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INTERNATIONAL AND NATIONAL LEGAL ASPECTS

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## CONTENTS

# EDITORIAL

**Dear Readers and Authors,**

The 4the issue of the Journal features several in-depth articles on various topics that are undoubtedly of international interest. The dynamic evolution of cross-country relations, development and implementation of different technologies make it vital to consider familiar challenges from new perspectives. In this issue, consideration is given to both criminal and civil law issues that are mostly reflected at the international level.

Thus, the concept of responsibility is to some extent a hallmark of the international law, namely the responsibility for offences committed against internationally protected persons (OIPP), in particular in armed conflicts. *Aleksander N. Vylegzhanin* and *Ruslan A. Kantur* scrutinize such responsibility in two different ways: as an ordinary crime and as an international crime. One of the key questions that the authors pose is the question of international legal responsibility of a state as to OIPP, especially in cases when the state controls a state agent or a non-state actor having committed OIPP.

*Janko R. Munjić* scrutinizes the institute of multiple recidivism in the Republic of Serbia, the construct that became of paramount importance when making decisions on the severance of punishment imposed on those having committed repeated crimes. The author considers different types of multiple recidivism and argues that the concept of multiple recidivism brought into the system is incorrect as it leaves little space for judiciary to properly deal with all the circumstances relevant for the particular case. In this regards, the author proposes alternative solutions to the existing regulatory system.

*Kaliolla K. Seitenov, Sergey V. Efimov* and *Pavel L. Chernov* study some practical issues of financial crimes investigation in the Republic of Kazakhstan. In general, this area is well developed; however, some obstacles prevent enforcement agencies from tracing and recovering assets found abroad. Some mechanisms for the asset recovery turned out to be quite unsuccessful that is why it is important to reconsider the existing approaches in order to overcome the problems related to the tracing and recovery of such assets. One of the ways to do so is to improve international cooperation in this area, especially when it comes to mutual assistance and cooperation with some key countries where fraudulently gained assets may be found.

A question relevant for both the domestic and international legislation is the right of foreigners to own property in Vietnam. *Truong S. Le* and *Xuan Q.*

*Nguyen* consider home ownership as a basic human right that is called into question as there some restrictions as to owning a dwelling in a number of houses and in some areas. The need for foreign investment into the real estate market in Vietnam made it evident that it is vital to provide transparency for the industry sector and to develop the regulatory base that can be beneficial for both the local and foreign investors.

Modern technologies, explainable artificial intelligence (xAI) in judiciary in particular, are the cornerstone of the research presented by *Gyandeep Chaudhary*. Criminal, administrative and civil proceedings are increasingly implementing machine-learning algorithms that become more and more customary. Still, there is a problem of the "black box" nature and it is something to be taken into account when considering the role that the judicial system can play in developing xAI, especially when it comes to decision-making process in a transparent way.

In this regard, specialized knowledge in legal proceedings may appear as vital. *Oksana G. Dyakonova* discusses forms and types of the use of specialized knowledge in Russian legal proceedings. To begin with, special forms define the use of specialized knowledge. These include procedural, non-procedural forms as well as some specific types (e.g., medical forensic examination (expertise), revisions, audits, etc.). Of paramount importance is the participation of a specialist, an expert or other procedure participants in procedural and judicial actions. However, although there is quite an extensive normative regulation of the procedural forms, there are some shortcomings as well. It is essential to unify not only the forms of using specialized knowledge, but also the types, based on a general theoretical expert approach, as well as ways to use their results in legal proceedings.

The Academic events section features *Anthony Carty's* outlook on sustainability as a foundation for the philosophy of international law where the primary actors are states, let alone individuals and companies who are nevertheless linked to individual states. Undoubtedly, sustainability is vital for the international community, proper cooperation and it is the task of states to generate sustainable relations with one another — the idea, which, to some extent, runs through the main messages of the studies presented in this issue.

***Anastasia N. Mitrushchenkova***
Cand. Sci. (Philosophy), LLM
Deputy Editor-in-Chief

# INTERNATIONAL LAW

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# Responsibility for Offences against Internationally Protected Persons: Contemporary Legal Aspects

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***Abstract:*** The article examines complex legal aspects of the problem of responsibility, when it comes to offences against internationally protected persons (OIPP). The article reveals that, depending on the international legal qualification of the offence, OIPP can be qualified as either an ordinary crime (the one prosecuted under domestic law following the participation of the State in the relevant international conventions the key of which is the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents) or an international crime when it is a violent act against the protected person committed in the situation of an armed conflict. The authors argue that notwithstanding the fact that both cases entail individual criminal responsibility of the delinquent, individual criminal responsibility for OIPP as an ordinary crime occurs to the extent in which a State party to a relevant international convention has provided for punishment in its national legislation for the conduct criminalized thereby. At the same time, with regard to OIPP as a war crime, the article highlights that the commission of OIPP engenders the right to exercise universal jurisdiction under customary international law and the obligation to exercise quasiuniversal jurisdiction under the

"Geneva law" for the purpose of bringing delinquents to justice. In the meantime, the most controversial issue is the question of international legal responsibility of a State in cases of OIPP. It is argued that such responsibility can arise, when OIPP is a war crime committed by a State agent or a non-State actor effectively controlled by the State, as well as when it fails to undertake necessary measures to ensure personal inviolability of protected persons in violation of diplomatic law, or in situations of the denial of justice.

***Keywords:*** internationally protected persons; ordinary crimes; war crimes; individual criminal responsibility; State responsibility; the 1949 Geneva Conventions; Rome Statute; denial of justice; criminal jurisdiction

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## Contents



## I. Introduction

The notion of responsibility belongs to the most fundamental ones in international law. In the beginning of the 20th century, Lassa Oppenheim considered responsibility as a condition for a peaceful existence of the nations (Oppenheim, 1905, p. 198). As noted, responsibility is the best proof of existence of international law and the most credible means of the effectiveness thereof (Pellet, 2010, p. 3). Besides, responsibility is the direct consequence of the binding nature of legal obligations (Hillier, 1998, p. 321). Moreover, it is underlined

that the legal institute of responsibility constitutes a way of enforcing legal order in international relations (Kolosov, 2014, p. 3).

Regardless of the fact that under contemporary international law responsibility can arise from activity not prohibited by international law[1] (the term "liability"[2] is more frequently used in such a context), the majority of cases involving "responsibility" refer to illegal conduct when *de lege lata* international norms are violated and the relevant international wrong is committed.[3] According to the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts adopted in 2001 (hereinafter — the 2001 ILC Articles), every such act "entails the international responsibility of that State" (Art. 1 of the 2001 ILC Articles). As noted, it is "on States that most obligations rest and on whom the burden of compliance principally lies… In relation to individuals, international responsibility has only developed in the criminal field and then only in comparatively recent times" (Crawford and Ollson, 2006, pp. 452–453). We remark that international judicial practice shows some cases of liability of individuals as a result of international economic disputes between States and foreign investors (Vereina, 2021, pp. 16–18).

[1] For details, *See* Boyle, 1990, pp. 1–26.

[2] This issue was carefully examined in the International Law Commission (hereinafter also — ILC). *See* Draft Articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, with commentaries: Twelfth Report of the Special Rapporteur, Mr. Julio Barboza. Report of the International Law Commission on the Work of Its Forty-Eighth Session. A/51/10 // Yearbook of the International Law Commission. Vol. II. Part Two. 1996. Pp. 102–132; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries. Report of the International Law Commission on the Work of Its Fifty-Third Session. A/56/10 // Yearbook of the International Law Commission. Vol. II. Part Two. 2001. P. 150.

[3] In this study the term "to commit a crime" is used in accordance with the ICTY *Blagojević* standard. See *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment of 9 May 2007, IT-02-60-A, Appeals Chamber, International Criminal Tribunal for the former Yugoslavia. Para. 282 ("[T]he Appeals Chamber cannot accept that… the Statute intended to limit a superior's obligation to prevent or punish violations of international humanitarian law to only those individuals physically committing the material elements of a crime and to somehow exclude subordinates who as accomplices substantially contributed to the completion of the crime. Accordingly, 'commit' as used in Art. 7(3) of the Statute must be understood as it is in Protocol I, in its ordinary and broad sense.").

From the international legal standpoint, the violation of a norm prohibiting the most egregious wrongful acts also considered international crimes (or "core crimes"[4]) can lead to both international legal responsibility of a State (or "State responsibility") and individual criminal responsibility. Although in international law the notion of individual criminal responsibility is often used to describe responsibility for international crimes (Cryer, 2007, p. 7; Ambos, 2013, p. 55; Werle and Jessberger, 2014, pp. 5–8; Stahn, 2019, p. 21), whilst in the context of ordinary crimes of international significance (or "conventional crimes," or "transnational crimes") the emphasis is made upon "criminal responsibility under domestic law," when a person is brought to justice for an offence criminalized in a particular international criminal convention and only to extent in which a State party thereto duly implemented it in its domestic criminal legislation (Stahn, 2019, p. 106), it seems still relevant to extrapolate the term "individual criminal responsibility" to conventional crimes also (this approach is supported in legal teachings (Soler, 2019, p. 121)).

The purpose of the present Article is to scrutinize the phenomenon of responsibility (State responsibility and individual criminal responsibility, as well as complex issues of their intercorrelation) associated with offences against internationally protected persons (hereinafter — OIPP). The relevance and topicality of the present study can be justified by the following three reasons.

