under the People's Commissariat for Military and Naval Affairs received an order to develop a remote control system for aircraft. The initiative belonged to Marshal Mikhail Tukhachevsky, who sought to find a way to use outdated and worn-out machines that were not suitable for combat but could still take off. They were supposed to be used as remote-controlled bombers to attack targets with powerful air defense systems (as guided "flying bombs") and as targets for anti-aircraft training. Initially, the twin-engine TB-1 bomber was the main candidate for conversion into a drone. Despite being the world's first mass-produced all-metal monoplane bomber, it quickly became obsolete, giving way to the four-engine TB-3, but it had a fairly large bomb load and

acceptable survivability. The Daedalus control system operated on the principle of tone modulation, transmitting a total of 16 commands (turns, altitude and speed control, bomb drops, etc.) over a distance of 25 km using acoustic tones. The receiver on board the UAV recognized the signals coming through the filter system and activated the appropriate mechanisms. A unique detail was the automatic landing system, which allowed the drone to descend and land independently after activating the appropriate command. Since 1937 the concept of a "flying bomb" was tried. The remotely controlled TB-3 received a 6.2-ton warhead filled with TNT, hexogen and aluminum powder. The control system ensured high accuracy of target destruction. However, due to technical problems, delays in finalization and changes in military priorities, the project was curtailed in 1938. Nevertheless, Soviet developments in the field of drones became a valuable basis for future developments in the field of guided weapons.

Germany was actively working on the development of remote control systems that would form the basis of future unmanned aerial vehicles and guided missiles. Despite technological limitations, a number of experiments were carried out at that time that formed the basis for the development of automated combat systems in the twentieth century.

The first large-scale UAV project in Germany was the development of a torpedo airframe, the concept of which was proposed in 1914 by Wilhelm von Siemens[14]. It was planned that the glider would carry a naval torpedo, which, after reaching a predetermined altitude, would separate and continue to move in the water to the target. It was controlled by a 4 km long copper wire that transmitted commands from the operator. Tests began in 1915 and the final test took place on August 2, 1918, when the glider was dropped from a Zeppelin LZ 80 (L 35) airship. The device lost control after a wire broke, which showed the shortcomings of the technology. Further research stopped after the signing of the Armistice in Compiegne.

In addition to aviation unmanned systems, Germany conducted experiments with remote control of surface vehicles. FL boat (*Fernlenkboot*)[15] was designed for the German Navy; 17 meters long, it carried 700 kg of explosives and was intended for attacks on enemy ships. It was controlled by radio, but the accuracy of targeting remained low, which limited the effectiveness of this weapon.

After the end of World War I the Treaty of Versailles imposed severe restrictions on the development of German military aviation. As a result, research on unmanned systems continued under the guise of civilian aviation developments. But 1937, only two years after the official announcement of existence of German military aviation (Luftwaffe), the Reich Ministry of Aviation (RLM) contracted Fieseler to develop the Fi 157, a remotely piloted target drone for training anti-aircraft troops. The aircraft had an all-wood construction and was launched from under a bomber carrier. During testing, all three prototypes crashed. Its manned version (Fi 158) was created and used for research on remote control systems. However, low efficiency and technological problems led to the termination of development.

By 1939, Germany had made significant progress in the development of unmanned combat vehicles. The most famous result of this research was the Fau-1 (V-1, Vergeltungswaffe-1), the world's first mass-produced projectile aircraft, which was put into production in 1942 and was actively used during World War II. The next step was the creation of the Fau-2 (V-2, Aggregat-4), the world's first ballistic missile. It was developed under the leadership of Wernher von Braun and was used by Germany at the end of the war to strike the United Kingdom

[14] Branfill-Cook, R. *Torpedo: The Complete History of the World's Most Revolutionary Naval Weapon.* Seaforth Publishing, 2014. P. 133.

[15] Karau, M. *Wielding the Dagger: The MarineKorps Flandern and the German War Effort, 1914-1918 (Contributions in Military Studies)*. Praeger; First Edition. October 30, 2003. P. 91.

and Belgium. The Fau-2 was the first rocket to reach outer space and laid the foundation for further development of missile technology in the United States, the Soviet Union and other countries.

Consequently, the period of the First World War and the interwar years was crucial in the development of UAVs. Military conflicts stimulated the development of technologies that could reduce human losses and increase the efficiency of combat operations. It was at this time that the first successful experiments with remote control of aircraft and automated systems were carried out. Leading powers in the field of aviation were actively researching and testing various drone concepts – from target aircraft to guided projectiles.

Although many designs at the time did not reach widespread use due to technical difficulties, they laid the groundwork for future advances in unmanned systems. The experience of these developments later contributed to the creation of modern drones and guided missile weapons that have dramatically changed the conduct of hostilities in the twentieth and twenty-first centuries.

**Origins of the international legal regulation**

It has been already proved that the First World War and the interwar years became the time of active experimentation and development in the field of drone use. It was during this period that radio control was first used for aircraft, unmanned targets for military training, the first autonomous aircraft capable of carrying explosives, and the term "drone" was introduced. Although most of the projects of that time remained experimental, they laid the foundation for the further development of UAVs.

At the same time, the use of drones and remotely controlled weapons was not regulated in international law. However, certain international agreements that regulated the use of new weapons and military technologies and defined the rules of warfare already were in force.

The Treaty of Versailles[16] imposed severe restrictions on the development of German aviation, prohibiting it from having military aircraft, which, accordingly, affected the development of UAVs.

Concluded in the same year Paris Convention Relating to the Regulation of Aerial Navigation[17] became one of the most important international documents of the interwar period enshrined the principle of sovereignty of states over their airspace and created the basis for international regulation of civil aviation.

Established in 1922, the International Commission for Air Transport (ICAT):

- ensured the adaptation of the Paris Convention to new conditions, introducing changes caused by the development of air transport;
- harmonized technical standards for air navigation;
- resolved disputes between States Parties on technical issues;
- performed advisory functions for States Parties and the League of Nations;
- collect and disseminate information necessary for air transportation.

Despite the fact that the activities of the ICAT were mainly focused on the regulation of manned aviation, its standards and principles later became the basis for the legal regulation of the use of UAVs in the second half of the 20th century.

Since the disarmament of the defeated Germany was a condition of the 1919 Treaty of Versailles (and was carried out under the supervision of the League of Nations), restrictions and prohibitions on certain types of weapons were established by separate international treaties. For example, Washington Conference[18] established the maximum percentage of displacement of warships of the main classes and introduced the term "standard displacement"; Geneva

[16] Treaty of Versailles, *Treaty of Peace between the Allied and Associated Powers and Germany*, June 28, 1919.

[17] Paris Convention, *Convention Relating to the Regulation of Aerial Navigation*, October 13, 1919.

[18] Washington Naval Conference, *Washington Naval Treaty (Five-Power Treaty)*, February 6, 1922.

Protocol[19] prohibited use of asphyxiating, poisonous, other gases and bacteriological methods of warfare.

The means and methods of air warfare were not ignored as well. According to the resolution of the Washington Conference, a commission of lawyers was set up to prepare (on the basis of the provisions of the Hague Convention[20]) binding Rules of Air Warfare. The commission was chaired by Professor John Bassett Moore of Columbia University (USA) and included representatives of the United Kingdom, France, Italy, Japan and the Netherlands. The document developed by the commission in November 1922 – February 1923 was based on established customs and general principles of the existing laws of war.

From the very beginning, the commission members were aware of the impossibility of establishing quantitative or qualitative restrictions on military aviation, as no one could (and did not intend to) stop the technological progress in civil aviation. Regulation of air warfare by international legal acts seemed more effective. The Commission agreed that the Declaration Concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods[21] also covers cases of aerial bombardment by aircraft. However, as it was limited in scope (applying exclusively to States Parties), it was necessary to extend its effectiveness first.

Mindful of the atmosphere of terror caused by the indiscriminate bombing of cities during the First World War, the Commission nevertheless failed to agree on restrictions on the use of military aircraft. It only defined legitimate targets for air attacks. The rules prohibited Aerial bombardment for the purpose of terrorizing the civilian population, destroying or damaging civilian property, or injuring non-combatants was prohibited (Article 23), an obligation to protect hospitals, places of warship, scientific, charitable and historical monuments was set (Articles 25-26). On the other hand, military objectives, including troops, military factories, communications and transport used for military purposes, were recognized as legitimate targets for bombing. If there was a risk of indiscriminate damage to civilian objects, bombing was to be prohibited. At the same time, towns or individual buildings near a war zone could be legitimate targets, provided that they contained troops important enough to justify an attack.

In other aspects the draft of the Hague Rules of Air Warfare did not cause significant controversy. In particular, the idea of extending the laws of war on land and sea (Articles 17, 67), rules on distinctive signs and the rights and obligations of combatants (Articles 2-3, 7-8, 10, 13-16) to air warfare was approved. States Parties (whether belligerent or neutral) retained sovereignty over their own airspace and the right to restrict flights in wartime (Article 12). Certain issues, such as the use of certain types of munitions (Article 19), propaganda (Article 21), espionage (Articles 27-29), and the confiscation of enemy aircraft (Articles 30-32), were to be regulated by the laws of land warfare. Instead, the treatment of captured crew members, the sovereignty of neutral states, and the rules for searching, seizing and destroying enemy civilian aircraft were to be regulated rather in accordance with the laws of war at sea (Articles 39-43, 46-60). The provisions on the protection of crew members and passengers of aircraft escaping by parachute (Article 20) and forcing aircraft to land under the threat of weapons (Article 33) were an innovation. Although drones were not the main subject of discussion, their development was limited to general provisions on the control of new types of military equipment.

In the interwar period, issues of legal regulation of air navigation were actively discussed at the regional level. It is worth mentioning the Ibero-American Aeronautical

[19] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925.

[20] Hague Conventions, *Convention Respecting the Laws and Customs of War on Land (Hague IV, 1907)*, October 18, 1907.

[21] Hague Declaration, *Declaration to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature*. July 29, 1899.

Commission, which developed legal mechanisms for controlling air traffic in Latin America, and the Pan American Union, which was transformed into the Permanent American Aeronautical Commission in 1937. The latter was engaged in the unification and codification of international air law, which laid the foundation for the future standards of the International Civil Aviation Organisation (ICAO).

## Conclusion

The period of the First World War and the interwar period (1914-1939) was a time of birth of UAVs, when the first military experiments were conducted to create aircraft capable of operating without a pilot. The hostilities demonstrated the potential of drones for reconnaissance, bombing and training, although their development was constrained by technological limitations. Nevertheless, active research in the field of remote control and flight automation began in the United States, the Great Britain, France, the Soviet Union and other countries. In particular, the American Kettering Bug of 1918 was one of the first attempts to create an unmanned cruise missile, and the British Aerial Target demonstrated interest in creating guided aircraft.

In parallel with technical development, the process of international legal regulation of the use of military aircraft (including UAVs) began. After the end of the First World War a number of international agreements were concluded that established (among other) the general principles of air operations. The Paris Convention enshrined the sovereignty of states over their airspace, and its Protocol contained the first mention of drones. In addition, the Hague Rules of Air Warfare were developed to impose certain restrictions on the use of aviation, in particular in terms of attacks on civilian objects, but they were not officially ratified.

Although there were no specific regulations on UAVs in the interwar period, general provisions of international law provided the basis for their future regulation (in particular, the principles of inviolability of airspace and restrictions on the use of new weapons influenced further discussions on the use of drones). In addition, the Geneva Protocol, which prohibited the use of chemical and bacteriological weapons, could theoretically be applied to UAVs if they were used to spray these substances.

Thus, the years of 1914-1939 defined the key areas of development of drones, combining military experiments with the formation of the first international legal approaches to its regulation. Although most UAVs projects remained experimental, the technological and legal foundations laid at that time became the starting point for the future development of drones during the Second World War.

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# БЕЗПІЛОТНІ ЛІТАЛЬНІ АПАРАТИ У ПЕРІОД ПЕРШОЇ СВІТОВОЇ ВІЙНИ ТА В МІЖВОЄННИЙ ПЕРІОД (1914-1939): ВІЙСЬКОВІ ЕКСПЕРИМЕНТИ, ПОЧАТОК МІЖНАРОДНО-ПРАВОВОГО РЕГУЛЮВАННЯ

***Анотація***

*Проведено аналіз появи та розвитку безпілотних літальних апаратів (БПЛА), або дронів, під час Першої світової війни та в міжвоєнний період (1914-1939). Автори дослідили перші військові експерименти у США, Великій Британії, Франції та СРСР, що заклали основи для майбутнього використання БПЛА у військовій сфері. Особливу увагу приділено таким прототипам, як американський Kettering Bug і британський Aerial Target, а також першим серійним моделям, зокрема OQ-2 Radioplane. Також досліджено початок міжнародно-правового регулювання використання військової авіації (Паризька конвенція, Гаазькі правила повітряної війни), що також стало основою для майбутнього регулювання використання БПЛА. Наголошено, що, незважаючи на технологічні обмеження, цей період був ключовим для формування інженерних концепцій та правових підходів, які вплинули на подальший розвиток дронів.*

***Ключові слова:*** *Безпілотний літальний апарат, БПЛА, дрон, Перша світова війна, військовий експеримент, міжнародне право, військова авіація*

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# THEORETICAL AND PRACTICAL CHALLENGES OF PROPER ADMINISTRATIVE SERVICE FEE REGULATION

***Abstract***

*The article addresses one of the recommendations of the European Union outlined in the 2024 Enlargement Report on Ukraine – the adoption of a law on administrative fees. This is indeed a very relevant issue for Ukraine, the resolution of which will significantly impact the functioning of public administration and its relationship with citizens. The adoption of such a law of appropriate quality will contribute to greater stability in the system of providing administrative services through the introduction of moderate and transparent compensatory administrative fees for administrative services. The availability of additional financial resources in this area will help maintain the accessibility and quality of administrative services. Proper legislative resolution of this issue is also a way to overcome certain unscrupulous interests in this field, particularly those of a departmental or other nature.*

***Key Words****: Administrative Services, Fees for Administrative Services (Administrative Fees), Administrative Service Centres, The Law On Administrative Fees, Eurointegration.*

## Introduction

Ukraine's survival today is not only related to the fight against the aggressor on the frontlines. It is also a matter of the effective functioning of Ukraine as a state and the rapid integration of our country into the European Union and NATO. An important guiding factor on this path is the annual assessment of Ukraine conducted by the European Commission. The assessments and recommendations outlined in the EU Enlargement Reports define priority tasks for our state.

In the field of public administration, one of the areas that significantly affects the lives of citizens and businesses, and one of the items of the "Fundamentals" section within the EU membership negotiations, is the issue of administrative services in general and the regulation of relations regarding the payment for administrative services in particular. Thus, the 2024 Enlargement

Report *(Ukraine Report 2024)* states: «Service delivery to the public and to businesses is working overall. <…>. Offline provision of services continued via a large network of local administrative service centres (ASCs). The number of ASCs that are accessible to people with disabilities and senior citizens is steadily growing. To further increase administrative service provision capacity, Ukraine *should adopt the proposed Law on administrative fees*»[1] *(Emphasis supplied by VT).*

Despite the conciseness of these assessments and the specificity of the EU recommendation, it is worth analysing:

- why the EU emphasizes the need for adopting a law on administrative fees and why Ukrainian civil society (non-governmental organizations and the expert community) has also insisted and continues to insist on this idea;

- what theoretical challenges lie behind this task, starting with the general question — should administrative services be paid for, what constitutional frameworks and limitations does Ukraine have in this regard, and which bodies should set the fees for administrative services;

- which specific administrative services could be subject to payment, and what parameters need to be considered in this matter, including the following: is payment the general rule or an exception; how to determine the specific amounts of fees (charges) for administrative services;

- the main controversial issues in policy-making and legislative drafting on this matter are as follows: can the government be granted the power to set fees for administrative services; how to better establish the specific amounts of fees: in absolute units or in the form of a special measure (conditional unit); how to ensure the effectiveness and stability of legal regulation; where to get the calculations for setting initial fee amounts;

- other important questions: can the amounts of the administrative fee vary within the country's territory and/or among providers of administrative services; is it lawful and correct to impose higher fees for urgency.

Thus, what is the status of this issue in theoretical and practical dimensions, why has this issue arisen in the negotiation process but is moving so slowly within the Ukrainian government and parliament?

It should be noted that without the support of legal science and without the theoretical development of relevant issues, achieving proper quality in legislation and, in general, positive results will be impossible. Although the issue has a constitutional basis, it primarily belongs to the sphere of administrative law as a fundamental branch of law, and partly to financial law as a comprehensive field of law. However, it is also worth mentioning that this issue not received much attention from scholars.

## Methodology and Objectives

The research methodology primarily relies on the use of historical, comparative-legal and dialectical methods. The historical method is applied in the collection and analysis of information, particularly with respect to normative legal acts governing the payment for administrative services in Ukraine, as well as the practice of their application, and, separately, the practice that have developed in this sphere of social relations due to the absence of adequate legal regulation. The historical method — similar to the policy analysis

[1] European Commission, *Ukraine Report 2024,* Directorate-General for Neighbourhood and Enlargement Negotiations, October 30, 2024, https://neighbourhood-enlargement.ec.europa.eu/ukraine-report-2024_en.

method in political science — facilitates a clearer identification of existing problems related to the payment for administrative services and the functioning of the administrative service delivery system through the lens of its sustainability, as well as their underlying causes. Also, this method enables the projection of potential consequences arising from the adoption of particular approaches to the future normative regulation of relations concerning the payment for administrative services, that is, it allows for the determination of relevant causal linkages, trends, and prospects. Of particular value in this research is the comparative-legal method, specifically the examination and analysis of relevant foreign experience in approaches to the payment for administrative services and their legal regulation. Attention is devoted to the experience of the states belonging to different legal families and possessing diverse systems of public administration. Nevertheless, priority is accorded to the countries within the continental European legal tradition that are EU member states (notably Bulgaria, Estonia and others), as well as Ukraine's immediate neighbours (such as Poland, the Czech Republic and the Federal Republic of Germany). The dialectical method is likewise employed, given that all social phenomena, their legal regulation, practice — both strengths and shortcomings — historical context and experience must be considered in their interrelation. Appropriate responses to Ukraine's specific challenges and problems necessitate taking into account the peculiarities of domestic experience and the current state of development, and selecting the most suitable solutions for the future.

The objectives of the research are chiefly as follows: to reinvigorate scholarly and public discourse on the regulation of relations concerning the payment for administrative services; to demonstrate the urgent need for proper legislative regulation of these social relations in addressing pressing issues for Ukraine, the challenges to the sustainability of the administrative service delivery system, and, crucially, in connection with Ukraine's respective commitments on its path towards EU membership; to elucidate the key tasks at both theoretical and practical levels that arise in the process of adopting corresponding national legislation; and to propose — from the author's perspective — optimal solutions for Ukraine.

## Literature Review

It must be noted at the outset that the issue of payment for administrative services has not yet received due attention among domestic researchers in the field of administrative law. Nor has it been the subject of focused inquiry among Ukrainian scholars of financial law. The bulk of the works referenced in this research belong rather to translated materials produced by international organisations (notably, the OECD (2001)[2]) and to domestic analytical organisations (such as the Centre for Political and Legal Reforms (CPLR, 2003)[3]), including work led by the author of this research. The first of the works mentioned above primarily analyses the matters and approaches concerning the

[2] Vprovadzhennia systemy zboru oplaty z korystuvachiv derzhavnykh posluh: Teoriia i praktyka [Implementation of a system for collecting payments from users of public services: Theory and Practice]: Translation from English and French / Resource centre for the development of public organisations, "Gurt", Kyiv, Publishing House "Kyiv-Mohyla Academy", 2001, 123 p.

[3] Tymoshchuk V.P., Administratyvna protsedura ta administratyvni posluhy. Zarubizhnyi dosvid ta propozytsii dlia Ukrainy [Administrative procedure and administrative services. Foreign experience and proposals for Ukraine], Kyiv, Fact, 2003. pp. 121-134.

advisability of introducing fees for administrative (or, more precisely, public) services, as well as the experiences of certain countries. The CPLR report addressed the pressing challenges faced by Ukraine in the early 2000s, driven in part by widespread abuses in this domain. A new wave of analytical research in Ukraine emerged following the submission of draft law No. 4380 to the Parliament in 2020, accompanied by requests from the Parliament itself (notably, researches carried out by the Research Service of the Verkhovna Rada of Ukraine[4] and certain non-governmental organisations) and a series of expert discussions. The said report of the Research Service once again demonstrated the considerable diversity of approaches adopted by different countries on this issue, including with respect to the determination of specific administrative fees. For instance, some countries establish such fees through acts of the government (or even ministries), while others do so by parliamentary enactment. Yet, these researches are predominantly descriptive and fail to address the specific challenges faced by Ukraine in this area (such as the gratuitous nature of most administrative services; persistent abuses in sectors where fees are still set by the government rather than the legislature, and so forth). Among strictly scholarly sources, one may single out a section in the thesis for a doctor's degree of O. Bukhanevych (2016)[5], which itself draws extensively on CPLR sources and ideas. This work also discusses certain abuses in the process of delivering administrative services, the necessity of proper legislative regulation of the respective social relations, the linkage to the cost price of providing administrative services and the compensatory nature of administrative fees. One might also mention the article of I. L. Zheltobryukh in the Great Ukrainian Legal Encyclopaedia[6], which is largely based on current legislation and the approaches embodied in draft law No. 4380. The author contributes several valuable points, observing that administrative fees are paid once, in advance, and are often non-refundable in the event of an applicant's denial. At the same time, this article, for reasons inherent to the format of the encyclopaedia, does not explore the current practical problems and challenges in this domain. It is also worth noting one of the author's own earlier works[7], the ideas of which have been further developed and have contributed to the revitalisation of the scholarly and expert debate. In the overall body of sources used for this research, primary emphasis has, objectively, been placed on normative legal acts.