First, OIPP undermine the stability of international relations. Notwithstanding the fact that the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (hereinafter — the 1973 IPP Convention) provides for a quite broad definition of the internationally protected persons (hereinafter — IPP), this term primarily embraces diplomats (both national and international) who are the most vulnerable category of IPP susceptible to being attacked throughout the world, since (as compared, for instance, to heads of States, heads of government and ministers of foreign affairs who are usually protected at the highest

[4] Aggression, genocide, crimes against humanity, and war crimes.

possible degree) the absolute guarantee of the security of diplomats is hardly possible in principle.[5] Their security is put at risk especially in situations of extreme international turbulence, when certain individuals who tend to act in a delinquent manner and bear animosity towards a specific foreign country work off their bad temper on those foreign officials who they associate with a country they hate.

Second, there are also some difficulties of the legal qualification of OIPP: they may be qualified as ordinary crimes under domestic law (in such a situation, State responsibility can be invoked through the diplomatic law perspective or when a State violates mostly procedural obligations resulting in the denial of justice); or OIPP may be legally regarded as an international crime which engenders State responsibility and gives all States the right to exercise universal jurisdiction for the purpose of individual criminal responsibility upon the basis of *erga omnes* ("towards the whole international community" in Latin) obligations.

Third, against the background of the heterogeneity of IPP, the *corpus juris* applicable to the prevention and suppression of OIPP is also heterogeneous, which practically means that various sources of international law can be applicable *prima facie* to the same legal relations involving individual criminal responsibility for OIPP. Therefore, the relevant conflict of legal norms is possible. Moreover, due to the multifaceted character of the problem, the legal dimension of OIPP might simultaneously engage norms of different branches of international law, including international criminal law, international humanitarian law, diplomatic law, etc.

[5] After the assassination in Turkey in December 2016 of the Russian Ambassador Andrei Karlov, it was found out that there were serious problems with the physical security of the Russian embassies and their personnel. *See* Putin Explained the Lack of Security of the Russian Ambassador Andrei Karlov. 21 December 2016. Available at: https://www.m24.ru/articles/Vladimir-Putin/21122016/125663?utm_source=CopyBuf [Accessed 20.07.2022].

## II. OIPP as an Ordinary Crime: International Legal Aspects of Individual Criminal Responsibility

The definitions of IPP and OIPP are provided for in Art. 1 (1)[6] and Art. 2 (1)[7] of the 1973 IPP Convention, respectively. The convention also clarifies the notion of "international protection," which means special protection pursuant to international law from any attack on a person, his freedom or dignity. Although the convention does not specify the exact norms of international law regulating the international protection of IPP, its *travaux préparatoires* (the treaty was elaborated at the initiative of Uruguay that proposed the zero draft in the UN General Assembly Sixth Committee[8]) highlight that from the teleological viewpoint the target group of the instrument was primarily diplomats of foreign States and officials of international intergovernmental organizations.[9] The obligation of a receiving State to ensure personal

[6] Under Art. 1, Para. 1, of the 1973 IPP Convention, IPP means: a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him; b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

[7] Under Art. 2, Para. 1, of the 1973 IPP Convention, the intentional commission of: (a) a murder, kidnapping or other attack upon the person or liberty of an IPP; (b) a violent attack upon the official premises, the private accommodation or the means of transport of an IPP likely to endanger his person or liberty; (c) a threat to commit any such attack; (d) an attempt to commit any such attack; and (e) an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.

[8] United Nations General Assembly Sixth Committee. Question of the Protection and Inviolability of Diplomatic Agents and Other Persons Entitled to Special Protection under International Law: Uruguay. Working Paper. 15 October 1971. A/C.6/L.822. United Nations. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/L.822 [Accessed 28.07.2022].

[9] Under Para. III (2) the UN General Assembly Resolution, the ILC was asked to examine the issue of inviolability of diplomatic agents and other persons entitled to international protection. See Draft Articles concerning Crimes against Persons Entitled to Special Protection under International Law: Working Paper prepared

enviolability of diplomatic agents and other foreign State officials, including, *inter alia*, the obligation to protect these persons, their freedom and dignity, is part of customary international law[10] (the question was also dissected in detail in international legal teachings — see Higgins, 1985, pp. 642–643; Akinsanya, 1989, p. 109; Talmon, 2015, p. 434; Nagieva, 2022, pp. 65–77) and has been codified in Art. 29 of the 1961 Vienna Convention on Diplomatic Relations (hereinafter — the 1961 Vienna Convention); therefore, the above-mentioned international legal obligation is intrinsic to the notion of international protection. However, the customary nature of international protection of IPP and the international legal obligation of a receiving State to ensure it are without prejudice to issues of criminalization and establishing criminal jurisdiction over OIPP, since the international protection is the institute of diplomatic law, whereas preventing and countering OIPP are regulated by international criminal law.

In the majority of cases, OIPP can be qualified as a terrorist offence[11] (which is an ordinary crime), but not as an international crime. It means that:

by Mr. Richard D. Kearney. A/CN.4/L.182. Yearbook of the International Law Commission. Vol. II. 1972. P. 201–203.

[10] E.g. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*. Judgment of 24 May 1980. International Court of Justice. I.C.J. Reports 1980. Para. 62. P. 30–31; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Judgment of 4 June 2008. I.C.J. Reports 2008. Para. 174. P. 238.

[11] First, the counter-terrorist purpose of the 1973 IPP Convention is confirmed by its *travaux préparatoires*. Second, according to the Special Tribunal for Lebanon, which is the only international judicial body dealing with the crime of terrorism, an attack on an IPP falls within the category of a terrorist offence (*Prosecutor v. Ayyash et al.* Interlocutory Decision on Applicable Law: Terrorism, Conspiracy, Homicide, Commission, Cumulative Charging. 16 February 2011. STL-11-01/I. Special Tribunal for Lebanon. Para. 141). Third, the blanket references to the 1973 IPP Convention which should be analyzed within the entire applicable *corpus juris gentium* are made in the 1999 International Convention for the Suppression of the Financing of Terrorism, as well as in a series of regional antiterrorist conventions including but not limited to the 1998 Arab convention for the Suppression of Terrorism, the 1999 Organisation of African Unity Convention on the Prevention and Combating of Terrorism, the 2002 Inter-American convention against Terrorism, the 2005 Council of Europe Convention for the Prevention of Terrorism. Fourth, the relevant counter-terrorism authorities of the United Nations consider the 1973 IPP Convention as a counter-terrorist instrument

*first*, a State party to the 1973 IPP Convention bears an obligation to criminalize the conduct prohibited thereby and provide for individual criminal responsibility in its domestic legislation;

*second*, a State party possesses rights and obligations relating to establishing jurisdiction over OIPP;

*third*, a State party incurs secondary obligations to cooperate in the prevention and suppression of OIPP, including by observing the *aut dedere aut judicare* ("extradite or prosecute" in Latin) principle.

Moreover, in practical terms, the categorization of OIPP as ordinary crimes presumes that a person can be held criminally responsible only when a State party prohibited certain conduct in its domestic legislation (technically, it can be done by means of stipulating a special *corpus delicti* or qualifing such conduct as embraced by the already existing *corpus delicti*, or considering it as an aggravating circumstance). Ordinary crimes are also subject to amnesties, pardons, statutes of limitations, and, on the other hand, not subject to universal jurisdiction. And probably the most important characteristic of OIPP as ordinary crimes is that they are committed by any person, not by States, and the affiliation of the delinquent with a State should be disregarded for the purpose of individual criminal responsibility.

As it stems from the 1973 IPP Convention, the *actus reus* ("guilty act" in Latin) of OIPP can be described by virtue of Art. 1, Para. 1, of the 1973 IPP Convention, as a violent act implying either a real use of violence against IPP or a threat thereof (including through the complicity in a crime) and be targeted at IPP with the mental element (also known as *mens rea;* "guilty mind" in Latin) embracing a special intent (*dolus specialis*; "special intent" in Latin) to attack IPP thereby excluding the possibility to commit such offence with indirect intent (*dolus criminalis indirectus*; "indirect criminal intent" in Latin) or even negligently. OIPP are transnational in nature due to the international status of IPP and the legal purpose of the 1973 IPP Convention reflected in Para. 2 of its preamble, i.e., the maintenance of normal international relations that are necessary for cooperation among States. Thus, the general definition of OIPP implies willful and violent acts against a head

(United Nations Counter-Terrorism Committee Executive Directorate. International Legal Instruments. United Nations. Available at: https://www.un.org/securitycouncil/ctc/content/international-legal-instruments [Accessed 28.07.2022]).

of State, a head of government, a minister of foreign affairs or their family members, or a diplomatic agent, an agent of an international intergovernmental organization and their family members.[12]

It is obvious that the approach to defining IPP under the 1973 IPP Convention is quite broad and fraught with possible conflicts with other sources of international law *prima facie* applicable for the purposes of individual criminal responsibility. The first instrument notable in this context is the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter — the 1994 Convention). In particular, the disposition of the norm of Art. 9 of the 1994 Convention, *in essentia*, is built upon the model of Art. 2 of the 1973 IPP Convention dictating States parties to criminalize the same *actus reus* conduct, as the one specified in the 1973 IPP Convention, but in respect of the UN and associated personnel; moreover, the 1994 Convention *travaux préparatoires* highlight that the New Zealand — Ukrainian zero draft introduced in the UN General Assembly Sixth Committee was modelled after the 1973 IPP Convention.[13] In this regard, the 1994 Convention was initially aimed at reinforcing the provisions of the 1973 IPP Convention which scope is broader, because the notion of IPP protected by the 1973 IPP Convention undoubtedly encompasses the UN and associated personnel which is a sub-category of IPP, with the former constituting *lex generalis* in its relation to the 1994 Convention and the latter being *lex specialis* for the purposes of suppressing OIPP where an IPP is a member of the UN or associated personnel and ensuring individual criminal responsibility of perpetrators of such offences.

Nonetheless, only those OIPP against the UN and associated personnel can be qualified as ordinary crimes that are committed in peacetime.

[12] For the purposes of the present Article, family members of IPP are not touched upon therein.

[13] United Nations General Assembly Sixth Committee. Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for Such Attacks Are Brought to Justice. 6 October 1993. A/C.6/48/L.14. P. 2. Para. 5. United Nations. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/48/L.2 [Accessed 26.07.2022]; Summary Record of the 13th Meeting. 19 October 1993. A/C.6/48/SR.13. P. 3. Para. 7. United Nations. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.6/48/SR.13 [Accessed 26.07.2022].

*First*, in contemporary international criminal law, relevant offences committed in an armed conflict are considered as war crimes, which is corroborated by both treaty law[14] and international jurisprudence.[15]

*Second*, the view that attacks against the UN and associated personnel should be qualified as war crimes is shared by the International Committee of the Red Cross considering the norm prohibiting such attacks as possessing a customary nature (Henckaerts and Doswald-Beck, 2009, pp. 112–114).

Another treaty potentially applicable for the purposes of individual criminal responsibility is the 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter — the 1999 Convention) criminalizing, *inter alia*, the unlawful and wilful provision or collection of funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act criminalized by the 1973 IPP Convention (Art. 2, Para. 1(a), of the 1999 Convention in conjunction with Para. 3 of the Annex thereto). In this context, it is worth mentioning that under Art. 2, Para. 1(e), of the 1973 IPP Convention, participation as an accomplice in any such attack is also criminal; however, regardless of the fact that the financing of OIPP can be regarded as accomplicing in a crime (Jonas, 2022, p. 66),[16] it seems more correct that it is the 1999 Convention that

[14] *See* Art. 8, Para. (b) (iii), and Para. (e) (iii), of the Rome Statute of the International Criminal Court; Art. 4, Para. (b), of the Statute of the Special Court for Sierra Leone.

[15] Special Court for Sierra Leone. *Prosecutor v. Sesay, Kallon, Gbao*. Judgement of 2 March 2009. Trial Chamber I. SCSL-04-15-T. Para. 215; *Prosecutor v. Sesay, Kallon, Gbao*. Judgement of 26 October 2009. Appeals Chamber. SCSL-04-15-A. Para. 496–609; International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v. Karadžić*. Judgement of 24 March 2016. Trial Chamber. IT-95-5/18-T. Para. 5852, 5941–5951; *Prosecutor v. Mladić*. Judgement of 22 November 2017. Trial Chamber I. IT-09-92-T. Para. 2216; International Residual Mechanism for Criminal Tribunals. *Prosecutor v. Karadžić*. Judgement of 20 March 2019. Appeals Chamber. MICT-13-55-A. Para. 655–661.

[16] Under the classical approach to defining the concept of the criminal complicity, there two possible ways of holding an individual responsible as an accomplice; either by either ordering, planning, and instigating, or aiding and abetting (Jordash and Bracq, 2019, p. 754 ("[T]here are two main ways in which an individual may act as an accomplice; either ordering, planning, and instigating (which describe proximity between the perpetrator and the commission of the crime), or aiding and abetting (which generally entails a subsidiary contribution to the criminal act)")). Consequently,

is *lex specialis* for the purposes of the suppression of the financing of OIPP and ensuring individual criminal responsibility therefor.

The next applicable instrument is the 1997 International Convention for the Suppression of Terrorist Bombings (hereinafter — the 1997 Convention); under Art. 2 of the Convention, a person commits a crime in cases of *unlawful and international delivering, placing, discharging or detonating an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a) with the intent to cause death or serious bodily injury; b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss*. From the point of the disposition of the norm cited, the key is the concept of the "state or government facility" defined in Art. 1, Para. 1, of the 1997 Convention as *any permanent or temporary facility of conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties*. Irrespective of the fact that this norm does not indicate that an official in question should be foreign, Art. 3 of the 1997 Convention provides for the necessity to establish a transnational element in *actus reus*, therefore such officials can fall within the category of IPP if an act of terrorist bombings is directed at a State or government facility occupied or used by employees or officials of an international intergovernmental organization. Moreover, neither Art. 1, Para. 1, of the 1997 Convention, nor its *travaux préparatoires*[17] *indicate that its*

if the financing of terrorism is not regarded in domestic legislation as a separate *corpus delicti*, it should be qualified as aiding and abetting. *See* Jordash and Bracq, 2019, p. 764 ("In international criminal law, financing is… generally an act or conduct that constitutes a way or form of aiding and abetting the crime"), although this approach is not supported by FATF (*See* Financial Action Task Force. Interpretative Note to Special Recommendation II: Criminalizing the Financing of Terrorism and Associated Money Laundering. P. 5. FATF IX Special Recommendations. October 2001. Financial Action Task Force. Available at: https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf [Accessed 27.07.2022]).

[17] Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996. United Nations General Assembly Official Records. Fifty-Second Session. Supplement No. 37. A/52/37. New York: United

*developers wanted to exclude from its espace juridique* acts of terrorist bombing against facilities occupied or used by diplomatic agents of a foreign State with the intent to cause death or a serious bodily injury; and, what is more important, the 1997 Convention *expressis verbis* applies to acts of terrorist bombing against facilities occupied or used by officials or employees of international intergovernmental organizations (who are IPP *ipso facto*), which means that leaving foreign diplomats without protection would run counter to the object and purposes of the 1997 Convention. The systemic interpretation of Art. 1, Para. 1, of the 1997 Convention in light of Art. 2 stipulating *mens rea* as the one embracing two possible criminal intents posits that the commission of any of the criminalized offences against the State or government facility inevitably puts IPP in jeopardy. Therefore, any attack against an IPP by means of an explosive or other lethal device falls within the scope of the 1997 Convention thereby constituting *lex specialis* in its relation to the 1973 IPP Convention, with the latter being *lex generalis* (regarding war exclusions clauses in anti-terrorist conventions, *see* Tarabrin and Kantur, 2021, p. 70).

*Table 1*

| **Convention** | **OIPP *per se*** | **OIPP targeted against a member of the UN or associated personnel in peacetime** | **Financing of OIPP** | **OIPP committed with the use of an explosive or other lethal devise** |
|---|---|---|---|---|
| **1973** | Applies | Applies as *lex generalis* | Applies as *lex generalis* | Applies as *lex generalis* |
| **1994** | | Applies as *lex specialis* | | |
| **1999** | | | Applies as *lex specialis* | |
| **1997** | | | | Applies as *lex specialis* |

As it stems from Table 1, the 1973, 1994, 1999 and 1997 Conventions scrutinized above epitomize a specific *corpus juris* aimed at enforcing individual criminal responsibility for OIPP and oblige States parties to

Nations, 1997. United Nations. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/52/37(SUPP) [Accessed 27.07.2022].

ensure such responsibility for those involved therein. They constitute a concrete model of such responsibility consisting of the following elements.

*First*, by incurring the respective conventional obligations, States parties are obliged to consider offences criminalized in the Conventions as crimes under domestic law thereby observing the *nullum crimen sine lege* principle. Such criminalization refers to elements of *corpus delicti*, including those relating to *actus reus* and *mens rea* (especially when a convention requires special intent to be established), as well as all forms of criminal complicity (a criminological element).

*Second*, any State party should provide for punishment under domestic law given the gravity of the offence thereby maintaining the *nulla poena sine lege* principle. Such punishment should correspond to the criterion of proportionality, which means that sanctions are necessary to take into account the gravity of the offence (a penological element).

*Third*, all mentioned Conventions establish a special regime of exercising criminal jurisdiction including State party's rights and obligations in this respect: *ad minimum*, they should establish jurisdiction in accordance with the territoriality principle and that of active personality, as well as the protective principle when the injured person is an IPP (a jurisdictional element), upon *inter alia*[18] the basis of the *aut dedere aut judicare* principle (Table 2).