## Practical justification

[4] Research Service of the Verkhovna Rada of Ukraine. Analytical memorandum on comparative legislation concerning the regulation of fees for the provision of administrative services and the establishment of administrative charges under the laws of European countries and the European Union, 2023, https://research.rada.gov.ua/uploads/documents/32544.pdf.

[5] Bukhanevych, O.M. Theoretical-legal and praxeological foundations for the provision of administrative services in Ukraine: Thesis for a doctor's degree in law (12.00.07), Institute of Legislation of the Verkhovna Rada of Ukraine, Kyiv, 2016, pp. 163–180.

[6] Zheltobryukh I. L. Administrative fee / *Great Ukrainian Legal Encyclopaedia*. *Vol. 5: Administrative Law* / Ed. Board: Yu. P. Bytyak (Chief Editor) et al.; National Academy of Legal Sciences of Ukraine; V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine; Yaroslav Mudryi National Law University, 2020, pp. 56–59.

[7] Tymoshchuk V. On the normative regulation of relations concerning payment for administrative services // *Pravova derzhava*. Issue 33. Kyiv: V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, 2022, pp. 360–372.

Contrary to methodological approaches, we will start not with theoretical justification but with practice.

The European Commission, in its documents on evaluation of the state of affairs in Ukraine, highlights one of the significant positive achievements – the creation and functioning of Administrative Service Centres (hereinafter referred to as "ASC"). However, even more importantly, Ukrainian citizens – the consumers of services – provide positive feedback about ASCs.

ASCs have become client-oriented, barrier-free, transparent, integrated offices that provide administrative services. Here are some figures from the report of the responsible authority for this policy (Ministry of Digital Transformation) for 2024. In Ukraine, out of 1469 communities (each of which is legally[8] required to establish an ASC) there have been established a "network": 1352 ASCs (1319[9] are functioning); 150 territorial subdivisions (138 are functioning); 3319 remote workplaces (RWP) (3058 are functioning); 45 mobile ASCs (29 are functioning)[10]. In 2024, more than 20 million services were provided through ASCs.

The main advantage of ASCs for citizens is the integration of services, meaning that in every community and in one office, citizens can access these services. Currently, this includes a very large number of services (approximately 200-500 services), including many highly demanded service groups (although the situation may vary): civil status registration (provided by 40% of ASCs), residence registration (almost all ASCs provide this service according to expert data), property and business registration (about 80-90% of ASCs provide these services), social protection administrative services (77% of ASCs provide these services). Some ASCs also provide passport services (252 ASCs) and vehicle registration and driver's license exchange services (117 ASCs), among others.

ASCs are also one of the mechanisms for implementing the decentralization reform, as they help maintain and even improve territorial accessibility to administrative services. This is especially valuable in the context of significant territorial community consolidation and periodic optimization of territorial subdivisions of executive authorities, which are also being moved further from service consumers. For example, in recent years, the number of civil status registration departments (the State Register of Civil Status Acts) under the Ministry of Justice has decreased. The State Tax Service has recently started its own "optimization."

Therefore, it is important to consider that, in addition to ASCs, many entities providing administrative services, especially state bodies, continue to directly offer administrative services: the State Migration Service – passport services; the Ministry of Justice – the State Register of Civil Status Acts; the State Service of Ukraine for Geodesy, Cartography and Cadastre – land registration; the Ministry of Internal Affairs and National Police – vehicle registration; the Pension Fund of Ukraine (PFU) and District Social Protection

[8] Verkhovna Rada Ukrainy, *Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo optymizatsii merezhi ta funktsionuvannia tsentriv nadannia administratyvnykh posluh ta udoskonalennia dostupu do administratyvnykh posluh, yaki nadaiutsia v elektronnii formi* [On Amendments to Certain Legislative Acts of Ukraine on Optimization of the Network and Functioning of Administrative Service Centres and Improving Access to Administrative Services Provided in Electronic Form], Zakon Ukrainy 943-IX, November 3, 2020, https://zakon.rada.gov.ua/laws/show/943-20#Text.

[9] The difference in established and operating ASCs is caused by the impact of the full-scale war.

[10] Ministerstvo tsyfrovoi transformatsii Ukrainy, *Blyzko 5 tysiach tochok ta 20 milioniv posluh u TsNAPakh — holovni dosiahnennia 2024 roku* [About 5,000 points and 20 mln services at ASC are the main achievements of 2024], February 15, 2025, https://thedigital.gov.ua/news/blizko-5-tisyach-tochok-ta-20-milyoniv-poslug-u-tsnapakh-golovni-dosyagnennya-2024-roku.

Departments – social administrative services (SAS).

But why does the EU link this issue with ASCs as a capability in this area and give this new recommendation in the 2024 Report – the adoption of a law on administrative fees?

This is likely due to the fact that the creation of ASC infrastructure (buildings, furniture, equipment, e-interaction) and the establishment of institutional processes within ASCs were significantly supported by various international technical assistance projects, funded by the European Union overall and its member countries (Germany, Sweden, Denmark, Poland, Slovenia, Estonia, etc.). These were substantial "investments" from the EU.

In these challenging times, when public resources are critically insufficient and the majority of expenditures go towards defending the country, it is naturally necessary to address the preservation of the system of administrative services, effectively "preserving invested capital" (although, of course, this is now the property of the communities of Ukraine and the state of Ukraine, not a commercial project). The EU and the governments of EU countries are thus emphasizing that Ukraine has internal resources in this matter, and these resources must be utilized.

Ultimately, throughout all the years of establishing this system of providing administrative services, specialists have always raised the issue of its sustainability. Providing high-quality administrative services requires resources, including financial ones, not only in the initial stages to equip the premises but also constantly: for staff, equipment, daily material supplies (paper, cartridges), and so on. Currently, ASCs in Ukraine, for example, provide 400 services (from the ASC of the Bobrovytsia community in the Chernihiv region), but 90% of these services are free of charge for the recipients. Revenues from paid administrative services cover only up to 30% of the expenses for ASCs. Therefore, the expenses for providing these services are covered by the local budget, funded by all taxpayers. This is at a time when, since the beginning of the full-scale war in February 2022, public resources in Ukraine have objectively had to be primarily directed to the defence of the country against the aggressor.

Thus, the practical justification for the adoption of the law on administrative fees is quite obvious. Public resources are limited. International aid is also limited. Therefore, Ukraine must use its internal resources to preserve and develop the system. These funds are necessary not only for local self-government bodies but also for the central government, including for digitalization of services.

One can also predict what will happen if this law is not adopted. Since the main goal of adopting the law on administrative fees is to increase budget revenues, i.e., the resource for providing administrative services, further delays in taking this decision will increase the gap between the expenditures going into this system and the revenues (compensatory payments) obtained from the services provided. This gap will objectively affect the fact that local self-government bodies will lack resources to maintain the functioning of ASCs (and other access points to services), which will in turn worsen the accessibility and quality of services. Executive authorities will also continue their "optimization" (which is effectively the reduction of territorial bodies and staff), further worsening service accessibility.

Digitalization does not cover all the needs of administrative service provision, because Ukraine's

demographics and current studies[11] show that online services, although they have gained popularity, have seen a decline in growth since last year; some of the most widespread services objectively require offline communication; security factors in Ukraine require the maintenance of offline channels; and legal standards for proper public administration mandate ensuring alternative and physical access to services.

## 2.2. Theoretical justification

The issue of fees for administrative services always sparks lively debates (this is confirmed annually within the Master's program of A. Melechevych School of Public Administration at NAUKMA or in any other audience). Even specialists often take fundamentally different positions on whether citizens should pay an additional fee for a specific service, considering they already pay taxes.

Therefore, it is important to understand why it is necessary for the recipient (the client) to compensate at least a portion of the costs for administrative services. When a person obtains a passport, registers his/her business, car, or property, it is the customer who should pay for this service, not all other citizens who are taxpayers. At the very least, part of the expenses should be compensated by the recipient of this individual benefit. This is fair.

One of the few studies on this (or at least a related) topic available in Ukraine is a publication of 2001, where the introduction already stated that OECD countries "are increasingly financing public services from consumers. This policy contributes to: reducing the budget deficit; increasing transparency of expenditures and revenues from providing certain services for consumers and public institutions that provide them; freeing taxpayers from costs that should be borne by consumers to whom these services are directly provided; and regulating consumer demand for certain types of services."[12]. Although the study itself does not focus on administrative services, these approaches are fully applicable to the sphere of administrative services.

The exception to the general rule is obviously social protection services, as it would be unreasonable and unethical to charge a person who is in need of social assistance. There are also a few services where payment should not be a "barrier" to access, such as birth registration, death registration, etc. In other words, certain services may be designated as free for the consumer. However, this cannot apply to 90% of services, as is the case today. On the contrary, the general rule should be that services are paid for, and there must be reasons for services to be free of charge.

From the perspective of the Constitution of Ukraine, one of the key provisions in this issue is paragraph 1 of part 2 of Article 92, which states that "taxes and fees are established exclusively by law". In Ukraine, the fee for administrative services is called an "administrative fee". One could debate whether it would be better to avoid the term "fee" and instead use a more general term like "payment" or the older term

[11] UNDP, *Analitychnyi zvit «Dumky i pohliady naselennia Ukrainy shchodo derzhavnykh elektronnykh posluh u 2024 rotsi»* [Analytical Report "Opinions and Views of the Population of Ukraine on State Electronic Services" based on the results in 2024], January 21, 2025, https://www.undp.org/uk/ukraine/publications/analitychnyy-zvit-dumky-i-pohlyady-naselennya-ukrayiny-shchodo-derzhavnykh-elektronnykh-posluh-u-2024-rotsi.

[12] *Vprovadzhennia systemy zboru oplaty z korystuvachiv derzhavnykh posluh: Teoriia i praktyka* [Implementation of a system for collecting payments from users of public services: Theory and Practice]: Translation from English and French / Resource centre for the development of public organisations, "Gurt", Kyiv, Publishing House "Kyiv-Mohyla Academy", 2001, p. 5.

"state duty" (as was the case since 1993 based on the CMU Decree "On State Duty"[13]). However, it is still reasonable to agree with the legislator in the Law of Ukraine "On Administrative Services" and the specialists who proposed it, that the term "administrative fee" is acceptable. This is because it refers to a subset of public services, which are legally provided in the form of administrative acts. These services are primarily provided by local government bodies and executive authorities (and much more rarely in an authorized or outsourcing manner – by other entities). Considering the public-legal nature of these relations and the fact that this is a sphere of public administration, the term "administrative fee" is very appropriate and, in our opinion, the most accurate. The term "duty" is clearly outdated and not entirely appropriate, as it does not pertain to the customs sphere.

Ultimately, it is unimaginable to think of an approach where this fee could be established by anyone other than the state. The administrative fee, like a tax, must be transparent, clear, and stable. The state at the national level is best positioned to regulate this through law.

Also, it is inherently not possible for every executive authority or local self-government to regulate this matter independently. After all, we are dealing with the legal regime for public authorities, as defined in part 2 of Article 19 of the Constitution of Ukraine, which states that *"state authorities and local self-governments, their officials, must act solely based on, within the powers, and in the manner* prescribed by the Constitution and laws of Ukraine*."* Therefore, both the payment for services and the amount of fees can only be established by the state, ideally by law.

However, can one find interpretations of the quoted paragraph 1 of part 2 of Article 92 of the Constitution at the level of dogmatics, as the word "*established*" can be interpreted in two ways? On the one hand, this could be the legislator's position that a specific administrative service is paid, and the fee amount is immediately stated. On the other hand, there could be an approach where the legislator simply establishes that a specific service is paid (i.e., that an administrative fee is charged), but the authority *to determine* the specific amount could be delegated to other entities (for example, the government or local councils in local self-government). From a purely literal understanding of the word "established", both options are acceptable. However, in the second case, the legislator still needs to define certain rules, grounds, and limitations.

Thus, the search for an acceptable answer, considering the two possible options (or their combination), should primarily be based on the objectives of the corresponding state policy, the problems that need to be solved, and their causes. The answer to the last question will be provided separately in the next section. For now, we note that the objective should, in our opinion, include the following subgoals and functions:

- ensuring the system for providing administrative services with stable compensatory resources to maintain its uninterrupted functioning (i.e., the main function is compensation);
- keeping administrative services accessible to consumers without turning public administration into a commercial activity. Thus, the amounts of administrative fees should be moderate and acceptable for individuals and business entities;

[13] Kabinet Ministriv Ukrainy, *Pro derzhavne myto* [On State Duty], Decree 7-93, adopted January 21, 1993, https://zakon.rada.gov.ua/laws/show/7-93#Text.

- ensuring equality and non-discrimination, as all citizens should receive equal treatment from the state;

- ensuring a high level of transparency and certainty in these relations, as they involve state power and public funds.

## Current legislation and practice

The current legislation, specifically Article 11 of the Law of Ukraine "On Administrative Services" *("Payment for administrative services (administrative fee)")*, defines certain parameters in this sphere:

*"1. When providing administrative services in cases specified by law, a payment (administrative fee) is charged. 2. Provision of administrative services in the sphere of social security of citizens is carried out on a free-of-charge basis. 3. The amount of the fee for providing administrative services (administrative fee) and the procedure for its collection are determined by law, taking into account its social and economic significance. 4. The fee for providing administrative services (administrative fee) is credited to the state or respective local budget, except for the cases specified by law. 5. The fee for providing administrative services (administrative fee) is paid by the applicant once for the entire set of actions and decisions taken by the administrative services provider necessary for obtaining the administrative service (including the cost of forms, expertise conducted by the service provider, obtaining extracts from registers, etc.). 6. The collection of any additional payments not provided by law or the demand for any additional funds is prohibited. 7. Executive authorities, other state bodies, authorities of the Autonomous Republic of Crimea, local government bodies, and their officials cannot provide other paid services…"*[14].

On the one hand, there are many positive aspects to note here, in all the cited provisions of Article 12, including the establishment of a paid service by law; the allocation of this fee to the state or local budget; the unity of the fee (i.e., the prohibition of breaking up the administrative fee), the prohibition on collecting "additional funds" and "providing other paid services", etc.

On the other hand, the practice of more than 12 years since the adoption of this law shows is such that it has only been possible to restore order in a few areas.

Thus, the areas of state registration of real estate[15] and business[16] are relatively well-organized. That is, there is at least formal legality here because it has been determined which services are paid or free and specific fees for paid administrative services have been defined. The situation is somewhat similar in the field of state registration of land plots. However, even for these three sectors, the need has long arisen to make at least part of the service paid (for example, the registration of individual entrepreneurs and legal entities remains free). Some sources[17] have shown that local governments have not taken on the

[14] Verkhovna Rada Ukrainy, *Pro administratyvni posluhy* [On Administrative Services], Zakon Ukrainy 5203-VI, adopted September 6, 2012, https://zakon.rada.gov.ua/laws/show/5203-17#Text.

[15] Verkhovna Rada Ukrainy, *Pro derzhavnu reiestratsiiu rechovykh prav na nerukhome maino ta yikh obtiazhen* [On State Registration of Real Rights to Real Estate and Their Encumbrances], Zakon Ukrainy 1952-IV, adopted July 1, 2004, Article 34, (as amended by Zakon 834-VII , adopted November 26, 2015), https://zakon.rada.gov.ua/laws/show/1952-15#Text.

[16] Verkhovna Rada Ukrainy, *Pro derzhavnu reiestratsiiu yurydychnykh osib, fizychnykh osib - pidpryiemtsiv ta hromadskykh formuvan* [On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations], Zakon Ukrainy 755-IV, adopted May 15, 2003, Article 36, (as amended by Zakon 835-VIII, adopted November 26, 2015), https://zakon.rada.gov.ua/laws/show/755-15#top.

[17] Prosto, *Bila knyha derzhavnoi polityky u sferi administratyvnykh posluh (redaktsiia tretia — 2024 rik)* [White Paper on State Policy in the Field of Administrative Services (third edition – 2024)], January 2024, Page 18,

function of business state registration (i.e., they did not appoint state registrars, and at certain periods, there were 40% fewer state registrars for business than for real estate), and one of the reasons was precisely because these services are mostly free. Local politicians are not ready to finance this function without compensatory revenues to the local budget. Obtaining extracts from the State Land Cadastre is free of change and this has also led to a significant reduction in the number of cadastral registrars and even pushes the government toward risky outsourcing — delegating these powers to private entities ("certified land surveyors").

The situation is even worse in other service groups, even from a purely formal point of view. Over the 12 years, it has not been possible to bring order at the level of laws.

For example, regarding passport fees, despite the adoption of the new law in this sphere in 2016[18], there is no proper, transparent, and sustainable "pricing" system in place. A de facto own system for determining fees for these services has been introduced, which does not comply with Article 11 of the Law of Ukraine "On Administrative Services". In addition to the category of "administrative fee", Article 20 also includes categories such as "cost of administrative services", "maximum cost of administrative services", and so on. The amounts of administrative fees are not specified in the law. They consist of several elements, some of which are influenced by the government, while others are directly determined by the state producer of passport forms (which is a state enterprise but heavily reliant on private subcontractors). Therefore, neither the state nor the parliament is forming the administrative fee in this case.

The above-mentioned issue is a separate problem, as there are also illegal payments (for example, additional charges for passport services provided by a specific service provider – State Enterprise "Document" in the sphere of the State Migration Service (SMS)). This is a unique situation where a passport can be obtained for two different prices: at the ASC (Administrative Service Centre) and SMS (State Migration Service), the cost is one, while at SE "Document", working under the brand "Passport Service", it is another, and significantly higher (as of February 2025, an additional 650 UAH is charged for each administrative service). Such precedents are unheard of worldwide. Incidentally, this state enterprise started offering its services abroad during the full-scale war, with a significantly different pricing policy (additional 80-100 Euros per service). Without delving into the appropriateness of this, we simply express doubt that there is a lack of legal grounds, specifically legislative regulation. After all, abroad, these services should be provided by consular institutions. Even in the case of high demand, these relations should be properly regulated, including the issue of setting the cost of services. This should not be a commercial project, especially for people seeking protection from war.

There are issues with (additional) "paid services"[19], particularly "consultations" and "drafting applications in the system of state registration of civil

https://prosto.in.ua/documents/764/White%20Book_web_2024.pdf.

[18] Verkhovna Rada Ukrainy, *Pro Yedynyi derzhavnyi demohrafichnyi reiestr ta dokumenty, shcho pidtverdzhuiut hromadianstvo Ukrainy, posvidchuiut osobu chy yii spetsialnyi statu*s [On the Unified State Demographic Register and Documents Confirming Citizenship of Ukraine, Certifying a Person or His/Her Special Status], Zakon Ukrainy 5492-VI, adopted November 20, 2012, Article 20 (as amended by Zakon 1474-VIII, adopted July 14, 2016), https://zakon.rada.gov.ua/laws/show/5492-17#Text.

[19] Kabinet Ministriv Ukrainy, *Perelik platnykh posluh, yaki mozhut nadavatysia viddilamy derzhavnoi reiestratsii aktiv tsyvilnoho stanu* [The list of paid services that may be provided by civil status registration departments], Postanova 1168, dated December 22, 2010, https://zakon.rada.gov.ua/laws/show/1168-2010-%D0%BF#Text.

status acts under the Ministry of Justice[20]. There are also dubious "experiments", such as "marriage in a day", where the fee for this administrative service (which is actually provided in collaboration with commercial service providers, though they have the status of state or municipal enterprises) can range from several thousands to twenty thousand hryvnias[21]. Overall, "ceremonial rites" (weddings) from the state authority, which cost from UAH 481.00 to UAH 3,664.00, effectively turn this administrative activity into a commercial one. This is allowed by these questionable actions for the Ministry of Justice, but it is not provided for similar bodies in the local government system. Overall, the fee for the marriage registration service provided by local government authorities is still only UAH 0.85 to the local budget. This is an anomalous situation, where the Ministry of Justice charges significantly different "fees" for the same services compared to local government bodies. Such non-transparent and inadequate situations may be one of the factors hindering the adoption of the law on administrative fees. The same applies to related issues, such as blank forms in the passport sector, driver's licenses, car registration documents, and the supply of specialized technical equipment in these areas (which also have a monopolistic nature).

Regarding vehicle registration, the main formal problem now is that the laws (including the Law of Ukraine "On Road Traffic") do not specify that these are paid administrative services. However, the government regulates their cost at its own risk. There is clearly a lack of legitimate foundation and transparency in pricing.

On the other hand, regarding administrative services provided by local self-governments, the situation is completely opposite and worse for another reason. The government does not risk regulating anything there and shows no initiative. As a result, a significant number of powers performed by local self-governments are not resourcefully supported by the state, at least at the level of compensatory fees. Direct revenues from other administrative services (remember, 90% of them are free) are insufficient to cover the costs of local self-governments. In other words, when the state delegates new powers to local self-governments, adds mandatory services to the ASC (which, by the way, is a separate problem of excessive and extensive expansion of service lists), no proportional resources are allocated to local self-governments to cover the relevant expenditures for providing these services.

This overview indicates several needs. It is necessary to clearly regulate which services in all groups, especially mass services (which could also be called "basic"), are paid, and to define well-targeted fee amounts. This should be done through a single law that would also bring unity to the approaches, proportionality of fee amounts, and transparency for consumers – this could be an efficient solution for Ukraine. Moreover, it would address narrow departmental interests, where issues are resolved only for specific state bodies (such as the Ministry of Internal Affairs, the State Migration Service, etc.).

## What do legislators propose

[20] Ministerstvo yustytsii Ukrainy, *Rozmir platy za nadannia platnykh posluh viddilamy derzhavnoi reiestratsii aktiv tsyvilnoho stanu* [The amount of the fee for the provision of paid services by the departments of state registration of civil status acts], Nakaz 4526/5, dated October 14, 2022, https://zakon.rada.gov.ua/laws/show/z1249-22#n25.

[21] HOTOVO! Dokument-servis, https://gotovo.net.ua/wedding-for-day.