*Table 2*

| **The 1973 IPP Convention** | **The 1994 Convention** | **The 1999 Convention** | **The 1997 Convention** |
|---|---|---|---|
| 1 | 2 | 3 | 4 |
| **I. Individual criminal responsibility: a criminological element** | | | |
| **I.1. *Actus reus*** | | | |
| The commission of OIPP including a threat or an attempt thereof *(Art. 2(1)(a)-(d))* | The commission of OIPP including a threat or an attempt thereof *(Art. 9(1)(a)-(d))* | The commission of OIPP including an attempt thereof *(Art. 2(1) and (4) in conjunction with Para. 3 of the Annex)* | The commission of a bombing act including an attempt thereof against State or government facility *(Art. 2(1) and (2))* |

[18] Latin: "Among other things." Black's Law Dictionary. St. Paul Minn.: West Publishing Co., 1990. P. 811.

| 1 | 2 | 3 | 4 |
|---|---|---|---|
| **I.2. *Mens rea*** | | | |
| **I.2.1. General requirements** | | | |
| Intentional commission, with acts committed negligently being excluded *(chapeaux Art. 2(1))* | Intentional commission, with acts committed negligently being excluded *(chapeaux Art. 9(1))* | Intentional commission, with acts committed negligently being excluded *(Art. 2(1))* | Intentional commission, with acts committed negligently being excluded *(Art. 2(1))* |
| **I.2.2. Necessity to establish *dolus specialis*** | | | |
| No | No | Optional:<br>— the intent to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act<br>*(Art. 2(1)(b))* | Mandatory:<br>— the intent to cause death or serious bodily injury; or<br>— the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss<br>*(Art. 2(1)(a) and (b))* |
| **I.3. Modes of liability** | | | |
| Accomplicing in a crime criminalized *(Art. 2 (1) (e))* | Accomplicing in a crime criminalized *(Art. 9 (1) (e))* | Accomplicing in a crime criminalized, organizaing or directing, contribution to the commission in any other way *(Art. 2 (5))* | Accomplicing in a crime criminalized, organizaing or directing, contribution to the commission in any other way *(Art. 2 (3))* |
| **II. Individual criminal responsibility: a penological element** | | | |
| Punishment by appropriate penalties taking into account the grave nature of crimes *(Art. 2(2))* | Punishment by appropriate penalties taking into account the grave nature of crimes *(Art. 9(2))* | Punishment by appropriate penalties taking into account the grave nature of crimes *(Art. 4(b))* | Punishment by appropriate penalties taking into account the grave nature of crimes *(Art. 4(b))* |

| 1 | 2 | 3 | 4 |
|---|---|---|---|
| **III. Individual criminal responsibility: a jurisdictional element** | | | |
| **III.1. Mandatory requirements** | | | |
| — Territoriality principle;<br>— active personality principle;<br>— protective principle<br>*(Art. 3(1))* | — Territoriality principle;<br>— active personality principle<br>*(Art. 10(1))* | — Territoriality principle;<br>— active personality principle<br>*(Art. 7(1))* | — Territoriality principle;<br>— active personality principle<br>*(Art. 6(1))* |
| **III.2. Discretional powers** | | | |
| Not established *expressis verbis* | — Reality principle;<br>— passive personality principle;<br>— the intent to coerce the State<br>*(Art. 10(2))* | — Passive personality principle;<br>— protective principle;<br>— reality principle<br>*(Art. 7(2))* | — Passive personality principle;<br>— reality principle;<br>— the intent to coerce the State;<br>— place of the crime is an aircraft operated by the State<br>*(Art. 6(2))* |
| **III.3. The *aut dedere aut judicare* principle** | | | |
| Art. 7 | Art. 14 | Art. 11 | Art. 9 |

One can make the following preliminary conclusions.

*First,* in general States do not bear international responsibility for OIPP constituting ordinary crimes.

*Second,* perpetrators bear individual criminal responsibility for their acts; it arises from domestic law to the extent in which a State party to the 1973, 1994, 1999 and 1997 Conventions criminalized relevant offences in its national legislation in line with the model described in Table 2.

*Third*, a relevant State party should follow jurisdictional requirements stipulated in the respective Conventions described above in order to ensure individual criminal responsibility for the delinquents.

## III. Individual Criminal Responsibility for OIPP as an International Crime

The problem of differentiation between OIPP as ordinary crimes and international crimes is instrumental to defining the modalities of individual criminal responsibility. The model based upon the 1973, 1994, 1999 and 1997 Conventions is applicable to individuals only, and the commission of OIPP as an ordinary crime does not entail international legal responsibility of a State under those Conventions, even if a delinquent is a State agent.

As the International Court of Justice in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* pointed out, the 1999 Convention does not touch upon the State financing of acts of terrorism (which, however, does not mean its lawfulness under international law), but describes a delinquent as "any person" thereby recognizing the applicability of the 1999 Convention to any individual irrespective of his or her status as a State agent; but the financing of terrorism by a State does not entail its international legal responsibility under the 1999 Convention.[19] Since the 1999 Convention falls within the category of international law enforcement instruments (like the 1973, 1994 and 1997 Conventions) and its model of criminalization and ensuring individual criminal responsibility coincides with those prescribed in the 1973, 1994 and 1997 Conventions, it is justifiable to extrapolate the inference of the Court in *Ukraine v. Russia* case to the 1973, 1994, and 1997 Conventions as well.

Nevertheless, the perspective is completely different, when OIPP is an international crime. The commission of OIPP as an international crime also entails individual criminal responsibility, but the legal inferences therefrom are different than those relating to OIPP as an ordinary crime.

[19] *Application of the International convention for the Suppression of the Financing of Terrorism and of the International convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation).* Judgment of 8 November 2019. Preliminary Objections International Court of Justice. I.C.J. Reports 2019. Para. 60–61.

*First,* the legal ground for individual criminal responsibility for OIPP as an international crime has an international legal character, and the delinquent is criminally accountable under international law. In practical terms, individuals bear criminal responsibility due to the existence of the international legal norm prescribing certain conduct. Therefore, it is a violation of the relevant norm of international law by an individual that leads to individual criminal responsibility.

*Second*, amnesties and pardons are not permitted for international crimes. There are also no statutes of limitations, with States possessing the right to exercise universal jurisdiction over such offences.

*Third,* an international crime committed by a State agent (or by a person under the effective control of that State) entails international legal responsibility of the State.

It seems that there are two possible situations when OIPP can be qualified an international crime both of which refer to an armed conflict, with relevant OIPP being war crimes (Tarabrin and Kantur, 2001, p. 63).

*Situation I*, violent attacks on IPP during an armed conflict when they are considered as protected persons under international humanitarian law are war crimes (Tarabrin and Kantur, 2021, pp. 72–74). Thus, OIPP fall within the category of prohibited conduct under Art. 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva (hereinafter — IV Geneva Convention), for it constitutes violent acts against life or health of a civilian person (IPP are civilians under international humanitarian law).

*Situation II*, violent attacks during armed conflicts in respect of a member of the personnel engaged in peacekeeping operations are war crimes (Henckaerts and Doswald-Beck, 2009, pp. 112–114). Consequently, Art. 147 of the IV Geneva Convention also covers such cases.

The most significant condition for a qualification of attacks in both situations as war crimes (alongside their focus upon protected persons as the ones not directly participating in hostilities and thereby being protected by international humanitarian law (Melzer, 2009, pp. 20–36)) is the nexus with an armed conflict. Particularly, in *Kunarac et al.*

the ICTY Trial Chamber stated that the close link to armed conflict needs to be established;[20] in order to establish such a link, different factors should be taken into account, i.e., the perpetrator's combatant status, the victim's non-combatant status or a status as a member of the opposing party, the presumable characteristic of the act as serving the ultimate military goal and the contextual link of the crime with the exercise by the perpetrator of his or her official duties.[21] Consequently, violence against IPP motivated by some personal considerations, committed not in an official capacity, and not associated with an armed conflict should not be regarded as war crimes.

The relevant international jurisprudence proceeds from the premise that war crimes can be committed not only by combatants: there are cases where doctors,[22] journalists,[23] diplomats,[24] entrepre-

[20] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*. Judgement of 22 February 2001. Trial Chamber. International Criminal Tribunal for the former Yugoslavia. IT-96-23-T & IT-96-23/1-T. Para. 568 ("The Trial Chamber is also satisfied that the underlying crimes with which the Indictments were concerned were closely related to the armed conflict").

[21] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*. Judgement of 12 June 2002. Appeals Chamber. International Criminal Tribunal for the former Yugoslavia. IT-96-23 & IT-96-23/1-A. Para. 59.

[22] *United States of America v. Karl Brandt et al.* Judgment of 20 August 1947. American Military Tribunal. Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10. Vol. II. Washington, DC: US Government Printing Office, 1947. Pp. 174–180.

[23] Julius Streicher / *Governments of the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Göring, Hess, von Ribbentrop, Ley, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Funk, Schacht, Krupp von Bohlen und Halbach, Dönitz, Raeder, von Schirach, Sauckel, Jodl, Bormann, von Papen, Seyss-Inquart, Speer, von Neurath, and Fritzsche*. Judgment of 1 October 1946. International Military Tribunal. Vol. 8. Nuremberg Process: Materials in 8 volumes. Moscow: Yuridicheskaya Literatura, 1999. Pp. 686–687.

[24] *United States of America v. Ernst von Weizsäcker et al.* Judgment of 11 April 1949. American Military Tribunal. Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10. Vol. XIV. Washington, DC: US Government Printing Office, 1951. Pp. 436–467.

neurs[25] were found guilty. This assumption is corroborated by the conclusion of the ICTY Trial Chamber in *Delalić et al.* that any superior holding a position of authority can be held criminally responsible for war crimes.[26] At the same time, by imputing a war crime to an individual the latter one does not obtain the combatant status, since such imputation is without prejudice to his or her status under international humanitarian law (for instance, the commission by ISIL terrorists of war crimes in Iraq for the investigation of which the UN Investigative Team for Accountability of Da'esh/ISIL was launched by the UN Security Council Resolution 2379 under no circumstances endows the ISIL terrorists who allegedly committed the war crimes concerned with the status of combatants).

It is also important to underline that from the viewpoint of applicable law the incurrence of individual criminal responsibility depends upon the category of an armed conflict (Art. 147 of the IV Geneva Convention applies to international armed conflicts only).

In regard to international armed conflicts, Art. 85, Para. 2, of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter — Additional Protocol I) regards "grave breaches" of the Geneva Conventions as "grave breaches" of Additional Protocol I, which, however, contains a reinforcing provision that making a civilian the object of attack is a grave breach of Additional Protocol I (Art. 85, Para. 3(a)). Thus, making OIPP the object of attack is a war crime under Art. 85, Para. 5, of Additional Protocol I and entails individual criminal responsibility (see Table 3).

[25] *United States of America v. Friedrich Flick et al.* Opinion and Judgment of 22 December 1947. American Military Tribunal. Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10. Vol. VI. Washington, DC: US Government Printing Office, 1952. Pp. 1194–1212.

[26] *Prosecutor v. Delalić et al.* Judgement of 16 November 1998. ICTY Trial Chamber. Para. 355–363.

*Table 3*

| IV Geneva Convention | Additional Protocol I | Additional Protocol II | Rome Statute |
|---|---|---|---|
| **Individual criminal responsibility: a criminological element** | | | |
| Willful killing, torture or inhuman treatment, as well as causing great suffering or serious injury to body or health *(Art. 147)*<br><br>violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture *(Comm. Art. 3(a))* | Making the civilian population or individual civilians the object of attack *(Art. 85(3)(a))* | Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment *(Art. 4(2)(a))* | Intentional directing an attack against the civilian population as such or against individual civilians not taking direct part in hostilities is a war crime (in international armed conflicts) *(Art. 8(2)(b)(i))*<br><br>violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, is a war crime (in non-international armed conflicts) *(Art. 8(2)(c)(i))* |
| **Individual criminal responsibility: a penological element** | | | |
| Effective penal sanctions necessary to include in domestic legislation *(Art. 146)* | *Art. 85* | *Art. 6* | System of penalties within the Court |
| **Individual criminal responsibility: jurisdictional element** | | | |
| Quasiuniversal jurisdiction | Quasiuniversal jurisdiction | Not established *expressis verbis*, with the territoriality principle presumed | Quasiuniversal jurisdiction |

As to non-international armed conflicts, the legal qualification is completely different: on the one hand, under Common Art. 3 of the Geneva Conventions violence to life and person is among the prohibited acts; on the other one, not only Common Art. 3 does not qualify those acts as "grave breaches," but also it does not demand to hold criminally responsible those involved in such prohibited conduct,[27] with Art. 146 of the IV Geneva Convention not referring to Common Art. 3 at all. Moreover, the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter — Additional Protocol II) says nothing about "grave breaches" thereof or "war crimes," nor does it oblige *expressis verbis* States parties to criminally suppress acts prohibited by Additional Protocol II. Nevertheless, it seems that Additional Protocol II is a sufficient ground for criminal prosecution of individuals who committed war crimes during non-international armed conflict due to the following reasoning.

*First*, Art. 6 of Additional Protocol II codifies a wide range of fair trial guarantees set for persons who are prosecuted and punished for criminal offences in relation to a non-international armed conflict. Therefore, Art. 6 implies that during a non-international armed conflict there can be offences committed, with States parties having an obligation to prosecute and punish them in accordance with prescribed fair trial guarantees.

*Second*, the authoritative International Committee of the Red Cross shares the view that States should prosecute war crimes committed by their nationals or armed forces or on their territories, as well as those offences over which they have jurisdiction. This is a customary rule of international law applicable in non-international armed conflicts, too (Henckaerts and Doswald-Beck, 2009, p. 607).

*Third*, the qualification of certain acts as unlawful (in this case, unlawful under international humanitarian law) presumes that their commission should not be left unpunished, for they are prohibited *expressis verbis*. Consequently, any act considered as prohibited under

[27] *Prosecutor v. Duško Tadić*. Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction. Appeals Chamber. International Criminal Tribunal for the former Yugoslavia. IT-94-1. Para. 128.

Common Art. 3 and Additional Protocol II entails individual criminal responsibility irrespective of the fact that those instruments do not contain specific provisions relating to the obligation of States to ensure individual criminal responsibility for war crimes in non-international armed conflicts. This approach is confirmed by the international case law. Particularly, according to the ICTY Appeals Chamber *Hadžihasanović and Kubura* judgement, the conventional prohibition of attacks on civilian objects is part of customary international law entailing individual criminal responsibility of persons involved.[28] In *Akayesu*, the ICTR Appeals Chamber has taken the position according to which the minimum range of procedural guarantees stemming from Common Art. 3 of the Geneva Conventions includes the provision of effective punishment of its perpetrators.[29] In *Brima et al.*, the SCSL Trial Chamber II has emphasized that in order to qualify an act as the violation of the Common Art. 3 it should be committed during the armed conflict and linked thereto, with the victim not taking direct part in hostilities.[30]

*Fourth*, certainty of punishment is instrumental to crime deterrence (Ku and Nzelibe, 2006, p. 792; Alexander, 2009, pp. 11–14; Rothe and Mullins, 2010, pp. 102–104; Jenks, 2014, p. 781; Sander, 2019, pp. 186–187). War crimes are not an exception. In this regard, the exclusion of a penological element invalidating individual criminal responsibility for war crimes in non-international armed conflict would

[28] *Prosecutor v. Hadžihasanović and Kubura*. Decision of 11 March 2005 on Motion for Acquittal. Appeals Chamber. International Criminal Tribunal for the former Yugoslavia. IT-01-47-AR73.3. Para. 30 ("The Appeals Chamber is satisfied that the conventional prohibition on attacks on civilian objects in non-international armed conflicts has attained the status of customary international law… in… non-international armed conflict… [and] is further satisfied that violations of this provision entail, in customary international law, the individual criminal responsibility of the person breaching the rule").

[29] *Prosecutor v. Akayesu*. Judgement of 1 June 2001. Appeals Chamber. International Criminal Tribunal for Rwanda. ICTR-96-4-A. Para. 443 ("The Appeals Chamber is of the view that the minimum protection provided for victims under common Art. 3 [of the Geneva Conventions of 1949] implies necessarily effective punishment on persons who violate it").

[30] *Prosecutor v. Brima, Kamara and Kanu*. Judgment of 20 June 2007. Trial Chamber II. Special Court for Sierra Leone. SCSL-04-16-T. Para. 243–248.

neglect the object and purposes of international humanitarian law and inevitably demotivate participants in an armed conflict to observe laws and customs of war (see Table 3).

To sum up, individual criminal responsibility for OIPP as a war crime ensues if the following three requirements are met: 1) OIPP are committed during an armed conflict (its categorization as an international or non-international in this respect does not matter); 2) OIPP have a nexus to an armed conflict; 3) IPP do not take direct participation in hostilities.

The important role in ensuring individual criminal responsibility is played by the 1998 Rome Statute of the International Criminal Court amounting to the most up-dated codification of war crimes in contemporary international law (Gaeta, 1999, p. 190; Darcy, 2010, p. 46; Ambach, 2015, p. 422). This way, under Art. 8, Para. 2(b)(i), of the Rome Statute, intentional directing an attack against the civilian population as such or against individual civilians not taking direct part in hostilities is a war crime (in international armed conflicts); under Art. 8, Para. 2(c)(i), of the Rome Statute, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, is a war crime (in non-international armed conflicts), with both cases entailing individual criminal responsibility. These provisions of the Rome Statute fully correlate with the norms of Additional Protocols I and II and can serve as a basis for criminal prosecution of OIPP under conditions provided for by the Rome Statute. In particular, the parameters of individual criminal responsibility for offences criminalized by the Rome Statute are determined in Art. 25 thereof stating that the following modes of responsibility and liability are subject to prosecution:[31]

1. direct commission (Art. 25(3)(a));[32]
2. co-commission (Art. 25(3)(a));[33]

[31] Under Art. 25 of the Rome Statute, "a person who commits a crime shall be criminally responsible and liable for punishment."

[32] *E.g.*: *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*. Situation in Darfur, Sudan. Decision on the Confirmation of Charges. 9 July 2021. ICC-02/05-01/20-433. International Criminal Court. Pre-trial Chamber II. Para. 126–128.

[33] *E.g.*: *Prosecutor v. Thomas Lubanga Dyilo*. Situation in the Democratic Republic of the Congo. Decision on the Confirmation of Charges. 7 February 2007. ICC-01/04-01/06-803-tEN. International Criminal Court. Pre-Trial Chamber I. Para. 319;

3. indirect commission (Art. 25(3)(a));[34]

4. ordering to commit a crime (Art. 25(3)(b));[35]

5. soliciting or inducing (Art. 25(3)(b));[36]

6. aiding or abetting (Art. 25(3)(c));[37]

7. intentional contribution to the commission or attempting to commit a crime (Art. 25(3)(d));[38]

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*Prosecutor v. Germain Katanga*. Situation in the Democratic Republic of the Congo. Decision on the Confirmation of Charges. 14 October 2008. ICC-01/04-01/07-717. International Criminal Court. Pre-Trial Chamber I. Para. 33–35; *Prosecutor v. Charles Blé Goudé*. Situation in the Republic of Côte d'Ivoire. Decision on the Confirmation of Charges. 12 December 2014. ICC-02/11-02/11-186. International Criminal Court. Pre-Trial Chamber I. Para. 134–136; *Prosecutor v. Paul Gicheru*. Situation in the Republic of Kenya. Decision on the Confirmation of Charges. 15 July 2021. ICC-01/09-01/20-153-Red. International Criminal Court. Pre-Trial Chamber A (Art. 70). Para. 167–179.

[34] *E.g.*: *Prosecutor v. Bahr Idriss Abu Garda*. Situation in Darfur, Sudan. Decision on the Confirmation of Charges. 8 February 2010. ICC-02/05-02/09-243-Red. International Criminal Court. Pre-Trial Chamber I. Para. 152; *Prosecutor v. Mahamat Said Abdel Kani*. Situation in the Central African Republic II. Decision on the Confirmation of Charges. 9 December 2021. ICC-01/14-01/21-218-Red. International Criminal Court. Pre-Trial Chamber II. Para. 43.