In Ukraine, the relevant draft law "On Administrative Fees" (registration number 4380)[22] was prepared back in 2020. The development of the draft law involved not only parliament members but also experts in administrative services, representatives of the ASC community, international technical assistance projects, etc. Importantly, this draft law was supported and continues to be supported by nationwide associations of local self-governments. Ultimately, in June 2023, the draft law was unanimously supported by the members of the relevant parliamentary committee. And only on June 5, 2025, it was adopted in the first reading. Therefore, the appearance of this task in the EU 2024 Report is very valuable for Ukraine, as it significantly increases the chances of its adoption.

Draft Law 4380 proposes a simple, efficient and balanced approach: to establish moderate compensatory fees for certain groups of administrative services in the range of 50-100-200-300 hryvnias (for some services, with the additional cost of form products). There is an increased fee for urgency, i.e., accelerated processing (although it is known that not all countries accept this approach). Conversely, there is a reduced fee for receiving services in electronic form, and local self-governments have the right to provide benefits and compensations for the administrative service fees.

The main value of Draft Law 4380 is the annex listing more than 150 of the most popular administrative services, as its adoption would already provide additional resources for the public administration system. However, the "methodological part" is also valuable, i.e., the body of the law, where it defines what constitutes an administrative fee, the principles of state policy on this matter, the rules for determining specific fee amounts, etc.

Thus, the adoption of the law on administrative fees could help achieve two goals. First, it would strengthen the sustainability of the administrative services system. Since the fee for services primarily goes to local budgets, local governments would have more opportunities to finance the operation of ASCs and support this system in general. Additionally, the state needs resources for digitalization and resources for executive government bodies, which often perform back-office functions in providing specific types of services. Therefore, part of the fee for administrative services should be properly directed to the state budget, at least where state registries, forms, and government agencies as back offices are used.

Therefore, the adoption of the law on administrative fees should provide greater transparency and anti-corruption measures in the system of providing administrative services.

In political discourse, a question may arise whether the EU specifically referred to this particular draft law (No. 4380 of 2020) or perhaps another draft or other decisions. However, there are strong reasons to assert that the EU indeed referred to draft law No. 4380. This is because no other draft law with this title existed. Moreover, this draft law has already passed the relevant parliamentary committee with a positive recommendation for approval in principle.

## Foreign experience

[22] Verkhovna Rada Ukrainy, *Proekt Zakonu pro administratyvnyi zbir* [Draft Law On Administrative Fee], registration number 4380, dated November 16, 2020, https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=70434&pf35401=538173.

It is known that there are different approaches to regulating fees for administrative services worldwide, even within the EU countries. Among the known experiences, there are approaches where fees for services are set by the government or even by individual ministries. But it is important to remember that one must consider the country's legal system and the specific issues that need to be addressed.

Therefore, the Polish Law on Stamp Duty [23] of 2006 (with subsequent amendments) is particularly valuable and interesting. By its name, it is somewhat similar to Ukraine's Decree "On State Duty". However, by its content, it is quite similar to the Draft Law "On Administrative Fees". It specifies what the fee is paid for, which services (categories of cases) are free, when the fee is paid, how the payment is confirmed, and so on. The most valuable part is that it provides a specific list of actions and decisions made by government bodies, along with the corresponding fee amounts. Another interesting example is the Finnish Act on Criteria for Charges Payable to the State (150/1992)[24]. It generally defines the rules for determining fee amounts. Some of these rules are worth considering by Ukrainian lawmakers. In particular, services such as providing general information and certificates are exempt from fees if they do not cause significant expenses (Section 3, Article 5). The general rules for determining fee amounts are "linked" to the average cost of providing the service, and it also outlines the grounds when the fee may be lower or higher than the cost of providing the service. An interesting provision is that "for similar services (actions) performed by one or several authorities, a single fee may be established, even if the costs for providing them differ. When setting such a fixed fee, the general average cost of the provided services (actions) should be taken into account" (Section 2, Article 6). In Finland, there is no single authority responsible for setting the fee amounts, and this power belongs to a large number of agencies.

Also noteworthy is the experience of some German states. For example, Bavaria has the Bavarian Law on Administrative Fees dated 20 February 1998[25]. This law regulates issues such as: determining official (service) actions for which fees are paid; recipients of the funds; payers of fees; exemptions from payment of fees for certain subjects and persons; approval rules for the fee table; defining the fee amounts, rounding; application of coefficients in cases of deviation, withdrawal, or satisfaction of an application, and in the context of legal protection procedures; costs included in the fees; advance payment of fees, payment deadlines; reduction of fees; management of funds, etc. Article 5 is particularly interesting, which states that "the Ministry of Finance adopts the Fee Table as a regulation. Fees include: 1) defined specific amounts (final amounts), or 2) amounts based on the value of the subject of the official action (value fees), or 3) amounts based on the time spent on performing the official action (time-based fees), or 4) amounts within certain ranges (framework fees)". "The amounts of fees should be constantly checked to ensure that they still align with the cost calculations of the services/actions, and adjusted if necessary".

[23] Lexlege, *O oplacie skarbowej* [about stamp duty], Ustawa adopted November 16, 2006, https://lexlege.pl/ustawa-o-oplacie-skarbowej/.

[24] *Akt pro zbir z oplaty korystuvachiv derzhavnykh posluh* [Act on Criteria for Charges Payable to the State], Vprovadzhennia systemy zboru oplaty z korystuvachiv derzhavnykh posluh: Teoriia i praktyka [Implementation of a system for collecting payments from users of public services: Theory and Practice]: Translation from English and French / Resource centre for the development of public organisations. "Gurt", Kyiv, Publishing House "Kyiv-Mohyla Academy", 2001, p. 48-52.

[25] *Zakon Respubliky Bavariia pro upravlinski koshty* [Bavarian Administrative Funds Act], adopted February 20, 1998, Information based on a working translation by the German Foundation for International Legal Cooperation.

The experience of the Czech Republic is also very interesting. Since 2004, the country has had the Law on Administrative Fees, dated 26 November 2004[26]. This law also defines general rules in a descriptive form within this sphere. The actions subject to the fee are defined in separate articles of the Administrative Fees List (hereinafter referred to as the "List"), which is an integral part of this law. It defines the rules for paying fees, refunds, and exemptions from fees. The List itself helps to determine these fee amounts in a very transparent and accessible manner.

In 2023, several studies of foreign experiences were conducted in Ukraine. In particular, the Research Service of the Verkhovna Rada (the Parliament of Ukraine) prepared "The Analytical Note on Comparative Legislation Regarding the Regulation of Fees for Administrative Services and the Establishment of Administrative Fee Amounts According to the Legislation of European Countries and the European Union"[27]. This research also showed that there are quite different approaches to this issue in various countries, including the setting of specific fee amounts. In other words, there is no unified approach, and some countries determine these amounts through government acts (or even ministries), while others do so through their parliaments. Among the countries that use the latter approach is, in particular, Estonia[28].

In our opinion, Ukraine's experience would align closely with countries such as Estonia, Poland and the Czech Republic, which have laws on administrative fees (or similar laws in essence). These laws define general approaches to the paid and free-of-charge services, the procedure for paying these fees (or charges), and, most importantly, establish clear and transparent administrative fee amounts for specific services. By the way, in these countries, fee amounts are determined in absolute figures, not as percentages (in Poland – in zlotys, in the Czech Republic – in Czech crowns, in Estonia – in euros).

This is a solution to the problems that objectively exist in Ukraine.

## Key discussion issues in the current policy process and the progress of the draft law

On the one hand, there have been and still are specialists who sincerely believe that the government (the Cabinet of Ministers of Ukraine) should set the amounts for administrative service fees. They argue that this would give the government the advantage of being able to change these amounts more quickly, responding to inflation or other factors.

However, with regard to this option, we must primarily consider the constitutional limitation, as Article 92 of the Constitution specifies that taxes and fees are to be established exclusively by law. Therefore, this requires either a very flexible interpretation (though this cannot be ruled out), or an acceptance of the interpretation that this is indeed a barrier. By the way, at one time, the Parliamentary Committee on Legal Policy, when considering a draft law that proposed granting such powers to the government,

[26] ASPI, *Zákon o správních poplatcích* [Act on Administrative Fees], 634/2004, adopted November 26, 2004, https://www.aspi.cz/products/lawText/1/58613/1/2/zakon-c-634-2004-sb-o-spravnich-poplatcich/zakon-c-634-2004-sb-o-spravnich-poplatcich.

[27] Doslidnytska sluzhba Verkhovnoi Rady Ukrainy, *Analitychna zapyska z pytan porivnialnoho zakonodavstva shchodo vrehuliuvannia platy za nadannia administratyvnykh posluh ta vstanovlennia rozmiru administratyvnoho zboru zghidno iz zakonodavstvom krain Yevropy ta Yevropeiskoho Soiuzu* [Analytical note on comparative legislation on the regulation of fees for the provision of administrative services and the establishment of the amount of the administrative fee in accordance with the legislation of European countries and the European Union], https://research.rada.gov.ua/uploads/documents/32544.pdf.

[28] Riigiteataja, *State Fees Act,* adopted December 10, 2014, https://www.riigiteataja.ee/en/eli/511022015002/consolide.

stated that it considered this provision to be unconstitutional. Of course, the final answer to this question can only be given by the Constitutional Court of Ukraine.

But an even greater obstacle is the negative Ukrainian experience, where government decisions set opaque and unbalanced service fees (for example, splitting a single service into several separate paid services, imposing services that are essentially commercial, or turning consultations and filling out forms into separate paid services[29], etc.).

Even the current deviations from the requirements of the "Law on Administrative Services" show that where the government has responsibility for regulating service fees, there are legal concerns. We have already noted the issues with the passport sector. The fees are non-transparent and essentially dependent on the monopolistic enterprise. In the State Registration of Civil Status Acts sector (the Ministry of Justice), where "paid services" are set by a government act, there are also clear abuses: increases in fees for marriage registration, illegal paid consultations by government bodies. This evidence confirms that government procedures currently lack the transparency and even the legality required to ensure proper service regulation.

The second option (setting fees for administrative services in various laws: passport law, civil status registration, business registration etc.) is possible and constitutional. However, it has still not systematically solved the problem. As already mentioned, since 2015, there has effectively been no significant step forward. Moreover, this approach does not ensure consistency in service fees across various sectors, overall transparency for citizens, or compensation for service providers. That is why the experience of EU countries such as Poland, the Czech Republic and Estonia is considered valuable for Ukraine.

Other issues frequently discussed in the context of the administrative fee draft law include:

- Where to derive basic administrative fee amounts for parliamentary approval;
- Whether fee amounts can be defined in absolute units (simply in hryvnias), or whether some measure is needed, and how to ensure the stability of such a law and the adequacy of fee amounts;
- Whether local self-government authorities can approve specific fee amounts;
- Whether fee amounts can be increased (for urgency, for special services, such as on-site services, etc.).

By answering some of these questions, the following points should be taken into account.

For determining the amount of the administrative fee at the current stage, Draft Law No. 4380 uses fee amounts from the state property registration sector as the basis for calculations made by the Ministry of Justice in that sector. By analogy, similar amounts were proposed for state registration in other areas, such as the issuance of extracts from registers. It was also considered that some services are simpler than property registration, requiring less time and effort. Additionally, it was taken into account that there are much more widespread services that need to be more accessible. For example, the fee for general registration (of any kind) may range from 200 or 300 hryvnias, but for registering a place of residence, it could be lower (100 hryvnias). One approach of the draft law is the unification of fee amounts, ensuring their proportionality. That is, setting amounts such as 100, 200, 300 hryvnias,

[29] Tymoshchuk V.P., *Administratyvna protsedura ta administratyvni posluhy. Zarubizhnyi dosvid ta propozytsii dlia Ukrainy* [Administrative procedure and administrative services. Foreign experience and proposals for Ukraine], Kyiv, Fact, 2003. pp. 121-125.

etc. Larger fee amounts are set when the service involves the use of blank products (such as passport services).

Related to this is the question of whether administrative fees can be set in absolute units – in hryvnias. On the one hand, this would be correct, as the national currency is used for calculations. This approach ensures transparency of fee amounts for service users and makes it more difficult to charge illegal additional payments. However, the counter-argument is that inflation and other factors would require regular fee adjustments. Although, it can be said that even now, despite the full-scale war, the amounts set in Draft Law No. 4380 are still sufficiently adequate. A rule for the regular review of all fee amounts (every 3-5 years) has also been proposed.

However, it can also be acknowledged that there might be another approach, where a special measure ("conditional unit") is introduced for administrative fees (AF), which could be periodically changed by the parliament without a need to amend other parts of the law. This would allow for sufficient stability in the law, where the coefficients (the measure) are fixed: for example, the cost of a simple registration service could be 1 AF unit; a complex registration service – 2 AF units; an extract from the register – 0.5 AF units. In this way, by raising the value of the measure by the parliament decision, for example, from 100 to 110 hryvnias, the state could proportionally update all fee amounts. At the same time, social measures should not be used for these purposes, as increasing the minimum living wage would also increase the administrative fee, which is inconsistent with social policy objectives. To maintain transparency of fees for service consumers, an additional obligation should be placed on the authorized ministry, requiring it to update the relevant information table on official web resources and through other information channels.

A related question is whether the government can approve specific fee amounts and whether local self-governments can approve specific fee amounts. Regarding the Government (Cabinet of Ministers), we have already expressed our position. However, it is important to once again highlight the reasons why, at least for the most basic and popular services, fee amounts should be included in the law – this concerns transparency, stability and social balance. After all, it is the representative body that can provide the necessary legitimacy and balance to such decisions. Therefore, this approach is reflected in draft law 4380. At the same time, considering that there are over 2200 administrative services in the country, and even if half of them is paid, the fees for non-basic services could be set in special laws.

Following the same logic, one can also address the possible powers of local self-governments in this area. Administrative services are primarily state services, so the fee amounts should be the same across the entire country, in all communities. However, it cannot be excluded that, for certain services, the right for local councils to set fees within specific ranges (for example, from 20 to 200 hryvnias) may be introduced. This could be influenced by the fact that, for example, in the capital and megacities, the level of income and expenditure is different from that in the remote rural communities. Therefore, at least for some services (such as business registration), this approach could be adopted.. There is some similarity here with the phenomenon of local taxes (for example, property tax). At the same time, a good safeguard against abuse could also be the extraterritorial nature of services, with the possibility of receiving such services not only in one's own community but also in other communities.

Regarding the fee for "urgency" or out-of-office services, it is important to consider, on the one hand, the actual

demand for “expediting” (for urgency) and enhanced service. This raises issues of legality and non-discrimination. If some citizens receive better services simply because they can afford to pay more, it has signs of discrimination. Especially since this concerns government powers and the functions of public administration. The state must guarantee equal access to these services for everyone. At the same time, the fee for urgency could be higher to prevent corruption-related “expediting” (while ordinary deadlines should also be reasonable to avoid pushing everyone towards higher payment levels).

What should definitely be avoided is VIP services (for example, exit passports, etc.). This approach has clear discriminatory features. In our opinion, if certain categories of citizens objectively require out-of-office services (due to health reasons, etc.), no additional fee should be charged for such services.

There are other issues that need to be addressed. In particular, incentivizing the use of online services through reduced fee amounts. On the one hand, this might also seem discriminatory. However, there is a legal basis for this, as offline services typically require more resources.

Another open issue is the fee for extracts, certificates and references. If the state properly processes the result of an administrative service (an administrative act), a separate fee could be charged for these extracts only if the person loses the document (loses it, damages it, etc.). But if the result of the administrative service is not documented and even "unstable" (because other authorities regularly require the individual to confirm this information), then this is more of a problem for the state to set up data exchanges, rather than profiting from such certificates.

## Real practical barriers

The draft law on administrative fees faces clear opposition from certain interested parties. It is known that some government officials avoided including it in the relevant EU “Public Administration Reform” Roadmap (although the latest information indicates that he will be displayed there).

The task is also absent from the Government’s Priority Action Plan for 2025[30]. This once again confirms the great value of our Eurointegration process and the EU's position, which now significantly “binds” the power of our country.

One can assume who in the government (in the broad sense) is opposed to the law. These include experts with fully legitimate positions – those who argue that such powers should be granted to the Government, and those who advocate for regulating these issues in special (separate) laws. We have already analysed above why these are mistaken positions, primarily considering our own negative prior experience. An argument should also be that the problem has remained unresolved for more than 10 years. This means that qualitatively new, systemic, and transparent approaches are needed.

The position of those experts who fear that changing the rules will negatively impact the filling of the special budget fund of their agencies, such as the Ministry of Justice (which is largely financed by this agency), should also be analysed separately. It should be considered that no single agency/sector can operate under unique rules, especially those that do not comply with the “Law on Administrative Services”. The ministry's funding must be carried out in accordance

[30] Kabinet Ministriv Ukrainy, *Plan priorytetnykh dii Uriadu na 2025 rik* [The Government's Priority Action Plan for 2025], rozporiadzhennia 131-p, adopted February 18, 2025, https://zakon.rada.gov.ua/laws/show/131-2025-%D1%80#Text.

with the law, not by "earning" through dubious payments. There are also different solutions that could bring order: delegating the functions of the departments of state registration of civil status acts to local self-governments would significantly reduce the system of the Ministry of Justice, meaning part of the staff would need to be "transferred" to local governments. If the service involves the participation of central executive authorities in conjunction with local self-governments, part of the administrative fee, based on budget legislation, should go to the state budget (for example, 15-30%). Therefore, it is advisable to change budgetary legislation here as well.

A similar "problem" exists in the passport sphere. There are concerns that the State Migration Service will not receive its share for passport services, and the passport manufacturer will receive its share for producing passports. This could lead to a "deficit" of forms. This fear should be overcome with proper regulation of the distribution of administrative fees within the budget and between the involved entities. Specifically, if 30% of the administrative fee goes to the State Migration Service, and 70% goes to local self-governments based on the location of the service provider and/or the Administrative Services Centres (ASCs), then the State Migration Service should use its part of the administrative fee to purchase blank products. Thus, the mandatory costs for blank forms should be part of the administrative fee expenses. At the same time, the state should carefully monitor the justification for the increase in the cost of blank products by the relevant enterprise (or even reconsider the issue of monopolies in this sphere to ensure more balanced pricing).

It is also important to ensure control over the cost of administrative services provided by entities that outsource these services. Currently, these include certified land surveyors [31] and other entities where the state must exercise control.

## Conclusions

For Ukraine to become a full-fledged EU member, it needs an effective public administration system. The European integration process itself is a factor that contributes to the establishment of an effective public administration system and requires changing the rules and practices of its operation for the better. This is a chance for Ukraine to more quickly build capable and efficient institutions, implement proper procedures and form policies for daily public administration. This directly relates to the provision of administrative services.

The EU provides very clear and specific recommendations for Ukraine, demonstrating a good understanding of the real issues and the biggest challenges and internal barriers in Ukraine, including departmental or other obstacles. Therefore, it is very important that the EU has pointed out the need for the adoption of the law on administrative fees, evidently also to increase the stability of the administrative services sector, and its proper transparency and legality. After all, both the digital delivery of services and, especially, the offline component in the form of ASCs in territorial communities require resources. Moderate and transparent partially compensatory payments can provide this system with the necessary stability. Moreover, this is a

[31] Verkhovna Rada Ukrainy, *Pro Derzhavnyi zemelnyi kadastr* [On the State Land Cadastre], Zakon Ukrainy 3613-VI, adopted July 7, 2011, subparagraph 3 of paragraph 12 of section VII (as amended by Zakony Ukrainy 2247-IX adopted May 12, 2022, 3993-IX adopted October 8, 2024), https://zakon.rada.gov.ua/laws/show/3613-17#top.

step towards overcoming departmental interests and corruption risks in the provision of administrative services.

Ukraine should adopt a systemic law that defines the rules in this area and sets specific fee amounts for at least the most common groups of services, which can still be called “basic”. This will add transparency for citizens. These should be moderate compensatory payments that should not become barriers to accessing services. Social services must, of course, remain free of charge. A functioning mechanism for periodically updating the amounts of these fees should also be created. At the same time, it is important not to allow discrimination against citizens in terms of receiving administrative services based on their financial capacity. It is also important not to allow the commercialization of public administration, maintaining its fundamental distinction from the private sector.

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27. Kabinet Ministriv Ukrainy, *Plan priorytetnykh dii Uriadu na 2025 rik* [The Government's Priority Action Plan for 2025], rozporiadzhennia 131-p, adopted February 18, 2025, https://zakon.rada.gov.ua/laws/show/131-2025-%D1%80#Text.