[35] *E.g.*: *Prosecutor v. Germain Katanga*. Situation in the Democratic Republic of the Congo. Decision on the Confirmation of Charges. 14 October 2008. International Criminal Court. Pre-Trial Chamber I. Para. 36; *Prosecutor v. Bahr Idriss Abu Garda*. Situation in Darfur, Sudan. Decision on the Confirmation of Charges. 8 February 2010. ICC-02/05-02/09-243-Red. International Criminal Court. Pre-Trial Chamber I. Para. 152.

[36] *E.g.*: *Prosecutor v. Mahamat Said Abdel Kani*. Situation in the Central African Republic II. Decision on the Confirmation of Charges. 9 December 2021. ICC-01/14-01/21-218-Red. International Criminal Court. Pre-Trial Chamber II. Para. 43; *Prosecutor v. Charles Blé Goudé*. Situation in the Republic of Côte d'Ivoire. Decision on the Confirmation of Charges. 12 December 2014. ICC-02/11-02/11-186. International Criminal Court. Pre-Trial Chamber I. Para. 159.

[37] *E.g.*: *Prosecutor v. Mahamat Said Abdel Kani*. Situation in the Central African Republic II. Decision on the Confirmation of Charges. 9 December 2021. ICC-01/14-01/21-218-Red. International Criminal Court. Pre-Trial Chamber II. Para. 43; *Prosecutor v. Charles Blé Goudé*. Situation in the Republic of Côte d'Ivoire. Decision on the Confirmation of Charges. 12 December 2014. ICC-02/11-02/11-186. International Criminal Court. Pre-Trial Chamber I. Para. 167; *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*. Situation in the Central African Republic II. Decision on the Confirmation of Charges. 28 June 2021. ICC-01/14-01/18-403-Corr-Red. International Criminal Court. Pre-Trial Chamber V. Para. 104.

[38] *E.g.*: *Prosecutor v. Callixte Mbarushimana*. Situation in the Democratic Republic of the Congo. Decision on the Confirmation of Charges. 16 December 2011.

8. attempting to commit a crime that did not occur due to circumstances independent of the delinquent's intentions (Art. 25(3)(f)).[39]

Furthermore, Art. 28 and 33 of the Rome Statute provide for command responsibility of superiors,[40] as well as criminal responsibility for subordinates who executed manifestly unlawful superior orders respectively.

All described modes of liability are well-applicable to the prosecution of OIPP falling within the scope of war crimes under Art. 8 of the Rome Statute. As to the intercorrespondence between the "Geneva law" (in the present case, primarily the IV Geneva Convention) and the Rome Statute, it is important to note that these treaties are essentially complementary, since the legal purposes of the "Geneva law," on the one hand, and the Rome Statute, on the other one, are different, but mutually reinforcing: if the "Geneva law" is aimed at regulating legal relations of subjects of international law *in bello* whilst broadly outlining the contours of individual criminal responsibility for violations of international humanitarian law, the Rome Statute is specifically intended to ensure individual criminal responsibility exclusively within the regime created by this international treaty. Given the purely conventional scope of the Rome Statute and the principle of complementarity establishing the primary authority of States parties to

ICC-01/04-01/10-465-Red. International Criminal Court. Pre-Trial Chamber I. Para. 276–278; *Prosecutor v. Charles Blé Goudé*. Situation in the Republic of Côte d'Ivoire. Decision on the Confirmation of Charges. 12 December 2014. ICC-02/11-02/11-186. International Criminal Court. Pre-Trial Chamber I. Para. 172–173; *Prosecutor v. Ahmad Al Faqi Al Mahdi*. Situation in the Republic of Mali. Decision on the Confirmation of Charges. 24 March 2016. ICC-01/12-01/15-84-Red. Pre-Trial Chamber I. Para. 27.

[39] *E.g.*: *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*. Situation in Darfur, Sudan. Decision on the Confirmation of Charges. 9 July 2021. ICC-02/05-01/20-433. International Criminal Court. Pre-trial Chamber II. Para. 82, 118.

[40] *E.g.*: Prosecutor v. Dominic Ongwen. Situation in Uganda. Decision on the Confirmation of Charges. 23 March 2016. ICC-02/04-01/15-422-Red. International Criminal Court. Pre-Trial Chamber II. Para. 146; *Prosecutor v. Bosco Ntaganda*. Situation in the Democratic Republic of the Congo. Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor. 14 June 2014. ICC-01/04-02/06-309. International Criminal Court. Pre-Trial Chamber II. Para. 164–175.

prosecute the crimes enumerated in the Rome Statute, it is domestic courts whose competence is prioritized in ensuring individual criminal responsibility for violations of the "Geneva law" properly reproduced in Art. 8 of the Rome Statute, with the approach of the "Geneva law" presuming States as the only subjects of criminal prosecution of its violations and constituting thereby a universal regime of such prosecution, whereas the regime established by the Rome Statute forms a conventional *lex specialis*.

As to the principles of establishing criminal jurisdiction over attacks on protected persons embracing possible situations when OIPP constitutes a war crime, States parties to the IV Geneva convention are to prosecute any person who committed or ordered to commit a prohibited act irrespective of his or her nationality. Since the obligation provided for in Art. 146 is *erga omnes partes* ("towards all parties [to the treaty]" in Latin) (due to the *pacta tertii nec nocent nec prosunt* ("a treaty is not binding upon a third State" in Latin) principle, the IV Geneva Convention is binding upon States parties only) and notwithstanding the fact that up to date all States of the world are parties thereto, the "Geneva regime" of establishing jurisdiction is quasiuniversal. In international legal teachings, the concept of quasiunuversal jurisdiction being a subject of some reflection is sometimes called the treaty an "analogue" to universal jurisdiction (Cryer, 2007, p. 45 ("In 1949, the Geneva Conventions provided a treaty-based analogue to universal jurisdiction in relation to their grave breaches provisions"). See also: Williams, 2000, p. 549; Aust, 2010, p. 270; Shaw, 2014, p. 489). This approach does not seem legally incorrect for the following reasons.

*First*, universal jurisdiction is recognized as a *right* of States, but not an obligation (as compared to the territoriality and active personality principles), whereas the wording of Art. 146 of the IV Geneva Convention leaves no doubt that quasiuniversal jurisdiction is an *obligation* of a State party to find and prosecute those who commit "grave breaches" of the Geneva Conventions.

*Second*, universal jurisdiction is an absolutely unique legal institution (without analogues) initially deemed without connection to any international criminal law treaty, with quasiuniversal jurisdiction describing a purely conventional obligation effective insofar as a State

takes part in the treaty regime providing for the basis of quasiuniversal jurisdiction.

*Third*, universal jurisdiction is a customary mechanism parallel to treaty law, and it is scarcely possible to codify it; no international criminal law treaty prohibiting international crimes provides for universal jurisdiction, whilst the essence of quasiuniversal jurisdiction is to build a special conventional *inter partes* regime aimed at preventing impunity.

With respect to modalities of establishing universal jurisdiction, which consists in the right of any State to establish criminal jurisdiction irrespective of the place of the crime and nationality of the delinquent bearing in mind the gravity of the offence and the threat such crimes pose to the stability of international relations, contemporary international criminal law recognizes the possibility of such a type of jurisdiction over war crimes (the opinion that universal jurisdiction over war crimes is acceptable in international law in widely supported in international legal teachings: Meron, 1995, pp. 567–569; Joyner, 1996, pp. 153–156; Bantekas and Nash, 2003, p. 156; Cassese, 2003, pp. 594–595; Dinstein, 2004, p. 228; Philippe, 2006, pp. 385–387; Stahn, 2019, p. 185; Ambos, 2014, p. 223; Jeßberger, 2018, p. 9;[41] this approach is also shared by the ICRC[42]). It is important to underline that the regime established by the IV Geneva Convention does not substitute quasiuniversal jurisdiction with universal one: if a State party to the IV Geneva Convention is willing to denounce this treaty, it will become relieved from the obligation to establish quasiuniversal jurisdiction, but will retain the right to establish universal jurisdiction in accordance with customary international law. Alongside the quasiuniversal jurisdiction, Art. 146 of the IV Geneva Convention provides for the *aut dedere*

[41] Moreover, this opinion was enunciated in a serious of dissenting and separate opinions appended to the ICJ judgment in *Arrest Warrant*: Vid. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Judgment of 14 February 2002. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. I.C.J. Reports 2002. International Court of Justice. P. 78. Para. 51; Separate Opinion of Judge Koroma. P. 61. Para. 9; Dissenting Opinion of Judge Van Den Wyngaert. Pp. 173–175. Para. 59–62.

[42] Rule 157: Jurisdiction over War Crimes. *See* Henckaerts and Doswald-Beck, 2009, pp. 604–607.

*aut judicare* principle also aimed at the minimization of impunity (Strapatsas, 2001, p. 9; Zgonec-Rožej and Foakes, 2013, p. 3).[43]

From the penological viewpoint, the IV Geneva Convention obliges States to provide effective penal sanctions for delinquents in their domestic legislation. Notwithstanding the vagueness of the term "effective,"[44] effectiveness in this context seems to mean that penal sanctions should take account the gravity of violations and be also harsh[45] (see Table 3).

## IV. Raising a Question of International Legal Responsibility of a State in case of OIPP

As it was revealed earlier, individual criminal responsibility following the commission of OIPP is an inevitable criminal law consequence of the act prohibited *per se* irrespective of its categorization as an ordinary crime or a war crime (this categorization matters only in the aspect of applicable law in context of the *nullum crimen nulla poena sine lege* principle and determining grounds for establishing criminal jurisdiction). Let us consider the applicability of the concept

[43] In particular, Art. 146 establishes the obligation of a state party to bring before its own courts those involved in the grave breaches and the right, if it prefers, to hand them other to another state party.

[44] The official commentary of Art. 146 prepared by the ICRC does not uncover the meaning of the term.

Article 146. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958. International Humanitarian Law Databases. Available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-146/commentary/1958?activeTab=1949GCs-APs-and-commentaries [Accessed 02.01.2023].

[45] According the Black's Law Dictionary, the term "effect," the derivative of which is the adjective "effective," means "result," "outcome," "consequence." Consequently, effective sanctions are the ones the legal repercussions of which correspond to the seriousness of the unlawful act. Furthermore, it is pointed out in international legal teachings that, to be effective, sanctions should be provided for in domestic legislation before the authorized judicial or law enforcement actor imposes a relevant penal sanction.

Analysis of the Punishments Applicable to International Crimes (War Crimes, Crimes against Humanity and Genocide) in Domestic Law and Practice. International Review of the Red Cross, 2008, 90 (870), p. 462 ("[T]he measures set out above must be adopted before the grave breaches have occurred").

of international legal responsibility according to which *ipso facto* only subjects of international law can bear such a responsibility (generally, individuals are not considered subjects of international law and do not possess international legal personality).

*First*, OIPP is a criminal offence with a concrete *corpus delicti* comprising *actus reus* and *mens rea*. Such segmentation is inapplicable for acts of State, with States not being able bear criminal responsibility even if the delinquent of OIPP is a State agent. Therefore, the 1973 IPP Convention regulating relations in the sphere of the prevention and suppression of OIPP as ordinary crimes (as well as all other UN counter-terrorism conventions, including the 1994, 1999 and 1997 Conventions) is inapplicable to acts of States.

*Second*, even if a crime is committed by a State agent directed or controlled by a State under Art. 8 of the 2001 ILC Articles, as well as in light of the attribution standard elaborated by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,[46] it is necessary to raise a question what is the ground for qualifying this act as an international wrong and for invoking international legal responsibility of a State in case of OIPP.

*Third*, when it comes to OIPP as war crimes, the criteria for delineating individual criminal responsibility from international legal responsibility of States are not always clear.

As to the grounds of State responsibility, according to Art. 2 of the 2001 ILC Articles, an internationally wrongful act consists in an action or omission that is attributable to a State under international law and is a breach of its obligation. Moreover, as it was pointed out, it is the concept of objective responsibility that is laid at the heart the 2001 ILC Articles[47] thereby smoothing over the "subjective" element of the internationally wrongful act. Against the background of the unacceptability of objective imputation in criminal law and the necessity to establish *mens rea* to

[46] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits. Judgment of 27 June 1986. International Court of Justice. I.C.J. Reports 1986. Para. 113–115.

[47] International Law Commission. First Report on State Responsibility by Mr. James Crawford, Special Rapporteur. Doc. A/CN.4/490 and Add. 1–7. Para. 77.

qualify a crime, it is necessary to clarify under what conditions the commission of OIPP gives ground to raising a question of international legal responsibility of a State.

However, individual criminal responsibility and international legal responsibility are not mutually exclusive, which is corroborated by the ICJ's *dictum* in *Bosnia and Herzegovina v. Serbia and Montenegro*.[48] Consequently, when OIPP as a war crime is committed by a State agent, the relevant State is responsible alongside the individual (Skuratova, 2012, p. 9). This approach can be confirmed by reference not only to Art. 25, Para. 4, of the Rome Statute asserting that the provisions of the Statute does not influence the issues of State responsibility under international law, but also to the ICJ jurisprudence (in particular, to the ICJ judgment on *Croatia v. Serbia* in accordance with which individual criminal responsibility and State responsibility are governed by different legal regimes[49]), which is supported by international legal teachings (Nollkaemper, 2003, p. 617; Gaeta, 2007, p. 641; Spinedi, 2002, pp. 898–899; Bonafè, 2009, pp. 27–28). However, if a crime is committed by a non-State actor, the relevant State is responsible insofar as the act is attributable to that State in conformity with the criteria identified by the ICJ in *Nicaragua v. United States of America* and confirmed by the ILC in Art. 8 of the 2001 ILC Articles constituting customary international law.

As to OIPP as ordinary crimes, the importance should be attached to the 2019 jurisdictional judgment of the ICJ in *Ukraine v. Russia* stating that States parties to the 1999 Convention are bound to prosecute

[48] *Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment of 26 February 2007. International Court of Justice. I.C.J. Reports 2007. Para. 173. P. 116.

[49] International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*). Judgment of 3 February 2015 // I.C.J. Reports 2015. Para. 129 ("State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person").

and punish the perpetrators of the offences criminalized thereby,[50] lest States parties could bear international legal responsibility,[51] with the affiliation of the delinquent with a State being irrelevant.[52] Through an analogy, the ICJ legal position on the crime of financing terrorism can be projected at OIPP criminalized by the 1973 IPP Convention. In this respect, the question of international legal responsibility of a State is twofold: first, State can be internationally responsible under diplomatic law, since in compliance with Art. 29 of the 1961 Vienna Convention and customary law States are obliged to ensure personal inviolability of IPP and to protect duly their person, freedom and dignity; second, a State can be held responsible if it has not undertaken effective measures to prevent and suppress OIPP, which can be qualified as the denial of justice referring to situations when the receiving State is unable or unwilling to prosecute OIPP (Eagletone, 1928, p. 542; Lissitzyn, 1936, pp. 638–645; Paulsson, 2005, pp. 57–59; Douglas, 2014, p. 883; De Stefano, 2020, pp. 38–39); this norm is codified in Art. 3, 4 and 7 of the 1973 IPP Convention. However, States do not bear responsibility for OIPP *per se* since only individuals can bear responsibility for them (and this responsibility can be individual and criminal).

This reasoning can be illustrated by international jurisprudence.

In *Kellett (United States of America v. Kingdom of Siam)*,[53] the 1897 *ad hoc* arbitration delivered an award relating to the attack on

[50] International Court of Justice. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*. Judgment of 8 November 2019. Preliminary Objections. I.C.J. Reports 2019. Para. 59 ("[S]uppression through the prosecution and punishment of its perpetrators").

[51] Ibid. Para. 61 ("[A]ll States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the convention would arise").

[52] Ibid.

[53] *United States of America v. Kingdom of Siam (Kellett Case)*, Award of 20 September 1897, US-Siamese Arbitration ad hoc. History and Digest of the International Arbitrations to Which the United States Has Been a Party by John Bassett Moore: In Six Volumes, Vol. II. Washington: Government Printing Office, 1898. Pp. 1863–1864.

the US vice-consul in Chiangmai Edward Kellett committed by a group of Siamese armed soldiers, which resulted in injuries to the diplomat. The government of Siam initially attempted to blame Kellett for the incident and called upon to make it a subject of proceedings in a Siamese domestic court. But the position of Siam was challenged by the USA with reference to the official status of Kellett preventing him from appearing before domestic courts of Siam in any capacity and suggested that an arbitration consisting of two umpires should be formed. The arbitration established that neither the superior nor the soldiers undertook necessary measures to prevent the attack or at least mitigate its gravity[54] and ruled that Siam should punish both commanders who were obliged to undertake precautionary measures but did not do so; then, the government of Siam was required to present apologies to the government of the USA and to officially publish the award.

In *Mallen (Mexica v. USA)*,[55] the General Claims Commission examined the claim of Mexico with regard to two assaults on the Mexican consul in El Paso Fransisco Mallen committed by the deputy constable of El Paso in 1907. The delinquent motivated his act by the refusal of the government of the USA to extradite the delinquent's brother-in-law. In its analysis of both assaults, the Commission made a clear between two of them: whilst the first one for which direct responsibility of the respondent State was not alleged and which was characterized just as "a malevolent and unlawful act of a private individual who happened to be an official" (for which he was "neither punished," nor "warned that he would be discharged as soon as a thing of this type happened again")[56] and the USA is only responsible for the denial of justice;[57] the second one by the deputy constable was qualified as "misusing his official capacity"[58] and "the act of an official."[59]

[54] Ibid. P. 1863.

[55] *Francisco Mallen (United Mexican States) v. U.S.A.*, Decision of 27 April 1927, General Claims Commission. Reports of International Arbitral Awards. Vol. IV. Para. 1.

[56] Ibid. Para. 4.

[57] Ibid. Para. 5.

[58] Ibid, Para. 5.

[59] Ibid. Para. 7.

This case is remarkable not only because the award utilizes the term "special protection" (Przetacznik, 1983, p. 302), which in practice often seems identical to that of "international protection," but also establishes special prerogatives that stem from treaty and customary law and are endowed to foreign diplomats, as well as the duty to "exercise greater vigilance in respect to their security and safety."[60] This case is also important from the international legal responsibility perspective, since it touches upon the issues of State responsibility for OIPP and distinguishes between acts of State agents perpetrated as private persons (in this case State can be held responsible for the denial of justice) and those committed in official capacity (in such instance State is additionally responsible for the act itself, for it is the one of State). This conclusion coincides with the position of the ILC that commented upon *Mallen* in its commentaries to the 2001 ILC Articles: specifically, the ILC states that "[w]here… a person acts in an apparently official capacity… the actions in question will be attributable to the State,"[61] with the latter one being attributable to the State.