28. Verkhovna Rada Ukrainy, *Pro Derzhavnyi zemelnyi kadastr* [On the State Land Cadastre], Zakon Ukrainy 3613-VI, adopted July 7, 2011, subparagraph 3 of paragraph 12 of section VII (as amended by Zakony Ukrainy 2247-IX adopted May 12, 2022, 3993-IX adopted October 8, 2024), https://zakon.rada.gov.ua/laws/show/3613-17#top

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## ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ВИКЛИКИ НАЛЕЖНОГО ВРЕГУЛЮВАННЯ ПЛАТИ ЗА АДМІНІСТРАТИВНІ ПОСЛУГИ

***Анотація***

*У статті розглядається питання однієї з рекомендацій Європейського Союзу, викладених у Звіті про розширення щодо України 2024 року – ухвалення закону про адміністративний збір. Це дійсно дуже актуальна проблема для України, вирішення якої матиме суттєвий вплив на діяльність публічної адміністрації, її відносини з громадянами. Ухвалення такого закону належної якості сприятиме більшій сталості системи надання адміністративних послуг завдяки впровадженню помірних та прозорих компенсаційних адміністративних зборів принаймні за частину адміністративних послуг. Наявність додаткового фінансового ресурсу у сфері адміністративних послуг сприятиме принаймні збереженню рівня доступності адміністративних послуг та їх якості. Належне законодавче вирішення цієї проблеми - це також спосіб подолання окремих недоброчесних інтересів у цій сфері, зокрема, відомчого та іншого протиправного характеру.*

***Ключові слова****: адміністративні послуги, плата за адміністративні послуги (адміністративний збір), Центри надання адміністративних послуг, закон про адміністративний збір, євроінтеграція.*

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# INTERNATIONAL COMMERCIAL MEDIATION AND THE DEVELOPMENT OF THE RIGHT OF ACCESS TO JUSTICE

***Abstract***

*Access to justice is a fundamental and constitutional right and concept in most modern legal systems. This right is seen as a safeguard of peace and prosperity in societies through the insurance of the respect of the rule of law and rights by defined structures and institutions. Although the prevailing interpretation of this right is closely linked to the judicial system, there seem to be some developments toward integrating other tools and the emergence of a complex institutional and regulatory justice system. The case of international business disputes appears to be worthy of study as it reflects the specific needs and requirements for customized access to justice in this field. This paper will try to explore this movement and shift in paradigms, focusing on the potential influence of some mechanisms such as mediation, on the classic understanding of access to justice.*

***Key Words:*** *Justice, International Business, Mediation, Development, Interactions*

## Introduction

International commercial disputes are on the rise as a result of globalization and expanding economic integration projects. Resolving these disputes would contribute to the growth of international commercial transactions and ensure sustainable development in general. In this context, businesses seem to have many options to resolve disputes, such as cross-border litigation and alternative dispute resolution mechanisms. From a legal perspective, ensuring access to justice is highly connected to the role of adjudicative mechanisms, especially courts that are considered as safeguards for respect of the rule of law. Nevertheless, the failure of adjudicative methods to deliver efficient solutions and the unique requirements of international business transactions might have some influence on the understanding mentioned. Some of the previous research already highlighted this idea, however, it was more general and related to both civil and commercial disputes, where there seems to be a movement towards the expansion and modernization of the right of access to justice to include and cover Alternative Dispute Resolution (ADR) mechanisms as well.[1]

[1] Carlos Esplugues, "Civil and Commercial Mediation and National Courts: Towards a New Concept of Justice for the XXI Century?," in *General Reports of the XIXth Congress of the International Academy of Comparative Law Rapports Généraux du XIXème Congrès de l'Académie Internationale de Droit Comparé. Ius Comparatum - Global Studies in Comparative Law,* ed. M. Schauer and B. Verschraegen (Springer, 2017), 213-259, https://doi.org/10.1007/978-94-024-1066-2_10

These remarks are not merely a theoretical debate among scholars, but are also reflected in the integration of ADR regulations into procedural legal instruments that are typically related only to the judicial system. This is the case in France and Belgium, for instance, where the French Code of Civil Procedure (CCP) and the Belgian Judicial Code (BJC) now have provisions related to mediation as a process that is part of the justice system.[2]

These formal indicators reflect a growing recognition and support for alternative mechanisms as a potential remedy for issues faced in classic litigations. Mediation as one of the ADRs might be defined as an alternative non-adjudicative process of dispute resolution. Put simply, it consists of the efforts of a neutral third party (mediator), whose main role is to assist parties to reach a settlement agreement that will end their dispute entirely or partially.

Going back to the international business context, it is fair to mention that experts also highlighted that the international dispute resolution scene is increasingly evolving and expanding toward more "holistic" approaches, and mediation as an ADR is believed to play an important role in ensuring this shift.[3]

Therefore, it seems worthy of attention to conduct a detailed analysis of this expansion in the international business field and to consider the regulatory developments and institutional environment of international mediation.

This paper builds on previous contributions to elaborate and elucidate this movement and its influence on the right of access to justice. As a starting point, it tackles the features of the classic and common understanding of access to justice (1) then it explains how the nature of international business disputes and transactions might recall a need for customization of the mentioned understanding (2) before examining the complex nature of the emerging international commercial justice system and how mediation might contribute to its structure and functioning (3)

To achieve these objectives, the paper adopts a descriptive, analytical, and comparative legal research approach. The main focus will be on international and regional legal instruments connected to the regulation of international dispute resolution and mediation.

## Classic understanding of the right of access to justice

Ideally, access to justice could be a very wide term that includes any technique or legal path that allows individuals and businesses to get fair and just solutions to their legal disputes and issues. This would include recourse to State judicial bodies, such as courts, and other mechanisms that are seen as alternatives or sometimes considered "private," such as arbitration, mediation, or conciliation.

Nevertheless, in practice, there is a preference for connecting this right to certain dispute resolution mechanisms, such as courts or adjudicative methods only.[4] Experts believe that the monopoly of the State and its judicial system might be explained by some major historical events

[2] Marco Giacalone and Sajedeh Salehi, "An Empirical Study on Mediation in Civil and Commercial Disputes in Europe: The Mediation Service Providers Perspective," *Revista Ítalo-española De Derecho Procesal,* no. 2 (2022): 20-26, https://doi.org/10.37417/rivitsproc/802 in France, contractual mediation was regulated in articles 1530-1535, while judicial mediation was subject to articles 131-1 to 131-15. In Belgium, Mediation is regulated in Articles 1724-1737.

[3] Katia Fach Gómez, "The role of mediation in international commercial disputes," in *Mediation in international commercial and investment disputes,* ed. C. Titi and K. F. Gómez (Oxford University Press, 2019), 2-3 http://dx.doi.org/10.2139/ssrn.3418648

[4] Silvia Barona and Carlos Esplugues, "ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends," in Global Perspectives on ADR ed. C. Esplugues and S. Barona (Intersentia, 2014), 1-3 http://dx.doi.org/10.2139/ssrn.2403142

such as the French Revolution, which strengthened the idea of the "single source of power".[5] Put simply, parliaments and judges are seen as representing the "will of the population" when adopting or applying the rule of law, and thus, the judicial system as a type of continuity of States is worth being in a superior position in the hierarchy of powers.[6] History also proves a significant development and expansion in the power given to States in the justice field, which resulted in considering State courts and civil procedures as the preferred solution for any potential dispute.[7]

This preference was also enshrined in many international and national legal instruments. For instance, we might mention Article 8 of the Universal Declaration of Human Rights (UDHR) which stipulates that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.", Article 14 of the International Covenant on Civil and Political Rights (ICCPR) providing that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.", or Article 6 of the European Charter of Human rights (ECHR) related to the right to a fair trial which stipulates that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." These legal texts and many other regional and national texts usually connect the idea of achieving justice to State tribunals and courts without mentioning other alternatives to the judicial system.

In the best scenarios, the nature of some disputes (labor, commercial, etc.) led to the creation of the so-called judicial specialization as one of the solutions to enhance the quality and efficiency of the judicial system and the right of access to justice.[8] This approach, however, confirms this centralization around the judicial body, as even solutions are still inside the same system and paradigms.

This logic and centralization around the judicial system seems to be expanding beyond domestic disputes to touch international business disputes and attempt to solve some issues faced in international arbitration. This is clear from the movement to establish some institutions or more precisely divisions of existing ones such as international commercial courts (e.g. Singapore International Commercial Court) and international investment courts (the example of investment court systems established by the EU and its partners under some Free Trade Agreements, e.g. Comprehensive Economic and Trade Agreement EU-CANADA and European Union–Vietnam Free Trade Agreement).[9] The consideration of judicial institutions is not limited to specialized international bodies but even includes domestic courts that are, even when acknowledging the different forms of inadequacies with international business needs and requirements, still considered as "the most important forum" jointly with international arbitration in resolving cross-border commercial disputes.[10] It is also fair to mention that some domestic courts, such as the London Commercial Court model, gained remarkable popularity over others in

[5] Barona and Esplugues, "ADR Mechanisms," 2.

[6] Barona and Esplugues, "ADR Mechanisms," 2.

[7] Barona and Esplugues, "ADR Mechanisms," 2.

[8] Brian Opeskin, "The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems," Current Legal Problems 75, no. 1 (2022): 1-43, http://dx.doi.org/10.2139/ssrn.4185334

[9] Lucy Reed, "International Dispute Resolution Courts: Retreat Or Advance," McGill Journal of Dispute Resolution 4, (2017): 129-147, https://www.canlii.org/w/canlii/2017CanLIIDocs398.pdf

[10] Firew Tiba, "The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia," Loyola University Chicago International Law Review 14, no. 1 (2016): 38, https://ssrn.com/abstract=2943870

attracting disputants of international business disputes. According to scholars, this could be explained by English judges' level of expertise in commercial matters or their business-friendly legal system.[11] In one way or another, this good reputation of some domestic commercial courts with international influence might be a reason to strengthen the legitimacy of the classic understanding of the right of access to justice.

Some experts go further and suggest that cultural contexts could justify this inclination toward judicial institutions. For example, Western countries, known for having highly developed and independent judicial systems, could support this understanding of access to justice and respect for courts.[12] Other nations and cultures might be more inclined towards consensual dispute resolution methods; thus, their understanding of access to justice could be less adversarial. The Chinese example and the influence of Confucianism on this culture go in the same direction, as litigation was seen as a threat to harmonious and peaceful social relationships.[13]

Nevertheless, it is fair to highlight that the cultural factors mentioned, even when acknowledging their importance in shaping the understanding of the right of access to justice, are not exclusive and may only constitute a portion of a larger picture. The way access to justice is perceived is also highly influenced by the efficiency of the dominant judicial structures; the lower the quality and the responsiveness of courts to the needs and interests of businesses and disputants in general, the higher the chances of a more open and broad interpretation of this concept beyond classic institutions.[14] The interaction between the mentioned variables will be assisted by a movement from lawmakers and business organizations to tailor modern solutions to dispute resolution. This may result in establishing a new, customized justice structure, at least for certain kinds of conflicts.

## The need for customized access to justice in the international commercial field

The idea behind this section is to present the context and background that would justify or facilitate the acceptance of a potential development of our understanding of access to justice. Three factors may be examined in this context: the current condition and limits of traditional mechanisms such as litigation; the nature of international business transactions and disputes, which appear to have particular requirements and features; and the unique characteristics of mediation in this field.

Before delving deep into this part, it is fair to clarify that thinking about the customization of the right of access to justice might be considered a debatable topic, subject to a lot of skepticism and uncertainty. Previous research already highlighted this idea and how ADRs were generally considered a threat to the authority of classic, more formal paradigms of delivering justice.[15] ADRs were considered as limiting the role of the judicial body as a safeguard for the respect of the rule of law in society.[16] Mediation, as one of the ADRs and as an alternative dispute resolution process, was heavily criticized by scholars who saw it as a kind of "poor justice to the poor".[17] The process was also seen as a weak alternative that does not provide enough protection to those who want to use it compared to litigation.[18] In

[11] Reed, "International Dispute Resolution," 138.

[12] Reed, "International Dispute Resolution," 134.

[13] Cheng Qian, "The culture of China's mediation in regional and international affairs," Conflict Resolution Quarterly 28, no. 1 (2010): 54-55, https://doi.org/10.1002/crq.20012

[14] Barona and Esplugues, "ADR Mechanisms," 37-38.

[15] Charlie Irvine, "What Do 'Lay' People Know about Justice? An Empirical Enquiry," International Journal of Law in Context 16, no. 2 (2020): 146–164, https://doi.org/10.1017/S1744552320000117.

[16] Irvine, "What Do 'Lay'," 148-149.

[17] Irvine, "What Do 'Lay'," 147.

[18] Irvine, "What Do 'Lay'," 148.

other words, Mediation was considered a social practice that is far from any legal basis or theory behind it as a process or as an outcome. The criticism, in large part, originated from a formalistic and positivist way of thinking that focuses on substantive justice (solutions and outcomes must be based on the legal rights of disputants) rather than other approaches that are used in consensual methods such as problem-solving or interests of disputants.[19] The influence of the strong internal and formal doctrinal approach on the legal industry and research might also explain this situation.

Nevertheless, the crisis and complexity surrounding the functioning of classic institutions,[20], such as the case backlog in front of State courts and the related high costs, paved the way for the introduction of many solutions, such as the integration of mechanisms that were somehow seen as external or different from the known judicial structures.[21]

It is fair to clarify first that diversifying dispute-resolution methods might be seen in domestic and non-commercial disputes as well, for many practical reasons, such as the mentioned backlog in front of most judicial systems in the world and the expected efficiency related to ADR mechanisms in different types of conflicts.

Nonetheless, this paper's focus on international business disputes is not a random selection of a field to examine or study. It could be justified by the fact that they usually involve professionals and businesses assisted by highly experienced legal teams and representatives, and by the structure of ensuring justice in this field, which seems to be subject to many developments and changes. The distinct demands and features of international business may necessitate innovative approaches in this area, apart from those that predominate in domestic and non-commercial disputes.

In most cases, parties and practitioners in cross-border commercial disputes are inclined towards arbitration as an ADR mechanism that is well-surrounded by national and international legal instruments that ensure the certainty and predictability of the process. The preference for arbitration is reflected in most international commercial contracts and investment treaties; in almost 90 % of the former and 93% of the latter, an arbitration clause is included.[22]

The use of arbitration and its popularity raises many questions about the possible unique understanding of access to justice in the international commercial field. Litigation in the international business context poses many issues related to its adequacy with the expectations of different players in this sector. In most cases, litigation tends to be a very lengthy and complex process subject to the principle of public proceedings, which might be incompatible with businesses' expectations for speed, flexibility, and confidentiality. Moreover, the foreign nature of legal systems and possible risks related to applicable rules and regulations would render cross-border litigation even less attractive.

The level of international cooperation concerning the circulation of foreign judgments, if we exclude some regional efforts such as the developed EU Private International Law regulations in this

[19] Irvine, "What Do 'Lay'," 147-148.

[20] For statistics in this context see; ADR Center, The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation (Report, June 9, 2010) https://toolkitcompany.com/data/files/Resource%20center/Research%20and%20surveys/Survey_Data_Report%20cost%20of%20not%20using%20ADR%20EU%202010.pdf; Giuseppe De Palo, Ashley Feasley and Flavia Orecchini, Quantifying the Cost of Not Using Mediation – A Data Analysis (Report, 2011) https://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf.

[21] Barona and Esplugues, "ADR Mechanisms," 37-38.

[22] Otto Sandrock, "The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives," American Review of International Arbitration 20, (2009): 37 cited in Stacie Strong, "Realizing Rationality: An Empirical Assessment of International Commercial Mediation," Washington and Lee Law Review 73, no. 4 (2016): 1976, https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1639&context=facpubs

matter,[23], also seems to be very limited, and this could increase uncertainties related to litigation. Additionally, even the different forms of bilateral agreements in the field of judicial cooperation are seen by some experts as insufficient and unable to achieve the same amount of certainty for cross-border enforcement of judgments if compared to regional[24] or multilateral instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[25]

In the same context as ADRs, mediation also seems to be subject to an increasing number of international efforts that are steadily reducing different uncertainties surrounding this tool.[26] Many of these efforts are trying to put mediation in a similar position to that of other more commonly used alternatives, such as arbitration. These regulatory developments might make the process more qualified to overcome the issues faced in cross-border commercial litigation and contribute to the growth of the emerging comprehensive international dispute resolution system.

Furthermore, the nature of international business transactions seems to have become more complex and sensitive.[27] Thus, as mentioned earlier, most companies prefer to follow the guidance and assistance provided by their legal teams and counsels, including participating in the mediation process and drafting its outcomes. This assistance from legal professionals and regulatory changes could reduce risks related to the informal nature of this mechanism and allow it to be a key element in amending the way in which international commercial justice is perceived.

Another factor to consider is the mediation model used. In general, there are two approaches: facilitative mediation, where the third party's role is limited to facilitating negotiations between parties who are supposed to bring the solution themselves, and evaluative mediation, where the role of the mediator seems to be more active as he expresses views and proposes potential solutions.[28] Some experts highlighted that parties usually expect the mediator to be more evaluative and active in business matters, such as providing recommendations based on the legal merits of the case.[29] Therefore, if we consider that many mediators, especially in international commercial disputes, have the minimum requirements of legal expertise and that business lawyers usually participate in mediation to assist and advise their clients, this might also ensure the quality of the process as a reliable alternative.

These remarks might pave the way for a new approach to ensuring justice in the international commercial field. An approach that is not strictly limited to the role of courts and judges as classic solutions but open to other mechanisms that are not necessarily adjudicative.

[23] Sarolta Szabó, "Brief summary of the evolution of the EU regulation on private international law," Iustum Aequum Salutare 7, no. 2 (2011): 143-151, https://publikacio.ppke.hu/id/eprint/773/1/000679841.pdf

[24] Such as the EU Private International Law framework.

[25] Tiba, "The Emergence of Hybrid," 53.

[26] We will present some of these developments in section 3

[27] Stacie I. Strong, "Beyond international commercial arbitration - the promise of international commercial mediation," Washington University Journal 45, no. 1 (2014): 19-21, https://journals.library.wustl.edu/lawpolicy/article/885/galley/17720/view/

[28] Wesam Faisal Al Shawawreh, "An evaluation study in mediation: a comparative study between Australia and Jordan" (PhD diss., University of Southern Queensland, 2020), 14-26, https://eprints.usq.edu.au/39907/1/Wesam%20Faisal%20Al%20Shawawreh-%20PhD%20Final%20thesis.pdf

[29] Manuela Renata Grosu, "Hybrid Procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective," (PhD diss., Eötvös Loránd University, 2021), 43-44, https://edit.elte.hu/xmlui/bitstream/handle/10831/54725/Disszert%C3%A1ci%C3%B3.pdf?sequence=1

## Mediation and the complex "ecosystem"[30] of international commercial justice

The analysis of the complexity of this emergent system and the potential contribution of mediation in this context might require three steps. The first is to examine the different developments related to the legal and institutional environment of international business mediation, in particular, and international dispute resolution in general, and how this is reshaping the classic understanding of dispute resolution (section 3.1). The second focuses on the increasing interactions between dispute-resolution mechanisms as one of the main features of the mentioned 'ecosystem', focusing on the role of mediation in strengthening this connection (section 3.2). The third aims to provide some other examples of the way mediation might bring some amendments to procedural rules related to adjudicative methods (section 3.3).

## Regulatory and institutional developments as a framework for this ecosystem

In the last two decades, mediation has been subject to a large wave of regulations all around the world.[31] This movement could be a reason for a reassessment of the relationship between mediation as a process and the legal system. Many experts have started to examine this interaction and to extract legal principles behind the functioning of mediation.[32] Other researchers focused on the best techniques to regulate mediation as a process with a unique nature and features.[33] The legal and theoretical attention that mediation has received may lead to taking it more seriously as a complement to the courts as a means of administering justice.[34]

In contrast to previous years, when arbitration was the go-to option for resolving most international business disputes with little to no competition from other ADR processes, it appears that the situation is slowly starting to change. This should not be interpreted as denying the dominance of arbitration in the international dispute resolution scene, but just to highlight that some factors could justify expectations of growth in the use of other mechanisms such as mediation.

The legal element is one of the best examples of the mentioned factors as international business mediation seems to receive different forms of regulation that go from soft-law to hard-law legal rules at national, regional, and international levels. Many regional and international organizations are increasing their efforts to strengthen and harmonize the legal environment of international business mediation. We can mention many initiatives, such as the United Nations Commission on International Trade Law (UNCITRAL) through its different Model Laws related to International Commercial Conciliation/ Mediation (2002/2018) and binding instruments such as the United Nations Convention on International Settlement Agreements Resulting from Mediation known also as the "Singapore

[30] The use of the word "ecosystem" was inspired by the expression "Mediation ecosystem" used previously in Fach Gómez, above n. 3 at 10

[31] Barona and Esplugues, "ADR Mechanisms," 38.

[32] Petra Hietanen-Kunwald, "Mediation and the legal system: Extracting the legal principles of Civil and Commercial Mediation," (PhD diss., Helsinki University, 2018), 10-13, https://helda.helsinki.fi/server/api/core/bitstreams/4ade2ceb-67fc-4de4-8e9c-4793becc70b9/content

[33] Nadja Alexander, "Mediation and the Art of Regulation," QUT Law & Justice Journal 8, (2008): 1-23, http://dx.doi.org/10.2139/ssrn.3747674 ; Nadja Alexander, "Harmonisation and diversity in the private international law of mediation: The rhythms of regulatory reform" in Mediation: Principles and regulation in comparative perspective, ed. K. J. Hopt and F. Steffek (Oxford University Press, 2016) 1-72, http://mediation-moves.eu/wp-content/uploads/2018/06/Alexander_Harmonisation-and-Diversity-in-the-Private-International-Law-of-Mediation-The-Rhythms-of-Regulatory-Reform.pdf

[34] Barona and Esplugues, "ADR Mechanisms," 37-40.

Convention" (2018), the International Center for the Settlement of Investment Disputes (ICSID) and the mediation rules it developed in 2022, the efforts of some business organizations such as the International Chamber of Commerce (ICC) mediation rules and services, other initiatives of regional economic integration organizations such as the EU 2008 Directive on certain aspects of mediation in civil and commercial matters or the 2017 Uniform Act on Mediation (UAM) of the Organization for the Harmonization of Business Law in Africa (OHADA)…

This context might alleviate fears related to the disconnection between mediation and the legal system. In other words, even if mediation does not use the same adversarial and formalistic logic used in courts and arbitration, we can still notice that the process is moving closer toward certainty and predictability, which are considered important factors in international dispute resolution processes. The certainty around international business mediation might be ensured, as mentioned by regulatory and institutional safeguards of assistance and control from other mechanisms and institutions.

Some scholars have already mentioned the movement toward the expansion and establishment of "multi-faceted" dispute resolution systems in the international field.[35] This movement consists of creating a dispute resolution "ecosystem" of different techniques and tools, where there is an undeniable interaction between its components. This would create a comprehensive and complementary system where adjudicative and non-adjudicative methods control and assist each other. Fach Gómez describes these developments as a:

> "systemic evolution of public and private dispute resolution mechanisms towards a non-hierarchical coexistence (which) is also expected to produce effects in terms of the principle of access to justice. This key principle…, is likely to become broader in scope in the future. If it is concluded that access to justice no longer refers solely to access to state court justice but also to nonadjudicative protection mechanisms, many relevant changes are going to occur (e.g., the drafting and judicial interpretation of various international and regional provisions addressing this major issue will need to be modified)."[36]

Many countries, such as the UK, UAE, Qatar, and Singapore, are in the process of establishing or already have concrete models of the mentioned systems to be an international center of dispute resolution for international commercial disputes. For instance, Singapore, a leading country in the field of international commercial dispute resolution, seems to have a comprehensive legal and institutional framework dedicated to international dispute resolution. Singapore established the Singapore International Mediation Center (SIMC), Singapore International Arbitration Center (SIAC), and the Singapore International Commercial Court (SICC), which all serve the goal of transforming the country into a hub for resolving international business disputes.[37]

Mediation seems to be an important element of this dispute resolution system not only because of the dedicated institutions offering mediation in the international business field but also because

[35] Fach Gómez, "The role of mediation," 2.

[36] Fach Gómez, "The role of mediation," 3.

[37] Fach Gómez, "The role of mediation," 2-3.

of its connection to other mechanisms, such as arbitration and litigation.

## Mediation's interactions with adjudicative mechanisms as a connecting factor

As previously mentioned, one of the main features of this "ecosystem" for justice in the international commercial field is the interaction between its adjudicative and non-adjudicative mechanisms.[38] Given the nature of the mediation process and its need for support and control[39] from adjudicative mechanisms such as arbitration and litigation, mediation may serve as a connecting element within this complex system.

### Assistance-based interactions

When it comes to the interaction of mediation with other ADR forms, such as arbitration, it is obvious that many arbitration laws, institutional rules, and contracts provide for the possibility of hybrid procedures. Put simply, parties can mix mediation with arbitration to benefit from the advantages of both processes. This could be particularly useful in assisting with the weak parts of each process. A popular example in this regard is the issue of enforceability and the incorporation of mediated settlement agreements into consent arbitral awards to benefit from the wide recognition regime provided by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention" (1958).

In the same context, Article 16 of the OHADA Uniform Act on Mediation confirms this practice when it stipulates that

> "… When the agreement arising out of the mediation is reached while arbitral proceedings are ongoing, the parties, or the most diligent party, acting with the express agreement of the other party, may ask the arbitration tribunal constituted to take note of the agreement reached in a consent award. The arbitral tribunal shall decide without debate, unless it deems it necessary to hear the parties."

This would be quite helpful, especially considering that the Singapore Convention on Enforcement is recent in nature and may take some time to obtain more ratifications before it can significantly impact the facilitation of the cross-border enforcement of mediated settlement agreements. This interaction might be examined under the emergence of complex structures for international commercial justice in the 21st century.[40]

The same applies to ties between mediation and courts as a state body, as the interaction between both methods of dispute resolution could take different forms, either assistance or control or both.

Assistance might be recalled in many scenarios where the characteristics of the mediation process are incapable of providing efficient solutions or protective measures for parties' rights.

In this context, Article 14 of the UNCITRAL Model Law on International Commercial Mediation provides that

> "Where the parties have agreed to mediate and have

[38] Barona and Esplugues, "ADR Mechanisms," 39.

[39] Haris Meidanis, "International Mediation and Private International Law," ICC Dispute Resolution Bulletin, no. 1 (2020): 42. Meidanis highlights the importance of the duality of assistance and control from courts in the context of arbitration, which will inspire the author of the current paper to apply it in a broader interpretation when tackling mediation.

[40] Esplugues, "Civil and Commercial Mediation," 213-259.

expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings." This Article shows the assistance that courts and arbitral tribunals might offer to mediation, at least based on two levels. The first is the emphasis on the parties' agreement to mediate and the duty of courts or arbitral tribunals to respect it, or, to put it another way, guarantee their enforcement. It is fair to point out that court support for mediation agreements can range from relatively simple "irrecevabilité" of claims in violation of a mediation agreement, as in the French legal system, to stricter approaches that permit the non-breaching party to even request damages, as in the German and Austrian models.[41] The second level of assistance in Article 14 is reflected in the possibility given to parties to seek interim measures from courts or arbitral tribunals to protect their rights whenever necessary, even if they agree to waive their right to initiate litigation or arbitration procedures during mediation and the fact that this agreement is legally binding.[42] These provisions reflect a recognition, which is enshrined in mediation regulation, of the supportive role of adjudicative methods as an extra safeguard for the mediation process.

Despite being soft law, the model law's wording appears to have an impact on numerous legal systems. OHADA Article 15 of the Uniform Act on Mediation seems to provide an example by stipulating that "The provisions of the previous paragraph shall not apply when a party deems it necessary to initiate, for provisional or conservatory purposes, proceedings to safeguard its rights. The initiation of such proceedings may neither be considered as such, as a waiver to the mediation agreement, nor as terminating the mediation process." This paragraph is interesting as it confirms how the interaction between Mediation and adjudicative methods in general tries to strike a balance between the protection of rights and the respect of mediation as an ADR mechanism. Consequently, the fact that the mediation process's regulatory regime calls for assistance from other mechanisms does not imply that mediation was unsuccessful and has to be terminated; rather, it should be

[41] Meidanis, "International Mediation and Private," 45.

[42] United Nations Commission on International Trade Law, Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002), paras. 94–95, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf.

understood within the context of a broader dispute resolution "ecosystem" in which its elements work in cooperation.[43]

Another example is the enforcement of agreements resulting from the mediation process known also as "settlement agreements" which may require an intervention from courts such as the judicial homologation procedures. Article 6.2 of the EU Mediation Directive goes in this direction when it provides that "The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."

OHADA, as another regional economic integration organization, seems to recognize this approach and enshrined it in its Uniform Act on Mediation. Article 16 of this legal instrument stipulates that

> "…Upon joint request of the parties, the mediation agreement may be submitted for registration under the notary's registry, with formal recognition of the submissions and signatures. The notary provides, upon request of the relevant party, an engrossment or a copy of the agreement for enforcement. Upon joint request of the parties or, failing this, upon request of the most diligent party, the mediation agreement may also be subject to approval or exequatur by the competent court. The judge shall issue an order. He may not modify the terms of the agreement arising out of the mediation…"

These provisions also reflect the orientation to benefit from other institutions such as the approval of courts or engrossments of notaries.

Assistance could be very useful, especially in the international business context where there is a need for cross-border enforcement and many private international law rules are involved. This is clearly mentioned in some of the EU instruments, such as the EU Mediation Directive, where recital 20 of this legal text highlights the question of benefiting from other Private International Law instruments that are related to the circulation of judgments and not specifically to settlements. Meidanis describes this technique as a scenario where the settlement is "disguised" as another more "common" instrument (such as judgment, authentic instrument or a decision) according to the law of the EU member state where enforcement is sought for the first time and then this new instrument is the one that will be able to be enforced in other Member States.[44]

## Control-based interactions

When it comes to control, courts may also provide some extra safeguards in relation to the outcome of the mediation process and its adequacy with what are considered protective measures for the parties involved. The Singapore Convention may provide a legal basis for this remark as even if the purpose of this new legal instrument is to facilitate the circulation of international mediated settlement agreements, some protective measures are still there, such as the case of Article 5 related to the grounds for refusing to grant relief to the settlement agreement. Article 5 provides many safeguards to ensure that the enforcement of the

[43] Fach Gómez, "The role of mediation," 3.

[44] Haris Meidanis, "Enforcement of Mediation Settlement Agreements in the EU and the Need for Reform," Journal of Private International Law 16, no. 2 (2020): 280, https://doi.org/10.1080/17441048.2020.1796226

settlement agreement respects the legal requirements for its validity, the legal capacity of parties to enter into binding agreements, the standards applicable to the mediation process or the mediator, or the public policy of the country where enforcement is sought. This type of control could establish a balance between the mediation's overarching philosophy, which places a strong emphasis on voluntariness and the free will of the parties, and the requirement to preserve public interest and to ensure minimum safeguards.

Control might also be connected to the idea of ensuring the quality of the mediation process. For instance, the 2008 EU Mediation Directive in Article 4 and Recital 16 encourages Member States to adopt appropriate "quality control mechanisms" to guarantee the respect of the mediation principles and its effectiveness as a process. These mechanisms might take different forms, such as accreditation techniques for mediators or codes of conduct.[45] In this context, it is reasonable to imagine also a potential intervention from courts whenever one of the parties challenges the outcome of the mediation process based on its non-respect of these quality standards. Article 6 of the directive also seems to confirm these supervision powers given to courts when linking the possibility of enforcement to the respect of "the law of the Member State where the request is made." The courts will generally decide the actual assessment and interpretation of the degree of compliance of settlements with these national laws and regulations.

Another regional organization that appears to be moving in this direction is OHADA, which also permits courts to have minimum control over the agreements reached through the mediation process. This is confirmed by Article 16 of the OHADA Uniform Act on Mediation, which stipulates that "The competent court shall limit itself to checking the authenticity of the mediation agreement... However, approval or enforcement may be refused if the mediation agreement is contrary to public policy." This Article, even when trying to ensure the need for efficient enforcement of settlements reached through mediation with simplified procedures, still recognizes that judicial protection should be exercised. Thus, courts must ensure that both private and public interests are guaranteed by checking the authenticity of settlements and their conformity with the requirements of public policy. It is also expected that courts, while making this check, will consider the nature of the mediation process, which adds extra safeguards that should be controlled in addition to classic contract law defenses.

**Mediation's influence on procedural rules of other adjudicative mechanisms**

Mediation influence is not limited to the duality of assistance and control and might also have some implications on procedural rules of other adjudicative proceedings.

An excellent example could be found in the rules of evidence. Article 11 of UNCITRAL's Mediation Model Law states in this regard that

> "1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following: (a) An

[45] Jan Tymowski, The Mediation Directive: European Implementation Assessment (Brussels: European Parliamentary Research Service, 2016) 20, https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/593789/EPRS_IDA(2016)593789_EN.pdf

> invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings; (b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute; (c) Statements or admissions made by a party in the course of the mediation proceedings; (d) Proposals made by the mediator;…"

Another legal basis is Article 7 of the 2008 EU mediation directive, which ensures the same safeguard of confidentiality by stipulating that

> "1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process…"

These rules are supposed to protect one of the most important features of the process: its confidentiality. Confidentiality seems to be an appealing feature of mediation and ADRs in general because of its vital role in ensuring the interests of commercial disputants and its ability to protect the reputation of businesses, which is a very sensitive issue, especially for large companies. Going back to the main focus of this paper, the rules of evidence are without a doubt one of the key features of the way how justice is ensured through litigation or arbitration, and allowing mediation to make adjustments to these rules might be interpreted as a recognition of the impact of ADRs on the classic understanding of access to justice.

Moreover, even if the mediation regulatory framework is contributing to the development of the right of access to justice towards expansion, it still acknowledges that recourse to State courts must be ensured in case of termination of mediation without reaching a settlement agreement. This is the case of limitation periods, the time specified by law to start a legal action, as many mediation rules insist on the importance of suspending these timeframes to guarantee that parties always have their right to litigate the matter subject to dispute. UNCITRAL Model Law on International Commercial Mediation in its 4th footnotes suggests the following provision

> "1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended. 2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement."

Article 8 of the EU Mediation Directive also ensures this safeguard by providing that

> "1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. 2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party."

Even if this type of extension of the prescription periods aims to protect parties' right to access to state courts, it could also have a positive impact on the level of engagement and participation of parties in the mediation process if they are certain that their time in mediation will not put them in a disadvantaged legal and procedural situation. In all cases and with the different justifications, the impact of mediation on the timeframes and procedural rules of the judicial system seems to be present.

These are just a few examples of potential interactions between adjudicative and non-adjudicative techniques. Nevertheless, they might be the starting point for more research in the complex nature of access to justice in the international commercial field.

It is fair to emphasize that the mentioned complex and compound system and its diverse mutual interactions must also be subject to more scrutiny and analysis with critical eyes.

The relation between the different mechanisms is not purely idealistic and might generate certain problems as a result of the different structures and principles governing each process. In this context, scholars expressed fears about the potential impact of litigation on mediation, such as the risk of the "lawyerization" of mediation as a mechanism known for its flexibility and informal nature.[46] Some experts predict that the increase in the different regulatory instruments might be a sign of overregulation, which could threaten the hard balance between mediation's main features and the need for legal certainty.[47]

The same applies to forms of interaction between arbitration and mediation. Hybrid procedures might be a perfect example of the fears expressed concerning the level of independence and impartiality of the same neutral hybrid procedures.[48] This mixed type poses many problems in ensuring that both procedures, if used together, still reflect the core guiding principles, such as the impartiality of the neutral third party.

Some amendments to the legal framework of international dispute resolution might also be required to reduce the risks associated with the various and increasing interactions.

## Conclusion

Mediation as an ADR perfectly reflects this transformation and, somehow, through its emerging and developing legal and institutional environment, is

[46] Giovanni Matteucci, "The Singapore Convention on Mediation, challenges and opportunities," (Seminar Paper, the 2nd KIMC International Seminar, December 3, 2021), 9, https://www.academia.edu/download/88796956/The_Singapore_Convention_on_Mediation_challeng_The_2nd_KIMC_International_Seminar_Seoul_3.12.2021.pdf

[47] Delcy Lagones De Anglin, "Is Over-Regulation Killing Arbitration and Will It Kill Mediation?" in Trade Development through Harmonization of Commercial Law, Hors Série Volume XIX (Victoria University of Wellington, Faculty of Law, 2015), 239–243, https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-xvi,-2013/Lagones-de-Anglim.pdf.

[48] Grosu, "Hybrid Procedures," 298.

strengthening this connection between the components of the international commercial dispute resolution system.

The increasing regulatory instruments and institutional infrastructures related to international business mediation are, in most cases, directly referring to or indirectly recalling the question of control or assistance from other mechanisms such as arbitration or litigation, which is probably amending many procedural rules related to the functioning of dispute resolution mechanisms.

The interaction mentioned might be present and manifest in other fields; however, the movement toward the establishment of this "ecosystem" seems to be more obvious in the international business context.[49] Some experts have even suggested that to take these developments into account, it could be necessary to reform the laws that guarantee and regulate the right of access to justice.[50]

The author believes that access to justice and procedural law in general, especially rules connected to more dynamic fields such as international business, might need a specific understanding that goes beyond the classic structures that are centered around litigation. This should not be interpreted as an exclusion of the role of adjudicative methods; however, as a possible emergent complex system based on coexistence and cooperation rather than competition and exclusion.[51]

The system mentioned will probably pose many challenges arising from the diverse characteristics of its different components. Thus, lawmakers and the actors involved in the international dispute resolution field must pay significant attention to the best approaches that could guarantee the efficient functioning of this complex system without threatening the features of each process. This is vital, especially when considering that some mechanisms, such as litigation and arbitration, are in a relatively stronger position than others because of their well-established legal and institutional frameworks.

To conclude, it seems that the influence of mediation in the international business dispute resolution system became undeniable, even when acknowledging the low rates of the use of this mechanism compared to adjudicative methods. The weaknesses of the process also emphasize the need for cooperation with other mechanisms, which will obviously modify the classic understanding of access to justice.

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[49] Fach Gómez, "The role of mediation," 2.

[50] Fach Gómez, "The role of mediation," 3.

[51] Barona and Esplugues, "ADR Mechanisms," 37-40.

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## МІЖНАРОДНЕ КОМЕРЦІЙНЕ ПОСЕРЕДНИЦТВО ТА РОЗВИТОК ПРАВА НА ДОСТУП ДО ПРАВОСУДДЯ

***Анотація***

*Доступ до правосуддя є фундаментальним і конституційним правом та концепцією в більшості сучасних правових систем. Це право розглядається як запорука миру та процвітання в суспільстві завдяки забезпеченню поваги до верховенства права та прав з боку визначених структур та інституцій. Хоча переважаюче тлумачення цього права тісно пов'язане з судовою системою, здається, що відбуваються певні зміни в напрямку інтеграції інших інструментів та появи складної інституційної та регуляторної системи правосуддя. Випадок міжнародних господарських спорів, здається, заслуговує на вивчення, оскільки він відображає конкретні потреби та вимоги щодо індивідуального доступу до правосуддя в цій галузі. У цій статті ми спробуємо дослідити цей рух та зміну парадигм, зосередившись на потенційному впливі деяких механізмів, таких як медіація, на класичне розуміння доступу до правосуддя.*

***Ключові слова:*** *справедливість, міжнародний бізнес, медіація, розвиток, взаємодія*

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# GENERAL AND SPECIAL NORMS CONCERNING CARELESS CRIMES IN THE ASPECT OF LEGAL CERTAINTY AS A COMPONENT OF THE RULE OF LAW

***Abstract***

*The article examines collision between the requirements of legal certainty of the description of unlawful behavior and the desire of specialists for a rational construction of criminal legislation. The direction of criminal law policy is criticized, according to which the legislator tries to cover with special norms all possible forms of manifestation of careless behavior and thus achieve legal certainty. Specific practical examples prove that such a direction of criminal law policy leads to a decrease in the ability of law enforcement officers to abstract legal thinking and the loss of theoretical substantiation skills of the grounds for criminal liability. It is empirically proven that the above problems concern not only law enforcement agencies of Ukraine but also judges of the ECHR. The point of view that improving general norms on criminal liability for careless crimes is a more rational direction of criminal law policy is supported.*

***Keywords:*** *General Norm, Special Norm, Careless Crime, Carelessness, Negligence, Legal Certainty, Rule of Law*

## Introduction

The current stage of development of domestic jurisprudence is characterized by the growing role of interdisciplinary connections, systemic and comparative research methods in the field of law.

Ukraine's movement towards the European legal space sets a difficult task for domestic lawyers in bringing the provisions of domestic legislation into line with European Union law. This process is often referred to as the harmonization of the domestic legal system with the European one.

On June 27 2017, the document of the European Commission "For Democracy through Law" (Venice Commission) "Rule of Law Checklist" was presented in Kyiv, translated into Ukrainian from English as "*Mirylo pravovladdya*".[1]

The document had a significant impact on domestic legal science; its importance was immediately appreciated. For example, the Center for Research on the Problems of the Rule of Law and Its Implementation in the National Practice of Ukraine was established at

[1] Мірило правовладдя. Коментар. Глосарій [Rule of Law Checklist. Commentary. Glossary]. Ухвалено Венеційською комісією на 106-му пленарному засіданні (Венеція, 11–12 березня 2016 р.) / перекл. з анг. Сергія Головатого. USAID, червень 2017. 163 с.; Мірило верховенства права (правовладдя) національного рівня: практика України [Rule of Law Checklist at National Level: Case of Ukraine] / за заг. ред. М. Козюбри; передмова: Головатий С.; упоряди. та авт. коментарів: В. Венгер, С. Головатий, А. Заєць, Є. Звєрєв, М. Козюбра, Ю. Матвєєва, О. Цельєв; Центр дослідження проблем верховенства права та його втілення в національну практику України Національного університету «Києво-Могилянська академія». Київ, 2021. 152 с.

the Faculty of Law of the National University of Kyiv-Mohyla Academy.

The Venice document "Rule of Law Checklist" defines the following as the core elements of the concept of "The Rule of Law": (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice in independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Nondiscrimination and equality before the law.

It can be assumed that the "Rule of Law Checklist" was conceived as an attempt to develop standards, the observance of which makes it possible to understand whether a particular element of the legal system corresponds to the idea of the rule of law. This idea has been developed by some domestic scientists in such a way that the "Rule of Law Checklist" can be considered as a kind of tool of scientific knowledge, as a legal method of research.[2]

Legal certainty is an indispensable component or an integral core element of the rule of law. The content of this concept, its significance for the domestic legal system, and other aspects of its application are actively studied by domestic legal theory specialists.[3]

At the same time, representatives of sectoral legal sciences began to pay attention to the study of legal certainty as a component of the rule of law in terms of the goals and objectives of the relevant field. For example, in the science of criminal law, noteworthy studies by Yu. V. Baulin,[4] Z. A. Zahyney-Zabolotenko,[5] A. A. Muzyka,[6] V. O. Navrotsky,[7] M. I. Khavronyuk[8] and some other researchers have appeared. We share the opinion of V. O. Navrotsky that "the problem of legal certainty in criminal law is so deep and diverse that it can be adequately highlighted only at the monographic level".[9]

There is one aspect in the issue of harmonizing criminal law norms with the requirements of legal certainty that has not been separately considered yet in Ukrainian criminal law science. In our opinion, this aspect is very problematic and can be briefly highlighted in the following way. In the most general sense, legal certainty is explained as "the requirement for clarity of the grounds, goals and content of regulatory provisions, especially those that are addressed directly to a person. A person must be able to foresee the legal consequences of their behavior".[10] Or in other words legal certainty is viewed as one of the core rule of law elements supporting the idea that the law has to provide logical and firm

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[2] Л. Музика. Верховенство права – принцип чи метод? [Rule of Law – Principle or Method?]. Тези доповідей і повідомлень учасників конференції *«Принципи права: універсальне та національне в контексті сучасних глобалізаційних і євроінтеграційних процесів»*, Київ, 21-22 червня 2024 р. Київ: НаУКМА, 2024. С. 174–177.

[3] Ю. Матвєєва. Принцип правової визначеності як складова верховенства права [Principle of Legal Certainty as a Component of the Rule of Law]: дис. … канд. юрид. наук. Київ, 2019. 220 с.; I. Zvieriev. Death penalty is applied to the state. The view through legal certainty as an element of the rule of law. *Kyiv-Mohyla Law & Politics Journal*. 2024. # 10. P. 135–149.

[4] Ю. Баулін. Принцип верховенства права у кримінально-правовому вимірі [Principle of the Rule of Law in the Criminal Law Dimension]. *Концептуальні засади нової редакції Кримінального кодексу України*: матеріали міжнар. наук. конф. (м. Харків, 17–19 жовтня 2019 р.). Харків: Право, 2019. С. 109–113.

[5] З. Загиней-Заболотенко, О. Чаплюк. Правова визначеність юридичного рішення суду у кримінальних провадженнях (на прикладі застосування пункту 6 частини 3 статті 76 Кримінального кодексу України) [Legal Certainty of a Court Decision in Criminal Proceedings (on the Example of the Application of Paragraph 6 of Part 3 of Article 76 of the Criminal Code of Ukraine)]. *Юридичний науковий електронний журнал*. 2023. № 7. С. 28–32.

[6] А. Музика, С. Багіров. Верховенство права і правовий прагматизм як наукові методи дослідження [Rule of Law and Legal Pragmatism as Scientific Methods of Research]. *Вісник Національної академії правових наук України*. 2023. Т. 30. № 3. С. 98–125.

[7] В. Навроцький. Правова визначеність і забезпечення її реалізації у кримінальному праві України [Legal Certainty and its Providing in Criminal Law of Ukraine]. *Право України*. 2017. № 2. С. 59–67.

[8] М. Хавронюк. Щодо [не] відповідності Кримінального кодексу України принципу юридичної визначеності [Regarding Compliance or Inconsistency of the Criminal Code of Ukraine with the Principle of Legal Certainty]. *Наукові записки НаУКМА. Юридичні науки*. 2021. Том 8. С. 69–84.

[9] В. Навроцький. Правова визначеність і забезпечення її реалізації у кримінальному праві України [Legal Certainty and its Providing in Criminal Law of Ukraine]. *Право України*. 2017. № 2. С. 59–60.

[10] Мірило верховенства права (правовладдя) національного рівня: практика України [Rule of Law Checklist at National Level: Case of Ukraine] / за заг. ред. М. Козюбри; передмова: Головатий С.; упоряди. та авт. коментарів: В. Венгер, С. Головатий, А. Заєць, Є. Звєрєв, М. Козюбра, Ю. Матвєєва, О. Цельєв; Центр дослідження проблем верховенства права та його втілення в національну практику України Національного університету «Києво-Могилянська академія». Київ, 2021. С. 53.

idea about possible outcome of one's actions or inaction.[11]

The ability of legislation to be clear and predictable for the citizens to whom it is addressed is considered as one of the features of legal certainty. In addition, the guiding principle of criminal law is the principle of legislative determination of a crime (*nullum crimen sine lege*). Therefore, the general legal standard of legal certainty and the criminal law principle *nullum crimen sine lege* set the legislator the task of describing in law as fully as possible the wrongdoings that entail criminal liability.

The development of society is necessarily accompanied by the emergence of new sources of increased danger, careless handling of which can lead to severe harm. Such careless behavior becomes the subject of prohibition by criminal law. As a result, criminal legislation in terms of providing norms on careless crimes can move in two directions.

The first one is associated with a constant response to the emergence of another socially unacceptable careless behavior and the creation of new special criminal law norms that provide for liability for such behavior. It seems that this course of criminal law policy aims to achieve the necessary predictability of criminal legislation and awareness of citizens with special norms that establish liability for certain forms of careless behavior and the consequences caused.

The second direction is devising ultimate general norms concerning liability for carelessness. The legislative technique used in creating these norms is designed to cover all possible types of careless criminal culpable behavior, both those that already exist and those that may occur in the future.

As a result, a kind of collision arises between the requirements of legal certainty in describing illegal behavior and the desire of specialists to construct criminal law rationally. Therefore, which way is optimal given the rule of law? Below are some considerations on how to resolve the issue.

## The Volynkin case. Violation of the rules for handling weapons

Let us start with empirical argumentation. Practical situations similar to the Volynkin case once highlighted the problem of criminal-legal assessment of the actions of a subject who did not directly cause harm but created the conditions for it to be caused by another person. Criminal law theorists describe them in the following way: the initial careless behavior of the subject is interrupted by the actions of a person who does not possess the characteristics of a subject of a criminal offense.

Volynkin's case is often analyzed by researchers who study the problem of careless co-causing.[12] For example, considerable attention is paid to this case in the monograph of O. V. Kursayev (2015). This researcher of careless co-causing supports the position that careless acts of a person who created conditions conducive to socially dangerous acts of minors or the insane cannot be considered under the rules of indirect causation and also cites the Volynkin case in the monograph as an example. In connection with the above example, O. V. Kursayev notes that negligent storage of firearms constitutes careless aiding in the commission of the main crime, which necessitates the decriminalization of this act and the exclusion of Article 224 from the Criminal Code of the Russian Federation, because this article constitutes liability for "the fault of another".[13]

On that ground, citizen Volynkin was brought to criminal liability for careless manslaughter under Art. 139 of the Criminal Code of the RSFSR of 1926 (Art. 109 of the

[11] J. Braithwaite. Rules and Principles: A Theory of Legal Certainty. *Australasian Journal of Legal Philosophy.* Vol. 27. 2002 P. 47–82.

[12] The term "careless co-causing" in the theory of Ukrainian criminal law refers to a situation where, through careless behavior, several persons cause a criminal consequence. For the science and practice of Ukrainian criminal law, careless co-causing is a problem, since it is not covered by the norms of complicity in a crime, and the current criminal legislation does not provide for a separate normative construction regarding it.

[13] А. Курсаев. Неосторожное сопричинение в российском уголовном праве [Careless Co-causing in the Russian Criminal Law]. Москва: Юрлитинформ, 2015. С. 75–76.

Criminal Code of the Russian Federation of 1996. He was accused of the fact that having a hunting rifle and cartridges for it, he was negligent in their storage, as a result of which his six-year-old son shot a neighbor's four-year-old boy. Let us consider in more detail the circumstances of the case, which occurred in the 50s, before the Criminal Code of the RSFSR of 1960 came into force.

Volynkin lived with his wife and children in a private house and often went hunting. He hung his hunting rifle and cartridges on the wall at a height of 1.73 cm from the floor. He guessed this sufficient to ensure that children could not get to the weapon, considering that there were no pieces of furniture nearby that could facilitate children's access to the weapon. One day, he was away from home, and his wife's friend came to visit with her children. Due to heavy rain, the roof of the house started leaking in one place, and water began dripping onto the bed. Then Volynkin's wife moved the bed to the wall where the gun and cartridges were hanging. The women left the children unattended in the room for a while, and Volynkin's six-year-old son climbed onto the bed, gained access to the gun, and while playing with the gun, shot the neighbor's four-year-old son. The Supreme Court of the RSFSR having reviewed this case noted that even if Volynkin's guilt in negligent storage of weapons had been established, then in this case, he could not have been held criminally liable for the accident that occurred with the boy, since Volynkin himself did not commit any socially dangerous acts provided by criminal law; for the damage caused by his minor son, he could only be subject to material liability under the rules of the Civil Code of the RSFSR.[14]

What was the problem with the court bringing Volynkin to criminal liability? The criminal legislation of that time did not contain a special norm with the *corpus delicti* of "negligent storage of a firearm, which caused serious consequences." This norm was provided for in the Criminal Code of the RSFSR only after the 1960 reform (Article 219 of the Criminal Code of the RSFSR). The same applies to the Criminal Code of the Ukrainian SSR of 1960 (Article 224 of the Criminal Code of the Ukrainian SSR). The question arises: why then the court did not agree with the position of the prosecution regarding the assessment of Volynkin's omission as manslaughter by carelessness?

In our opinion, it is the decision of the Criminal Division of the Supreme Court of the RSFSR and the legal position it took that raises questions. Let us pay attention to the board's motivation: "even if Volynkin's guilt in negligent storage of weapons had been established." This may mean that the investigation did not establish the defendant's guilt in the negligent storage of weapons. In such a case, the board could not decide other than to acquit the accused. One should agree with the above aspect of the legal position of the Supreme Court of the RSFSR in this case. At the same time, there is a thesis in the motivation of the board's decision that arouses criticism. In particular, it was stated that "Volynkin himself did not commit any socially dangerous acts provided by criminal law." Apparently, with this provision, the board wanted to point out the absence of an *actus reus* of careless manslaughter – a socially dangerous act. Meanwhile, in the theory of criminal law, at the time of the consideration of the Volynkin case, it was established that an act of any careless crime always constitutes a violation of safety rules in a particular area. Let us consider this in a little more detail.

## Violation of safety rules – an essential element of a careless crime

In one of the first scientific monographs of the USSR devoted to criminal liability for carelessness (V. G. Makashvili, 1957) as well as in other publications of the late 50s of the

[14] See: Определение судебной коллегии по уголовным делам Верховного Суда РСФСР от 30 июня 1959 г. [Ruling of the Judicial Collegium for Criminal Cases of the Supreme Court of the RSFSR dated June 30, 1959]. *Советская юстиция*. 1959. № 10. С. 86.

XX century on the same subject, the position was defended that a necessary condition for liability for carelessness is a violation of the norms of generally obligatory foresight. It is noteworthy that V. G. Makashvili gave an appropriate title to paragraph 2 of chapter three of his work: "violation of generally obligatory foresight as a necessary condition for liability for carelessness".[15] This position was supported by another representative of the Georgian scientific school, M. G. Ugrekhelidze: "Violation of a special or vital norm of foresight is one of the necessary conditions for liability for carelessness".[16] A. N. Ilkhamov argues in the same way: "An analysis of judicial practice proves that cases of erroneous criminal liability based on the occurrence of serious consequences without establishing the fact of an act, which, due to negligence or recklessness, constitutes a violation of certain safety rules, are not uncommon".[17] The correctness of the position of these researchers can be proven from the opposite: the lawfulness of an act is based on its compliance with the norms provided by criminal or other branches of law.[18]

Manslaughter by carelessness (Article 119 of the Criminal Code of Ukraine) and careless grievous or medium gravity bodily injury (Article 128 of the Criminal Code of Ukraine) are not exceptions to the rule "an act in any careless crime constitutes a violation of certain safety rules". Acquaintance with the practice of manslaughter by carelessness, given in the monograph by O. V. Gorokhovska, allows us to verify the correctness of the above thesis – almost every example is somehow connected with a violation of certain safety rules.[19]

In addition, the rules for handling objects that pose an increased danger to the surroundings can be both written and unwritten. In the latter case, they can be called general or everyday safety rules. Thus, O. V. Gorokhovska agrees with the approach of M. D. Shargorodsky and believes that one of the circumstances of criminally punishable carelessness is the commission of an action that violates normal safety rules in society.[20] Adherence to common or everyday safety rules is considered the standard behavior of an ordinary reasonable person (as stated in the doctrine of Anglo-American criminal law – the standard of the ordinary reasonable person, or doctrine of the "normal man", "reasonable man", "reasonably prudent man", "man of ordinary sense"[21]).

When comparing the content of the cross-cutting criminal law concepts of "illegal actions" and "violation of rules", V. O. Navrotskyi reveals the content of the latter in the following way: "violation of rules has a broader meaning and is about non-compliance with any regulatory legal acts, including those adopted to develop the provisions of legislative acts, and in some cases, rules based on moral principles, customs, precedents, etc".[22]

Based on the above reasoning, we share the opinion that a person who owns a firearm with cartridges for it, who has a six-year-old son living in the premises where the weapon is stored, was obliged to exercise due care and take measures to limit the minor's access to the weapon. We understand that at that time there may not have been a requirement to store such weapons in a special safe, as is provided for in modern regulations. At the same time, the accused could well have stored the weapon

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[15] В. Макашвили. Уголовная ответственность за неосторожность [Criminal Liability for Carelessness]. Москва: Государственное издательство юридической литературы, 1957. С. 119–141.

[16] М. Угрехелидзе. Причинная связь при нарушении норм предосторожности [Causal Relationship by Violation of Precautionary Norms]. *Проблема причинности в криминологии и уголовном праве*. Межвузовский сборник. Владивосток: Изд-во ДВГУ, 1983. С. 110.

[17] И. Ильхамов. Преступная неосторожность: проблемы ответственности и предупреждения неосторожных преступлений [Culpable Carelessness: Problems of Liability and Prevention of Careless Crimes]: автореф. дис. ... канд. юрид. наук. Москва, 1983. С. 26.

[18] Ю. Баулин. Обстоятельства, исключающие преступность деяния [Circumstances that Excluding the Criminality of an Act]. Харьков: Основа, 1991. С. 32.

[19] О. Гороховська. Вбивство через необережність: проблеми кримінальної відповідальності [Manslaughter by Carelessness: Problems of Criminal Liability]: монографія / Наук. ред. А.А. Музика. Київ: Вид. Паливода А.В., 2007. С. 55, 66, 67 etc.

[20] О. Гороховська. Вбивство через необережність: проблеми кримінальної відповідальності [Manslaughter by Carelessness: Problems of Criminal Liability]: монографія / Наук. ред. А.А. Музика. Київ: Вид. Паливода А.В., 2007. С. 54;

[21] L. Bohnenkamp. The Doctrine of the "Normal Man". *St. Louis Law Review*. Vol. 9. 1924 P. 308.

[22] В. Навроцький. Наскрізні кримінально-правові поняття [Cross-cutting Concepts of Criminal Law]: навч. посіб. Київ: Юрінком Інтер, 2023. С.158.

disassembled, separately from the cartridges for it, or in any other way reasonably taken care to make access to the weapon impossible by the minor.

To further strengthen our position, we can give an example of a crime similar to careless manslaughter (Article 119 of the Criminal Code of Ukraine) in terms of the mechanism of commission of the crime, namely the careless causing of grievous or medium gravity bodily injury (Article 128 of the Criminal Code of Ukraine). Similar to manslaughter through carelessness, this is a general *corpus delicti*, i.e. one that contains the general criminal law norm of the Special Part of the Criminal Code. Act as a sign of the *actus reus* (in the domestic theory of criminal law that is called *objective side*) of this element of the crime is also formed by the violation of safety rules. For example, in criminal proceedings related to violation of the rules for the safekeeping of dangerous dog breeds, the injuries caused to the victims, which are grievous or medium gravity bodily injuries, were qualified by the pre-trial investigation under Article 128 of the Criminal Code of Ukraine. The courts subsequently agreed with such a qualification.

Thus, F. kept a fighting dog of the "pit bull terrier" breed on the territory of a summer cottage in the city of Sevastopol. On June 8, 2008, the dog ran out of this area through an opening under the gate and attacked Mr. B., who was passing by bit him, thereby causing serious bodily harm. In particular, the victim lost 65% of his working capacity as a result of the forced amputation of his left forearm. In the indictment, the investigator stated that F., violating the rules for keeping pets, let the dog off the chain in order to protect the territory of the summer cottage, did not foresee the possibility that the dog could run out into the street through an opening in the fence and cause bodily harm to someone, although he should and could have foreseen this.[23]

In this proceeding, the actions of the dog owner were recognized as socially dangerous, which formed one of the signs of the *actus reus* of the careless causing of serious bodily harm. Here, it is easy to draw an analogy with the negligent storage of a firearm in the Volynkin case and causing the death of the victim. If the courts perceive careless handling of dangerous animals as a sign of the *actus reus* of the crime provided for in Art. 128 of the Criminal Code of Ukraine (or Art. 119 of the Criminal Code of Ukraine in a case when the victim died), then in the Volynkin case, it was quite possible to recognize the negligent storage of a firearm (it should be noted – the criminal legislation of that time did not provide for such a separate element) as a sign of the *actus reus* of manslaughter through carelessness. This is due to the fact that there was a violation of safety rules in handling weapons, and as we have determined above – a violation of safety rules is an element of the *actus reus* of any careless crime.

The issue under research is not as simple as it might seem at first glance. If in the case of Volynkin the court referred to the fact that his act was not provided for by criminal law, then in cases where some persons violated the rules for keeping dangerous animals, the reference to Art. 128 or 119 of the Criminal Code of Ukraine may also be recognized as ungrounded, since the Special Part of the Criminal Code of Ukraine does not directly provide for criminal liability for the consequences caused by violating the rules for keeping dangerous animals. The authors of the scientific article O. Dudorov, E. Pysmensky and A. Danylevsky emphasized: "It is indicative that the investigator hesitated for a rather long time about what the correct criminal-legal assessment of F.'s behavior as the owner of the dog should be and only with the verbal advisory consent of the employees of the appellate court (primarily taking into account the severity of the consequences that occurred) did he initiate a criminal case under Art. 128 of the Criminal Code of Ukraine, which provides for liability for careless grievous or medium gravity bodily harm".[24]

[23] Матеріали Нахімовського РВ УМВС України в м. Севастополі. Кримінальна справа № 780334 за 2008 р. [Case Files of Nakhimovsky RDMIA of Ukraine in Sevastopol. Criminal Case № 780334 for 2008] / Can be found in: О. Дудоров, Є. Письменський, А. Данілевський. Порушення правил утримання тварин: кримінально-правовий аспект проблеми [Violation of Animal Keeping Rules: Criminal Legal Aspect of the Problem]. *Юридичний вісник України*. 15–21 травня 2010. № 20 (776). С. 6.

[24] О. Дудоров, Є. Письменський, А. Данілевський. Порушення правил утримання тварин: кримінально-правовий аспект проблеми [Violation of Animal Keeping Rules: Criminal Legal Aspect of the Problem]

Therefore, there is a contradiction in the legal positions of the courts in the above cases. In the Volynkin case, the court did not apply the general criminal law norm of manslaughter by carelessness, and in the F. case of the attack by a pit bull terrier, the court agreed with the qualification of F.'s behavior under the general criminal law norm.

The aforementioned divergent positions of judges are caused by the fact that in the theory of criminal law itself, there is no unity on the issue of the relationship between general and special criminal law norms that provide for liability for careless crimes. For example, regarding violation of the rules for keeping dangerous animals, as a result of which they caused harm to the victims, some experts believe that the current criminal legislation of Ukraine does not provide for liability for such an act; other experts see no problems in applying general formulations for manslaughter through carelessness (Article 119 of the Criminal Code of Ukraine) or careless causing of grievous or medium gravity bodily injury (Article 128 of the Criminal Code of Ukraine).[25]

As for the opinion of O. V. Kursayev that the negligent storage of a firearm constitutes careless aiding in the commission of the main crime[26], it is difficult to recognize it as grounded. The weapon can be used by a minor or an insane person, which in itself, despite the possible grave consequences, cannot be recognized as a crime due to the absence of signs of the subject of the crime (underage or insane). Therefore, the thesis of O. V. Kursayev that such a construction constitutes liability for "someone else's fault" is vulnerable to criticism.

Regarding the position of O. V. Kursayev, the following should be noted. It should be borne in mind that the concept of "which created conditions for its use by another person" in this article means the presence of at least two types of the following behavior. First, non-criminal, but socially dangerous behavior of a person who is not the subject of a crime. For example, a weapon can be used by an insane person. Second, the criminal use of a firearm by the subject of a crime.

In this matter, we believe that in the Volynkin case the court had every reason to recognize his behavior as a violation of safety rules and apply the general criminal law norm of manslaughter by carelessness. His act (omission) which constituted a violation of safety rules was not only a necessary but also a natural condition for the consequence in the form of the victim's death, and therefore is causally connected with it.

It would seem that the position of practitioners in the Volynkin case, which belongs to a long-overdue stage of judicial practice in criminal cases, is hardly possible in modern conditions. After all, the theory of criminal law has since then significantly advanced both in terms of the study of culpable carelessness and in the development of the doctrine of the theory of criminal law qualification. However, law enforcement practice is again making the same mistake. The incorrect actions of law enforcement agencies led to the decision of the ECHR against Ukraine in the case of Ms. Isayeva.

**The case of Isayeva v. Ukraine. Ukrainian law enforcement agencies and the European Court of Human Rights underestimated the importance of the general norm regarding careless crime**

The circumstances of the case of Ms. Natalia Isayeva (hereinafter referred to as the applicant) best illustrate the problems that we discuss in this study. In this case, the decisions taken by the law enforcement agencies of Ukraine revealed an inadequate understanding of the relationship between the general and special norms of the Special Part of the Criminal Code of Ukraine. Moreover, we believe that the European Court of Human

Legal Aspect of the Problem]. *Юридичний вісник України*. 15–21 травня 2010. № 20 (776). С. 6.

[25] О. Дудоров, Є. Письменський, А. Данілевський. Порушення правил утримання тварин: кримінально-правовий аспект проблеми [Violation of Animal Keeping Rules: Criminal Legal Aspect of the Problem*]. Юридичний вісник України*. 15–21 травня 2010. № 20 (776). С. 6.

[26] А. Курсаев. Неосторожное сопричинение в российском уголовном праве [Careless Co-causing in the Russian Criminal Law]. Москва: Юрлитинформ, 2015. С. 76.

Rights itself failed to properly deal with the criminal-legal aspects of this case.

The case concerned the applicant's complaint that she had been seriously harmed by another patient in a State-run psychiatric institution in 1998. As stated in paragraph 3 of this judgment, "the case concerns the infliction of grievous bodily harm on the applicant by another patient while in a State-run mental institution. The applicant alleged, in particular, that the State had failed to make those responsible for the incident accountable and had not provided proper redress for the harm inflicted on her within a reasonable time".[27]

The case established the following. On 8 May 1998 the Slavyanoserbskiy district prosecutor's office of the Luhansk Region ("the prosecutor's office") refused to institute criminal proceedings against two psychoneurological asylum employees (orderlies), N. and L. When questioned about the incident, the orderlies testified that on the morning of 2 April 1998 they were cleaning the rooms when they heard someone crying. They found the applicant on her bed with her face smashed. Other patients had told N. and L. that B. had beaten the applicant with a mop because she had hit B. The prosecutor noted that (i) B. was "incapacitated because of a mental disorder" and thus could not be held criminally responsible for assaulting the applicant, and (ii) even though it appeared that orderlies N. and L. had been negligent in their duties (according to the asylum orderlies' list of duties submitted by the Government they were not allowed to leave patients unsupervised), which could possibly constitute a crime under Article 167 of the 1960 Criminal Code, they were not considered to be "officials" who could be prosecuted under that provision[28].

Following the entry into force of a new Criminal Procedure Code, on 26 December 2012 the applicant lodged a complaint with the police, alleging negligence by the orderlies. The complaint was registered, and two separate investigations were launched into negligent performance of duties by members of the medical or pharmaceutical profession and negligence of duties by officials. On 19 February 2013 both investigations were merged. Several witnesses were questioned, including the applicant, her mother, and orderly L. The latter testified that she had not seen the accident take place but had later learned that, for an unknown reason, B. had hit the applicant with a mop left by L. in their room. On 30 June 2013 the proceedings were terminated by a police investigator of the Slyavyanoserbskyy District Police Department. That decision was identical to the one of 8 May 1998 (see paragraph 8 above) and referred to the investigator's findings (i) that B. had been "without legal capacity because of a mental disorder" and thus could not be held responsible for assaulting the applicant, and (ii) that even though it appeared that the orderlies N. and L. had been negligent in their duties, which could constitute a crime under Article 167 (negligence of duties by officials) or Article 140 of the new 2001 Criminal Code (negligent performance of duties by members of the medical profession), they were not considered to be "officials" or "members of the medical profession" who could be prosecuted under those provisions of the law (p. 10 of the Judgment)[29].

Analyzing in paragraphs 52–56 of the Judgment the content of criminal law remedies, the European Court of Human Rights summarized in paragraph 55: "The decisions not to institute or pursue criminal proceedings were taken because the orderlies could not be considered to be "officials" within the meaning of the relevant provisions of the Criminal Code in force at the material time. Therefore, the absence of legislation establishing the orderlies' liability in negligence and the objective fact of B.'s death led to all attempts of the applicant to institute

[27] Case of Isayeva v. Ukraine (Application no. 35523/06). Judgment Strasbourg. 4 December 2018: URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187919%22]} (Last accessed: 05.03.2025).

[28] Case of Isayeva v. Ukraine (Application no. 35523/06). Judgment Strasbourg. 4 December 2018: URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187919%22]} (Last accessed: 05.03.2025).

[29] Case of Isayeva v. Ukraine (Application no. 35523/06). Judgment Strasbourg. 4 December 2018: URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187919%22]} (Last accessed: 05.03.2025).

criminal proceedings fall flat in this particular case"[30].

In the following paragraph of this judgment, the ECHR, referring to its relevant case-law, reminds that an effective judicial system does not necessarily require the provision of a criminal-law remedy if, as in the case of the orderlies, the infringement of the right to personal integrity is not caused intentionally (see the case-law quoted in paragraph 49 above), the Court must also examine whether the respondent State made available other legal remedies that satisfied the requirements of Article 3 of the Convention.[31]

Thus, having not found the necessary legislative norms in terms of criminal-law legal remedies, the ECHR predictably turns to other legal remedies that should ensure the applicant's rights.

In our opinion, both the law enforcement agencies of Ukraine and the European Court of Human Rights lacked the proper theoretical training to conclude that the legislative norms that provided for the criminal liability of the orderlies were still contained in the legislation that was in force at the time. Let us prove this thesis.

In this case, we encounter a situation that, in criminal law theory, is called a careless crime committed by omission.

Causal relationship in criminal omission is a rather controversial issue in the theory of criminal law[32]. Historically, several positions have been developed on this issue. Briefly, there are two leading approaches. Representatives of one approach advocate the so-called "*acausality of omission*." They believe that omission does not have the quality of causing a result, and criminal liability arises not for causing harm but for failing to fulfill a legal obligation established by a norm. Proponents of another approach believe that a causal relationship in omission exists, but has a certain peculiarity. The subject does not interfere in the development of events, although he has a legal obligation to do so and prevent the occurrence of a criminal outcome. In the coordinate system of social relations, non-interference can have the same results as intervention in the sphere of physical phenomena. In addition, in "material" (i.e., productive or result-oriented) *corpus delicti*, the existence of a causal connection between omission and the result is obligatory in the view of the provisions of the theory of criminal law. Otherwise, we would have to assume that establishing a causal connection between omission and the result has no legal significance. But this is not the case, since the absence of such a connection between omission and a socially dangerous consequence may indicate that the consequence occurred regardless of the subject's omission. Therefore, under such circumstances, omission is not the one that caused the result, and the subject will not be subject to criminal liability. All this speaks in favor of the position of recognizing the quality of criminal omission to cause consequences. That is why the representatives of the second theoretical approach believe that a causal relationship exists in criminal omission, since in this case we consider the situation in terms of social causality, and not causality in the sphere of physical phenomena[33]. This second

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[30] Case of Isayeva v. Ukraine (Application no. 35523/06). Judgment Strasbourg. 4 December 2018: URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187919%22]} (Last accessed: 05.03.2025).

[31] Case of Isayeva v. Ukraine (Application no. 35523/06). Judgment Strasbourg. 4 December 2018: URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-187919%22]} (Last accessed: 05.03.2025).

[32] A. Ashworth. The Scope of Criminal Liability for Omissions. *Law Quarterly Review*. Vol. 105. 1989 P. 424–459; M. Dsouza. Against the Act/Omission Distinction. *Northern Ireland Legal Quarterly*. Vol. 73. 2022 P. 103 129; S. MacGrath. Causation by Omission: a Dilemma. *Philosophical Studies*. Vol. 123. 2005. P. 125–148; M. Moore. Causation and Responsibility: An Essay in Law, Morals, and Metaphysics. Oxford University Press, 2009. P. 444; P. Robinson. Criminal Liability for Omissions - A Brief Summary and Critique of the Law in the United States. *New York Law School Law Review* Vol. 29 Issue: 1. 1984 P. 101–124; A. Leavens. A Causation Approach to Criminal Omissions. *California Law Review*. Vol. 76. № 3. 1988 P. 547–591; A. McGee. Omissions, Causation and Responsibility. *Journal of Bioethical Inquiry*. Vol. 8(4). 2011 P. 351–361; D. Husak. Omissions, Causation and Liability. *The Philosophical Quarterly (1950-)*. Vol. 30. No. 121 Oct., 1980 P. 318–326; D. Fisher. Causation in Fact in Omission Cases. *Utah Law Review*. Fall 1992 P. 1335–1384;

[33] This is well emphasized by Mark Dsouza: "Another claim is that we cause things by our acts, whereas our omissions merely let things happen. Perhaps that is true in physics. But in law (and ordinary speech) the attribution of causal responsibility is a normative as well as mechanical issue. So, we commonly use the language of causation to pick out the most salient ingredients in the occurrence of an event – even if they are omissive – as their causes. That's why my omission to latch the window causes it to slam in a storm." See: M. Dsouza. Commentary for the article: Against the Act/Omission Distinction. *Northern Ireland Legal Quarterly*. Vol. 73. 2022 P. 103–129: Doi: https://nilq.qub.ac.uk/index.php/nilq/issue73AD1-article3 (Last accessed March 16, 2025).

position has more supporters in the theory of Ukrainian criminal law.

Thus, in certain social situations, a specific person may be legally obligated to act in such a way as to prevent dangerous forces from getting out of control and from giving them the opportunity to manifest their inherent ability to harm other subjects. An agent who directly harms others may not possess the characteristics sufficient to be a subject of criminal law relations. This may be, in particular: 1) a minor child (Volynkin case); 2) a potentially dangerous animal – a pit bull terrier (F. case); 3) a person of unsound mind (Isayeva case).

In our opinion, in the Isaeva case, the negligent omission of orderlies N. and L., who were obliged to, but did not, control a dangerous patient, led to grievous bodily injury to the victim. In a legal sense, an attack made by an insane person is not much different for the victim from an attack by an animal or the actions of a minor. There are grounds to assert that there is a causal connection between the orderlies' omission and the harm caused to the victim – according to the asylum orderlies' list of duties at the institution, they were not allowed to leave patients unattended. A rule specifically designed to prevent such consequences was violated. In addition, an object that could potentially cause harm was left behind – a mop. Therefore, through the orderlies' negligent omission resulted in a violation of safety rules – which is an essential element of a careless crime. The orderlies' careless behavior in this case was beyond doubt. They, under appropriate circumstances, demonstrated insufficient concern for others, which in the theory of criminal law is considered as one of the signs of negligence.[34]

Now we have established: 1) there was a violation of the instructions – a violation of special safety rules; 2) the omission of the subjects led to the fact that the victim was caused a grievous bodily harm; 3) the failure to comply with the requirements of the instructions by the orderlies allowed dangerous forces to act – there is a causal connection between the omission and the injury caused; 4) there is careless fault in the form of negligence – N. and L. did not foresee the possibility of such an outcome, although they should and could have foreseen it. Therefore, from a theoretical point of view, all the necessary elements of the crime are present.

Let us now consider the criminal legislation that was in force at the time of the events. Law enforcement agencies focused on finding special norms and turned to Article 167 of the Criminal Code of 1960 (earlier in Ukrainian legislation this called "*Khalatnist*"). Indeed, the orderlies could not be the subjects of this crime, since they are not "officials" within the meaning of Article 167 of the Criminal Code of 1960. But at that time there was another, general norm – careless grievous or medium gravity bodily harm (Article 105 of the Criminal Code of 1960). This article assumed the presence of a general subject, the characteristics of which the orderlies undoubtedly corresponded to. Therefore, instead of trying to find some special norm of the Special Part of the Criminal Code of Ukraine, law enforcement agencies had to turn to the general one, since there are all the signs of careless causing of grievous bodily harm, which was provided for in Article 105 of the then-current Criminal Code of 1960. We assume that in the minds of many lawyers, careless grievous or medium gravity bodily harm is associated only with the active behavior of the subject of the crime, who causes the corresponding consequence with his own physical actions. However, the theory of criminal law considers it permissible to commit such a careless crime by way of non-intervention – when the violation of the duty to intervene gives the opportunity to act to other factors that directly cause the harm. In terms of causality, the theoretical basis for this possibility is described by H.L.A. Hart and A. Honoré, M. Moore and other researchers: "Our central paradigm case of causing is doing these simple actions with our bodies. We then analogize from simple doings to more complex manipulations; by doing one thing we can cause something more remote to occur".[35]

[34] F. Stark. Culpable Carelessness. Recklessness and Negligence in the Criminal Law. Cambridge University Press, 2016. P. 272.

[35] See: H.L.A. Hart, & A. Honoré. Causation in the Law. 2d ed. Oxford: Oxford University Press, 1985. pp. 28–29; See also: M.

In connection with the above, it is difficult for us to agree with the conclusion about the alleged absence of legislative norms that would provide for criminal liability of orderlies for negligence. There were criminal legal remedies, but the level of theoretical grounding, as well as, probably, inadequate motivation, did not allow for a reasoned decision in the case.

## Conclusions

The practical situations which are highlighted in this article prove that legal certainty in the aspect of criminal law counteraction to careless crimes cannot be reduced to the creation of special norms for each separate sphere of manifestation of possible careless behavior. “No legislation, even the most perfect one (which is increasingly rare in modern life), due to its abstractness and impersonality, is unable to foresee all the specifics of a concrete situation”[36], – notes M. I. Kozyubra. Explaining the reasons for excluding from the Draft of the new Criminal Code of Ukraine the article on violation of road safety rules, V. O. Navrotsky emphasizes: “being consistent, the legislator should create special norms regarding offenses in violation of any safety rules, which caused harm through carelessness. But this would lead to the emergence of a countless number of special norms”.[37]

The aspiration to make legislation as detailed and understandable as possible for ordinary citizens should not turn into the prevalence of a casuistic approach when creating legal norms. The dominance of special norms can lead to deformation in the professional consciousness of law enforcement officers. The consequence of this is that practitioners focus exclusively on special norms and underestimate the legal significance of general norms regarding careless crimes. In other words, in some cases, judicial and law enforcement officials “are unable to see the wood for the trees". In this regard, we consider improving the construction and content of general norms that provide for liability for careless crimes as a more rational and theoretically based direction of criminal law policy.

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# ЗАГАЛЬНІ І СПЕЦІАЛЬНІ НОРМИ ЩОДО НЕОБЕРЕЖНИХ ЗЛОЧИНІВ В АСПЕКТІ ЮРИДИЧНОЇ ВИЗНАЧЕНОСТІ ЯК СКЛАДНИКА ВЕРХОВЕНСТВА ПРАВА

***Анотація***

*У статті розглядається колізія між вимогами юридичної визначеності опису протиправної поведінки і прагненням спеціалістів до раціональної побудови кримінального закону. Критикується напрям кримінально-правової політики, відповідно до якого законодавець намагається охопити спеціальними нормами всі можливі форми прояву необережної поведінки і в такий спосіб досягти юридичної визначеності. На конкретних практичних прикладах доводиться, що такий напрям кримінально-правової політики призводить до зниження здатності працівників правозастосовних органів до абстрактного юридичного мислення і до втрати навичок теоретичного обґрунтування підстав кримінальної відповідальності. Емпірично доведено, що зазначені проблеми стосуються не лише правоохоронних органів України, а й суддів ЄСПЛ. Підтримується погляд, згідно з яким удосконалення загальних норм про кримінальну відповідальність за необережні злочини є більш раціональним напрямом кримінально-правової політики.*

***Ключові слова***: *загальна норма, спеціальна норма, необережний злочин, необережність, недбалість, юридична визначеність, верховенство права*

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# REVIEW OF COURT PRACTICE IN DISPUTES ON RECLAMATION OF A SHARE IN COMMON JOINT PROPERTY

***Abstract***

*The article examines the current court practice in cases involving the application of civil sanctions in the form of reclamation of part of property by one of the co-owners in common joint ownership. The author analyzes the grounds for vindication of property and the types of property that may be reclaimed by way of vindication.*

*Based on the study of the arguments contained in the judgments of the Supreme Court, the author notes that certain legal positions are controversial and inconsistent with the provisions of civil and family law. Taking into account the author's arguments, the author determines the appropriate and effective ways to protect the rights of co-owners in case of alienation of common property by one spouse without the consent of the other spouse.*

***Key Words:*** *vindication, reclamation, part of the land plot, ideal share, joint ownership, spouses, sanction*

## Introduction

In Roman law, a vindication action was a type of action in rem that was filed to protect a property right or other real right against any person who encroached on a real right by unlawfully taking possession of a thing. Vindication was aimed at protecting the owner's right against a person who illegally retains his or her property. The term "vindication" is derived from rei vindicatio (vim dicere to announce the use of force). Vindication is the reclamation of a thing by a non-possessing owner from a possessing party.[1]

In Ukrainian law, this method of protection is regulated by Articles 387-390 of the Civil Code of Ukraine (hereinafter referred to as the CC), but is not called "vindication", instead the terminology "reclamation of property from someone else's illegal possession" is used[2].

This method of protecting property rights is quite common in court practice and contains a large number of legal positions. This review focuses only on examples of vindication of such objects as a part of a land plot and an ideal share in a jointly owned common property.

In Ukraine, property may belong to persons under the right of joint partial ownership or under the right of joint common ownership. The property of two or more persons with the determination of the shares of each of them in

[1] Rymske pravo: pidruch. (Roman law: a textbook) Za red. O.A. Pidopryhory, Ye.O. Kharytonova, 2-e vyd. K.: Yurinkom Inter, 2009. P. 333

[2] Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine], adopted January 16, 2003. http://zakon1.rada.gov.ua/laws/show/435-15.

the right of ownership is joint partial ownership (art.356 of CC); the joint property of two or more persons without determining the shares of each of them in the right of ownership is joint common ownership (art. of 368 CC). Pursuant to Article 355 of the CC joint ownership is considered partial, if the contract or law does not establish joint common ownership of the property.

According to art. 60 of Family Code of Ukraine, property acquired by the spouses during the marriage belongs to the wife and husband on the right of joint common ownership[3]. In the case of division of property that is subject to the right of joint common property, the shares of property of the wife and husband are equal, unless otherwise provided by agreement between them or a marriage agreement.

In this review, we will analyze the peculiarities of protecting the right of joint common ownership by vindication of shares.

## I. Peculiarities of vindication of certain types of objects (parts, shares)

Article 387 of the Civil Code stipulates that the owner has the right to reclaim his property from a person who has illegally, without an appropriate legal basis, taken possession of it[4] . This article does not specify the types or characteristics of property that may or may not be reclaimed in a vindication action. However, Article 389 of the Civil Code already states that money and bearer securities in paper form cannot be reclaimed from a bona fide purchaser. This provision establishes the principle that things that are not individually identifiable, i.e., things defined by generic characteristics, *cannot be reclaimed* in a vindication action (Article 184 of the Civil Code). For a long period of time, this approach was established in the case law of general jurisdiction courts. However, over the past few years, the court practice has changed the view of the subject matter of vindication, expanding it.

Thus, in case No. 362/2707/19, the subject of consideration was a claim for reclamation of ½ of the ideal share of the disputed house and land plot, which belonged to the spouses on the right of common joint ownership and subsequently alienated to a third party without the consent of the other spouse. Resolving the dispute, the Supreme Court found that the consequence of satisfying the claim would be the entry of records on the state registration of the plaintiff's ownership of 1/2 of the disputed house and 1/2 of the land plot, and the ownership of 1/2 of these residential house and land plot for PERSON_4 . [5]

The following problems can be identified in this case: 1) at the time of recognition of the property as family patrimony[6], it had already been alienated to a third party in whose name the ownership was registered; 2) not all the property was subject to reclamation by a court decision, but only a part of it, which at the time of going to court had not been allocated in kind; 3) in case of alienation of family patrimony under a contract without the consent of the other spouse, such a contract may be declared invalid by the court, which should result in restitution of everything received by the parties under such a contract; 4) vindication cannot be applied in this case, since the property alienated under the agreement was all the property transferred by the will of one of the spouses, who at the time of the agreement considered himself or herself the owner of the property - and vindication can only be applied in the case of alienation of property without the will of the owner, provided that there is no contractual relationship between the alienator and the acquirer.

As a basis for justifying the change in views on vindication, the Supreme Court noted that in its decision of November 14, 2018 in case No. 183/1617/16, the Grand Chamber of the

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[3] Simeinyi kodeks Ukrainy [Family code of Ukraine], adopted January 10, 2002. https://zakon.rada.gov.ua/laws/show/2947-14#n314

[4] Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine], adopted January 16, 2003.

[5] Postanova Velykoi palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 362/2707/19 (20.06.2023), accessed March 30, 2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/111908321

[6] In some civil law jurisdictions, for joint property of the spouses is referred to as family patrimony.

Supreme Court found that the purpose of a vindication claim is to ensure that the owner takes possession of the property of which he or she was unlawfully deprived. In the case of deprivation of the owner of possession of real estate, the said introduction consists in making a record of state registration of the owner's ownership of real estate (the principle of registration confirmation of ownership of real estate)". We can agree with such arguments, but with certain reservations. In this case, there was an expression of will by 1 of the co-owners, so there are no grounds for vindication. However, one of the spouses may challenge such an agreement on the grounds of lack of consent to its alienation or may demand that the value of a part of the property be taken into account when dividing the family patrimony. There are no grounds for vindication of such property under either family or civil law. In this case, only the entire agreement as a whole can be challenged and invalidated, not a part of it (i.e., an agreement cannot be invalidated as to a part of the object). The introduction into the owner's possession may be the purpose not only of a vindication claim, but also of other remedies that result in the return of property to the owner (restitution and unjustified enrichment). Therefore, in this case, the co-owners had to take possession of the disputed property, but not on the basis of a vindication claim, but restitution.

However, despite the contrary well-established legal positions, the Supreme Court found that "*The allocation of a share from property in common joint ownership is provided for in Article 364, and the division of property in common joint ownership is regulated by Article 367 of the Civil Code of Ukraine. The above is possible after reclaiming 1/2 of the disputed real estate in favor of the plaintiff*"[7] . In fact, this means that as a result of the vindication of a part of the unallocated property, the plaintiff will acquire the right to allocate it, and thus will be able to register a part of the disputed property. However, it should be borne in mind that not all property can be divisible and therefore be spun off. Therefore, this position may not always be realized in practice.

## II. Explanation of controversy of court position

The controversy of the position under study is confirmed by the view of the legal nature of joint ownership established in science and judicial practice: co-owners have the right to a share in the right of ownership of property, but not to the share in the property itself. In fact, this approach was also reflected in court practice before the adoption of the controversial legal position. Thus, in the decision of the Supreme Court of January 16, 2020 in case No. 661/2576/16-ц it is noted: it is impossible to reclaim a share from joint joint ownership, since common joint ownership applies to all property, so the court's conclusion on the reclamation of the property as a whole is correct) .[8]

The existence of two dissenting opinions of judges in this case also indicates that this legal position is not indisputable. Thus, in the dissenting opinion of the Supreme Court Judge I.V. Tkach it is rightly noted: "However, a share in the right of joint ownership is not a part of a material object and is not a right to a part of a material object, and, therefore, is not an actual possession of a part of a material object. Thus, a share of real estate in joint ownership cannot be the object of vindication. Reclamation of a part of property acquired by spouses during marriage is possible after it acquires the status of a separate material object, which is ensured by dividing such property in accordance with Article 367 of the Civil Code of Ukraine.[9] In the joint dissenting opinion to the said Resolution the judges of the Supreme Court very accurately note that in this case it will be impossible to establish which part of the house should be transferred to the plaintiff in kind and which part should be left to the defendant, and therefore there will be obstacles to enforcement. In their opinion, the arguments for deviating from the established case law are not sufficiently

[7] Ibid

[8] Postanova Velykoi palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 661/2576/16-ц (16.12.2020), accessed March 30, 2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/93834720

[9] Okrema dumka suddi Velykoi palaty Verkhovnoho Sudu Tkacha I.V. [Separate opinion of Judge of the Grand Chamber of the Supreme Court Tkach I.V]. u spravi No. 362/2707/19, accessed March 30, 2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/112896759

substantiated and do not indicate that the established and unchanged long-standing case law is wrong[10] . At the same time, the Supreme Court judges did not address the issue of the impossibility of reclaiming an unallocated share of a land plot. According to Art. 79(1)of the Land Code of Ukraine, a land plot may be an object of civil rights only from the moment of its formation (except for cases of sublease, servitude in respect of parts of land plots) and state registration of ownership of it[11]. Therefore, it is impossible to reclaim a part of a land plot, i.e. a non-existent object.

In addition, the judges overlooked the peculiarities of protecting the right to common joint property of spouses. In particular, this case did not take into account the peculiarities of choosing effective ways to protect the rights of co-owners in joint joint ownership. Thus, in deciding on the effectiveness of the method of protecting the violated right by filing a claim for invalidation of the contract, the Grand Chamber of the Supreme Court found that filing a claim by a party to the contract or another person (interested party) for invalidation of the contract is an effective way to protect the violated right in the event that if such a claim is filed in order to return to one of the spouses whose rights have been violated property rights and/or a share in the marital property, including by recognizing the rights to a share, and/or simultaneously allocating a share in the procedure for dividing the marital property or establishing the procedure for using this property, etc. At the same time, the good faith of the acquirer under such an agreement is subject to establishment[12] (see the decision of the Grand Chamber of the Supreme Court of June 29, 2021 in case No. 916/2813/18 (paragraph 8.67)).

If a party to the agreement or another person (interested party) wants to receive the equivalent value of the property that was alienated without its consent, it has the right to file a claim for compensation in the amount of the share of the alienated joint property, which is an effective way of protection without invalidating the transaction and applying restitution.[13]

Based on the foregoing, we can conclude that it is more correct, in our opinion, to focus not on the possibility of vindication of part of the property, but on choosing an appropriate and effective way to protect property rights. This may include, in particular, a demand for division of the family patrimony and recovery of compensation for part of the property alienated without the consent of the other spouse, rather than vindication. Therefore, in accordance with Article 16(2) of the Civil Code, the court had to replace the remedy with an effective and appropriate one, rather than satisfy the claim for reclamation of part of the property, which is impossible.

Therefore, this legal position requires careful study and revision, taking into account the norms of civil and family law.

The concept of expanded vindication laid down in court decisions will lead to complications in their implementation and application of sanctions provided for by the court decision, and ultimately will not lead to effective protection of the rights of co-owners.

In addition, the legal positions studied in this case law review do not comply with the established legislative provisions. Thus, by satisfying claims for reclamation of an unallocated part of a land plot or ideal shares of other real estate, a new object of civil rights is actually created on the basis of a court decision. Pursuant to Article 3280 of the Civil Code of Ukraine, property rights are acquired on the grounds not prohibited by law, in particular, from transactions, and pursuant to Article 11 of the CC, a court decision may be one of the grounds for the emergence of civil legal relations. However, the reclamation of property by way of vindication does not create a new object of civil rights, and ownership is not acquired over a new object, since the purpose of vindication is to reclaim the property belonging

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10 Okrema dumka suddiv Velykoi palaty Verkhovnoho Sudu [Separate opinion of the judges of the Grand Chamber of the Supreme Court] Tkachuka O. S., Vlasova Y. L., Hrytsiva M. I., Prokopenka O. B. u spravi No. 362/2707/19, accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/112803216.

11 Zemelnyi kodeks Ukrainy [Land Code of Ukraine], October 25, 2001. https://zakon.rada.gov.ua/laws/show/2768-14#Text

12 Postanova Velykoi Palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 916/2813/18 (29.06.2021), accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/98531899

13 Postanova Velykoi Palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 125/2157/19 (22.09.2022), accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. https://reyestr.court.gov.ua/Review/107706743

to the owner that is in someone else's illegal possession. At the same time, the vindication claim reclaims the property that has fallen out of the owner's possession. The court decisions under study reclaim property that does not actually exist (a land plot that is not allocated in kind and does not have a cadastral number at the time of the decision or an ideal share that is an unallocated part of the joint property). Accordingly, in this case, such court decisions actually create new objects of civil rights. However, this does not comply with the provisions of Chapter 24 of the Civil Code, which provides for the possibility of creating property and unfinished construction objects exclusively by a person, which in this case cannot be a court, since it is not vested with such powers under the Law of Ukraine "On the Judiciary" and the Civil Procedure Code and is not a party to civil relations in these cases, but is a judicial authority that administers justice in civil cases regarding legal relations between the plaintiff and the defendant.

Therefore, in our opinion, the legal positions under study contain controversial interpretations and application of the provisions of the Civil Code, as well as other acts of civil and procedural legislation, which requires a more thorough study and regulation of the objects of vindication at the legislative level.

## Conclusion

Despite the centuries-long history of vindication, the grounds for its application and the objects of vindication are constantly updated, depending on changes in scientific views on the basic concepts of civil law, such as possession, things, property, property rights, etc. However, such changes do not always have a positive impact on the protection of property rights, as in some cases the enforcement of a court decision is complicated by the lack of a clear mechanism of legal regulation in the field of vindication.

The expansion of the scope of vindication in court practice leads to constant changes in established legal positions, which negatively affects the unity of court practice and complicates their implementation.

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## ОГЛЯД СУДОВОЇ ПРАКТИКИ РОЗГЛЯДУ СПОРІВ ПРО ВИТРЕБУВАННЯ ЧАСТКИ У СПІЛЬНІЙ СУМІСНІЙ ВЛАСНОСТІ

***Анотація***

*У статті досліджується актуальна судова практика у справах про застосування цивільно-правових санкцій у формі витребування частини майна одним з співвласників у спільній сумісній власності. Досліджуються підстави для віндикації майна та види майна що можуть бути витребувані в порядку віндикації.*

*На підставі дослідження аргументів, наведених у судових рішеннях Верховного Суду відзначається спірність окремих правових позицій та їх невідповідність нормам цивільного та сімейного законодавства. З врахуванням аргументації автора визначаються належні та ефективні способи захисту прав співвласників у випадку відчуження спільного майна одним з подружжя без згоди другого.*

***Ключові слова****: віндикація, витребування, частина земельної ділянки, ідеальна частка, право спільної власності, подружжя, санкція*

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# LUCIDLY AND ATTRACTIVELY SIMPLY ABOUT COMPLEX ISSUES OF UNDERSTANDING LAW: GENERAL LEGAL THEORY INSTRUCTORS' REFLECTIONS ON THE MONOGRAPH MYKOLA KOZIUBRA "PRACTICAL PHILOSOPHY OF LAW"

The publication of the monograph in question which unfortunately happened to be the last one in Professor Koziubra's life has become an outstanding event in the legal life of Ukraine. Our reflections on it are motivated not only by our own scientific and pedagogical interests, but also by the fact that this work may be of great interest to lawyers in European and other countries. There has never been a similar work in Ukrainian legal scholarship before. This is due to a number of circumstances.

First of all, it is worth noting the rich professional experience of the author of the monograph. Thus, Mykola Koziubra was a well-known professor with significant academic and scientific experience in the field of general theory of law, philosophy of law, human rights, and constitutional law. As a well-known legal scholar, directly involved in the preparation of many fateful normative documents for Ukraine - the Declaration of State Sovereignty of Ukraine, the Constitution of Ukraine, etc., the author became a judge of the first composition of the Constitutional Court of Ukraine (1996 – 2003), which was created for the first time in the history of Ukraine. Professor Koziubra's knowledge and experience in the constitutional jurisdiction of Ukraine contributed to the realization of the importance of applying philosophical ideas and values in resolving complex constitutional and other legal issues. It was the professor's judicial work, on the one hand, that gave him the impetus for a deeper immersion in complex philosophical and legal issues, and on the other hand, confirmed the practical importance of philosophy of law.

The next circumstance we would like to mention is the partial inertia of legal consciousness of both ordinary citizens and practitioners in Ukrainian society that still prevails in Soviet times, based on a purely positivist approach to law and the state as its sole creator. These rudiments of legal thinking can, to a certain extent, be felt among first-year law students and, in some cases, among university professors. That is why this work is an event that will undoubtedly have an impact not only on Ukrainian legal doctrine, but will also help law professors, and through them, students, to touch and feel the modern approach to legal understanding. This approach is rooted in the best theories and practices of the Euro-Atlantic legal tradition.

It should be emphasized on the author's frankness and sincerity in presenting his thoughts. Starting with the extremely bold question asked by students at the beginning of the course in philosophy of law, which the author notes on the first page of the preface: "a rather pragmatic and even banal one: why is this course needed, what does it give to a practicing lawyer?" (p. 7). And what does it give to the students of the master's program who are "sharpened" and aimed at practice and many of whom are already practicing.

It should be recognized that this difficult question should be asked, first and foremost, by each and every teacher on a daily basis when conducting classes with future lawyers. The author answers this question throughout the monograph, using apt statements both from his own deep reflections and from well-known Western legal experts:

- René David, a famous french comparatist: "the essence of training a lawyer is not to memorize the rules currently in force in detail; it is unlikely that he will need it in ten years in his professional work, for which most of these rules will become unnecessary. But it is important for him to understand the essence of law as a universal, supranational phenomenon. The essence that cannot be arbitrarily changed by the stroke of a national legislator's pen" (pp. 13-14);

- One of the founders of the sociological theory of law, Eugen Ehrlich: "It is impossible ... to fix all law in laws and other regulations. The accumulated mass of normative material cannot be studied by any lawyer, even within one state and a separate industry, without losing his mind.

The content of life is always much richer. The desire to contain all of its richness in laws is as unreasonable as the desire to stop a stream in a puddle (Article 15);

- Ludwig Adamowicz, former President of the Austrian Constitutional Court: "legal science cannot be developed according to mathematical laws, and vice versa, it cannot be made into a pure evaluative philosophy" (p. 45).

Of course, such a vision of the essence of law also places special demands on the education of future lawyers. And the question "Why?" posed at the beginning is proved by the need for practical application of the philosophy of law.

The professor shares with the reader his own experience of cognition of complex legal matter, the stages of comprehension of which he experienced gradually during his long scientific, teaching and practical activities. This experience is very valuable for understanding the deep essence and complex process of cognition and comprehension of law.

It is worth noting the peculiarities of the content of the monograph, which has some unique subsections. In particular, as the author notes, the following question is not well studied in the national literature: how to explain that in the absence of a common understanding of law and even the word "law" in the lexicon of many nations, the same legal problems in different legal systems are solved mostly in the same way? The author refers to the so-called "presumption of identity" (presumption similitudinus) as a tool for making practical decisions,[1] which demonstrates the similarity of solving similar cases in different legal systems.

The author defines the style of the monograph as discursive and provocative, which encourages its readers (not only future lawyers, but primarily practicing lawyers and scholars) to think again about a number of complex issues. This feature is justified by the content, which throughout the text encourages the reader to reflect on the multifaceted nature of law, its essence and values. To this end, the author resorts to asking questions that are unusual even for legal professionals. In particular, this is reflected in the titles of the chapters: What is law: a real object or an unsolved social mystery? Why can law be attributed to socio-historical mysteries? Does law exist in reality? The author emphasizes that even today, law can be compared to those phenomena that remain a mystery, confirming this with both examples from history, in particular, Roman law, and modern ones - the uniqueness of legal science, the futility of striving for a comprehensive, "one true" definition of law, etc. These issues are of great importance for the training of future lawyers.

The emphasis in these reflections on legal education is due to the fact that traditionally in the continental legal system, the introduction to law in the first years of university begins, in particular, with such a discipline as general legal theory, or in the Anglo-American tradition, jurisprudence. In the beginning, students study different types of legal understanding, the relationship between law and human, law and state, the requirements of the rule of law, certain issues of "dogma of law" related to the legal system, updating of laws and other regulations, legal liability, etc. Philosophy of law as an academic discipline in domestic universities is mostly taught much later, at the level of master's programs. However, we are confident that the achievements of the philosophy of law, in particular, those set forth in the presented monograph, can and should be taken into account when students study general legal theory.

First of all, this concerns the existence of law: is it a real object or a mystery that has not yet been solved? The

[1] Zweigert K., Ketz H. Introduction to Comparative Jurisprudence in Private Law. VOL. 1. M., 2000. P. 58-59

very formulation of the question already encourages the reader to search for an answer. The answer is not given as something that already exists, it still needs to be found. Does law exist in reality?" - the author asks, what is its fundamental property, what characterizes its essence? Such and similar questions are generously scattered throughout the book, stimulate interest and encourage the reader's attention in the best possible way. And these are the questions that, on the one hand, are philosophical and require a certain humanitarian education to understand, but, on the other hand, can be considered already at the initial stages of legal education. The author himself reasonably distinguishes between philosophy of law and general theory of law, but gives it a place alongside. Somewhere between analytical theory and philosophical reflection (p. 70). This is evidenced by the overlap of topics and issues that are mostly considered in both philosophy of law and general legal theory. The first such unifying theme concerns the understanding of law. The author's work is crucial in this regard, as it concerns an attempt to explain the phenomenon of a predominantly uniform solution to similar legal problems in different legal systems. This path is overcome with the help of what is right in law - the values and ideals on which it grows and functions (p.132) Justice comes to the fore as a defining feature of law, which embodies its essence.

The author agrees with the view that "answers to specific legal problems cannot be strictly derived from state laws"; in their development, the understanding of justice plays an important role, which is especially necessary in the administration of justice, i.e. where the search for law is mainly completed (p. 117).

Justice is a special, not purely legal and not purely moral, but socio-ethical phenomenon that demonstrates not so much the differences between law and morality as their kinship, and even more so - their close intertwining" (p. 117).

"Law acquires its inherent and specific content only in the concept of justice" ... law cannot be unjust. "Without justice, it is a mockery, if not a complete negation of itself." (p. 117).

"Law is born of justice as a mother, since justice preceded law," as they said in ancient Rome (p. 118).

"It is hardly correct to consider equality and freedom as fundamental principles of law on a par with justice, as is often the case in legal literature. The category of justice is decisive for characterizing the essence of law as a social phenomenon... (p. 121).

"Justice is not a regional category, but a universal one, i.e., not limited in either the cultural or historical sense. Such universal justice is based on the fact that all of humanity can be spoken of as a certain just community, based on anthropological elements" (p. 122).

These and other statements by famous lawyers and philosophers, although presented in different contexts, allow the reader to be sure that the author's conclusions about the essential basis of law are based not only on his own reflections but also on his knowledge of the literature, in particular, the Western literature on these issues.

The next issue of the work, which is related to the subject of general legal theory studied in the first year, is the problem of the relationship between law and the state. In historical retrospect, until recent years, national legal theory sometimes maintained an approach whereby two subjects were studied within the same discipline - the theory of state and the theory of law. This is largely due to the still widespread approach to the simultaneous origin of law and the state, the determining role of the state in the creation of law and, accordingly, the "etatization" of all manifestations of law in public life. Of course, these rudiments of orthodox positivist thinking could not be ignored in the monograph. The author consistently demonstrates, using practical examples, the

possibility of law's emergence without any involvement of the State, without the influence of any laws common to the State. In particular, due to the significant role and ability of law to self-development and self-improvement, given its internal drivers - the desire for "correctness", impartiality and justice (p. 196). The author also criticizes the mono-factor linear-stage approach to social history, which has been inertially present since Soviet times and from which the new generation of lawyers should finally free themselves, paying attention to the interaction of various factors - politics and economics, religion and ideology, science and culture, law and morality, geographical and national characteristics, international environment, etc. - without dividing them into "causes" and "effects", "primary" and 'secondary' (p. 203).

Considerations of the distinction between the essence of the state and law are supported by reflections on the meaning of law, which is the phenomenon of human rights and freedoms, which form the basis of the most general property of the essential characteristic of law - justice. This is the basis of the ideal of the rule of law, which is now the most popular around the world (p. 205). Through the characterization of the initial provisions of this phenomenon, the author draws a reasonable conclusion that the legal source is not the state or even the socio-economic system, on which the materialistic worldview prevailing in Soviet times was based, but a person, his or her rights and freedoms. Their existence outside of law and without law is impossible, just as law is unthinkable without human rights and freedoms. These are phenomena of the same essence (p. 205).

These and other conclusions of the scientific work have found their logical development in the following subsections, which are related to the issues studied within the general theory of law.

Rulemaking is one of them. The author analyzes this issue from the perspective of the possibility and limits of scientific validity of rulemaking. Without questioning the connection between rulemaking and science, the author concludes that it is impossible to create high-quality legal norms which are relevant in the future solely with their help. Unlike in nature, where cognitive experience tends to transform into a scientific system of knowledge, in social life, most social relations are those whose development on the basis of experience remains dominant under any circumstances and cannot be verified by purely scientific methods (experiment or laboratory test) (p. 258). It is due to experience, not science, that law is enriched with numerous legal axioms, legal presumptions, legal fictions, precedents, etc. that resulted from long practical observations of recurring situations in various spheres of human life and the realization of their importance for finding fair legal solutions (p. 259).

Readers are interested in issues related to different social regulators, or rather the relationship between them. The work analyzes some of them in the chapter on law and values. In particular, the author asks the question: what is the relationship between law and religion in modern non-sacralized legal systems? And offers answers to this question, explaining the close intertwining of religion and law. This commonality of origin has both a historical basis for its formation and common heritage that has survived to the present day. First of all, we are talking about the elements of dogmatism and conservatism in law, such concepts as ritualism, traditionality, authority, universality, etc. (p. 320). Reflecting on the relationship between law and morality, a topic to which many philosophical treatises are devoted, the author emphasizes the moral and value-based conditionality of law and the existence of common axiological roots for law and morality. On the one hand, supporting and, on the other hand, criticizing certain provisions of Ronald Dworkin's concept of the relationship between law and morality, the author

concludes that there are no grounds not only for their opposition, but also for a sharp distinction between morality and law. Rather, we can only talk about their restrained, soft autonomy. The very need for axiological (value), moral and legal, rather than purely legal and dogmatic argumentation is particularly acute in complex cases, as evidenced by the practice of foreign courts. The quality of such argumentation is often decisive for a court decision (p. 344). As an example of moral argumentation, the decision of the Federal Communications Commission of Germany of February 15, 2006 on the compliance of the Aviation Safety Act with the Basic Law of Germany in terms of the state's authority to shoot down an aircraft used as an instrument of a crime against human life is cited.

The next topic that students begin to learn about in the first year of law school is the interpretation of legal norms. The author considers it, first of all, as an art. Before that, the author has considered in a wider range the direct links between law and art, the features of law as a science and law as an art. In particular, the art of rulemaking and the art of rule application.

Focus should be drawn to the author's conclusion regarding the challenges posed by artificial intelligence in the judicial process, namely, that no "smart robots" or automated systems can ensure the fairness of a court decision. After all, as noted earlier, justice is achieved not only, and sometimes not so much through logic and rationalization, but rather by taking into account individual, often unique circumstances of each case and its personalization to specific persons, in which sensory perception plays an important (sometimes decisive) role. It is also available only to people with relevant life and professional experience, developed intuition and other qualities united by the general name "judicial wisdom" (p. 372).

As for legal interpretation, the main explanation of its artistic component is through hermeneutical ideas and approaches, including to law itself. "True law", according to hermeneutical ideas, combines the complementary elements of the essence of law – justice as a natural human condition and existence, i.e., existence, including the developed normative world in which modern man lives (Article 383). Hence, it is quite logical to further elaborate on the issue by explaining the significance for legal interpretation of the hermeneutical triangle which is conditionally formed during interpretation between the author of the law, the text and the interpreter. The methodological significance for clarifying the nature of such legal interpretation is best formulated by Gustav Radbruch: "The interpreter," he wrote, "can understand the law better than its creators, the law can be wiser than its author, he, in fact, must be wiser than its author.[2]

Therefore, the author himself draws the following conclusion on this issue: "In the interpretation of normative legal texts, the creativity of interpreters is most clearly manifested - one of the main, as it is sometimes called, qualities of a person of the twenty-first century, that is, the ability to deviate from the accepted stereotypes of thinking, to see problems from an unconventional angle and solve them in an unconventional way" (p. 394).

The last subsection of the monograph, which concludes the section on law and values, is the principles of law. This topic is also present in educational programs on general legal theory. For the most part, it is considered from the angle of one of the most important sources of law. The author considers the principles of law to be one of the most important expressions of legal values and the most illustrative manifestations of the practicality of the philosophy of law. In particular, their

[2] Radbruch G. Philosophy of Law / translated from German. Kyiv: Tandem, 2006. P. 107

ontological and epistemological nature is investigated. Based on the existing approaches to the classification of legal principles, the author proposes his own classification:

a) universal (human) principles of law, i.e. fundamental, basic legal principles formulated in the course of centuries of history of progressive development of law, inherent in all legal systems;

b) civilizational principles of law, which are characteristic of certain legal cultures and traditions that embody their respective civilizations;

c) legal family principles of law, i.e. principles inherent in certain legal families (even within the same civilization)

d) national principles of law, i.e. principles formulated and operating within a particular national legal system, reflecting its specific features (p. 431).

Finally, the the linguistic features of the monograph's style need to also be assessed.

Just about the complicated: this is how you can briefly characterize this style. Although not all topics are easily perceived. Many issues require further personal perception and evaluation. However, Professor Mykola Koziubra does not change this unique author's style of presenting complex issues of a worldview nature in an accessible and understandable way in the monograph.

Vivid academic language, often with the use of various artistic means of literary language, adjectival and participial language forms, which enriches and gracefully emphasizes the author's opinion. For example: the multidimensional, contradictory and still secret nature of law, the multicolored legal reality, the complex world of law, the exquisite development of legal concepts, the depths of the mysterious nature of law, national limitations or even national egoism, intellectual beauty, aesthetic elegance, legal perfection, scientific nonsense, aesthetic clumsiness, elegant lapidarism, soulless executive diligence, the immeasurable nature of law.

Successful use of vivid images with quotations from various sources, which emphasizes the author's opinion in a particularly subtle way. This feature should be noted separately, since sometimes in various domestic scientific publications (or those that claim to be scientific, and there are many of them in “category B” journals, those domestic journals that were created with the status of Scopus, WoS for a one-time publication in order to meet modern requirements) there are references “for the sake of a reference”, for the sake of a “red word”. In the monograph, however, citations are used to accurately and vividly confirm the author's opinion.

In conclusion, we would like to emphasize how well-grounded and complete the author's explanation of the peculiarities of the value and ideological nature of the philosophy of law, its differences from science, and its comparison with related branches of knowledge, in particular, the general theory of law as a science, is. The author refers to the philosophy of law as “separate forms of mastering legal reality, different from legal science, within the framework of the category that unites them - metatheoretical jurisprudence”.

This view of the philosophy of law is innovative in the national legal thought. Therefore, Professor Mykola Koziubra's monograph “Practical Philosophy of Law” is an important achievement and ideological guideline for further development of legal science in Ukraine and abroad.

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