In *Chapman (USA v. Mexico)*, the General Claims Commission delved into the incident that occurred in 1927 when the consul of the USA in Puerto Mexico William Chapman had been assaulted.[62] It happened against that background of the public debate regarding the trial of Sacco and Vanzetti (the circumstances of the case of Sacco and Vanzetti are well-illustrated in the study of Justice Felix Frankfurter: see Frankfurter, 1927). Before the execution of Sacco and Vanzetti, the anonym sent a letter with the threat to blow the consulate and all American diplomats and consuls in Latin America, if Sacco and Vanzetti were executed. The consul warned of this fact the authorities of Puerto Mexico and requested to reinforce security measures of the consulate, but no reaction followed, and a few days later the unidentified individual

[60] *Mallen*. Para. 6.

[61] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Report of the International Law Commission on the Work of Its Fifty-Third Session. A/56/10. Yearbook of the International Law Commission. Vol. II. Part Two. 2001. P. 42.

[62] *William E. Chapman (U.S.A.) v. United Mexican States*. Decision of 24 October 1930, General Claims Commission. Reports of International Arbitral Awards. Vol. IV. P. 633.

entered the consulate and shot at the consul.[63] The police could not find the assaulter. The arbitration found that the consul could count on special protection given the existence of a serious threat to his security and duly informed the authorities of the receiving State about this fact,[64] with his request to provide additional protection qualified by the arbitration reasonable.[65] The Commission qualified the delinquents as insurrectionists[66] and, whilst citing its previous jurisprudence,[67] pointed out that the receiving State should undertake necessary measures to protect foreigners (diplomatic agents included) from attacks by such insurrectionists. Moreover, the arbitration made a reference to *Mallen* and established the inability of the receiving State to ensure effective protection of the consul, qualified the violation of international law and ruled that Mexico should pay reparations.[68]

Summarizing this jurisprudence, it can be inferred that in all these three cases a receiving State violated its obligations by: 1) not taking appropriate measures to protect the person of IPP under diplomatic law; 2) denying justice through leaving delinquents unpunished.

The approach to distinguish between the obligation to ensure personal inviolability of IPP and the one to bring assaulters to justice, which is supported by panels in *Kellett*, *Mallen*, and *Chapman,* correlates with the reasoning presented by the ICJ in *Ukraine v. Russia* and two other cases of the International Court.

The *Borchgrave (Belgium v. Spain)* case[69] related to the disappearance and a mysterious death of the Belgian diplomat Baron de Borchgrave. The applicant State (Belgium) requested the Permanent

[63] Ibid. P. 633.

[64] Ibid.

[65] Ibid. P. 636.

[66] Ibid. P. 637.

[67] *G.L. Solis (U.S.A.) v. United Mexican States*. Decision of 3 October 1928. General Claims Commission. Reports of International Arbitral Awards. Vol. IV. P. 362; *Bond Coleman (U.S.A.) v. United Mexican States*. Decision of 3 October 1928. General Claims Commission. Reports of International Arbitral Awards. Vol. IV. P. 366.

[68] *Chapman*. P. 640.

[69] *Borchgrave (Preliminary Objections)*. Judgment of 6 November 1937. Permanent Court of International Justice. 1937 P.C.I.J. Publications. Series A/B No. 72.

Court of International Justice to hold Spain responsible: 1) for the death of Baron de Borchgrave; 2) for insufficient measures to apprehend and punish the perpetrators, which resulted in the denial of justice.[70] Although the Permanent Court did not deliver a judgment on the merits due to the discontinuance of the case, the very fact that during the proceedings a party to the dispute distinguished between the two above-mentioned obligations for violation for which a State can potentially be held internationally responsible seems crucially important.

In *United States Diplomatic and Consular Staff in Tehran (USA v. Iran),*[71] the ICJ analyzed the events when 63 members of the USA diplomatic and consular personnel were taken as hostages by Islamist fundamentalists during the 1979 Islamic Revolution. The radicals' acts were supported by the Supreme Leader of Iran Ajatollah Khomeini. The USA claimed that Iran violated its obligations arising from a series of international conventions, including, *inter alia*, the 1961 Vienna Convention (including Art. 29) and the 1973 IPP Convention (particularly, Art. 2, 4 and 7), and asked the Court to adjudicate, amongst other things, that Iran should ensure the release of the hostages and afford them full protection under international law[72] and apply the principle *aut dedere aut judicare* to those responsible for the crimes against the diplomatic and consular personnel.[73] The Iranian government refused to participate in the proceedings and present pleadings to the Court. The case is noteworthy due to the fact that whilst the 1961 Vienna Convention was recognized as a basis for exercising its jurisdiction in accordance with Art. 1 of the 1961 Optional Protocol, the question whether it had jurisdiction under the 1973 IPP Convention was not entertained by the Court, since there were other sufficient bases for jurisdiction.[74] In its judgment on the merits, the Court found that by its continuous failure to take action against the radicals Iran violated certain provisions of the 1961 Vienna Convention,

[70] Ibid. P. 163.

[71] *United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*. Judgment of 24 May 1980. International Court of Justice. I.C.J. Reports 1980.

[72] Ibid. Para. 8. P. 7.

[73] Ibid.

[74] Ibid. Para. 55. P. 28.

including Art. 29 that reflects customary international law. Besides, the Court established that the government of Iran had not taken actions to release the hostages, and, since it approved the acts of the radicals, it translated such unlawful acts into those of Iran.[75] Hence, the Court held Iran internationally responsible and required to take all steps to redress the situation, terminate the detention of the personnel as hostages, and provide them with necessary means of leaving; the Court also decided that Iran should pay reparations for the violations concerned.

The analysis of this case leaves no doubt that, like in *Kellett*, *Mallen*, *Chapman* and *Borchgrave*, the judicial organ draws the line between the two obligations: the first one is to ensure personal inviolability of IPP from assaults (that is why the reference to Art. 29 of the 1961 Vienna Convention was made, the violation of which was subsequently established by the Court); the second obligation (explicitly not covered by the Court) is to bring the delinquents to justice, but, notwithstanding the apparent denial of justice on the part of Iran in this case, the Court after refusing without explanation to establish jurisdiction based on the 1973 IPP Convention did not delve into it thereby inviting us to ask a question "why?" It seems that the answer should be the following.

Since the Court qualified the acts of the radicals (initially non-State actors) as those of Iran, with the 1973 IPP Convention not applicable to acts of States, it preferred to adjudge the dispute exclusively within the framework of diplomatic law. Given the fact that the customary norm proscribing the denial of justice is codified in Art. 3, 4 and 7 of the 1973 IPP Convention, the Court whose jurisdiction was confined to specific international treaties (the 1973 IPP Convention excluded) could not examine the issue of the denial of justice under customary international law (as compared with *USA v. Iran*, in *Borchgrave* the Permanent Court was not so constrained from the viewpoint of applicable law).

To recapitulate, the following remarks can be made. States can bear international legal responsibility in four situations:

1) if OIPP is a war crime committed by a State agent;

[75] Ibid. Para. 74 ("[T]he approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State").

2) if OIPP is a war crime committed by a private person (non-State actor) whose acts were attributed to the State backing such person through the effective control test established by the ICJ in *Nicaragua v. USA* and codified in Art. 8 of the 2001 ILC Articles;

3) if OIPP is an ordinary crime committed by *any* person (irrespective of its status as a State agent or a non-State actor) and the relevant State:

3.1) failed to undertake necessary measures to ensure personal inviolability of an IPP in violation of the customary norm codified in Art. 29 of the 1961 Vienna Convention; or

3.2) committed the denial of justice in violation of the customary norm reflected in Art. 3, 4 and 7 of the 1973 IPP Convention; but in both cases a State is responsible not for OIPP *per se* but for non-apprehension or non-taking procedural measures envisaged by international law.

## V. Conclusion

The present study unequivocally demonstrates that the problem of responsibility for OIPP is rather complicated and depends primarily upon the international legal qualification of a specific crime.

As it was established, OIPP can be categorized into ordinary crimes and war crimes, with different parameters of responsibility that can be individual criminal responsibility and/or international legal responsibility.

When it comes to OIPP as an ordinary crime, the international legal dimension consists in the obligation of States who participate in the relevant international conventional regime (the 1973 IPP Convention acting as *lex generalis*, whilst the 1994, 1999, and 1997 Conventions being *lex specialis*) to criminalize OIPP in their domestic legislation (with due account to *actus reus* and *mens rea* requirements), to provide for effective penal sanctions thereby observing the *nullum crimen nulla poena sine lege* principle, to establish criminal jurisdiction in accordance with a clearly enumerated set of jurisdictional principles. Statutes of limitation, amnesties and pardons are not prohibited under international law, if they are applied to OIPP as ordinary crimes.

With regard to OIPP as a war crime, it is revealed that in a situation of an armed conflict IPP should be treated as civilians and fall within the category of protected persons. The commission of OIPP as a war crime engenders the right to exercise universal jurisdiction under customary international law and the obligation to exercise quasiuniversal jurisdiction under the "Geneva law." There are no statutes of limitation, amnesties and pardons accepted under international law in respect to OIPP as a war crime.

Both OIPP as a war crime and OIPP as an ordinary one entail individual criminal responsibility *per se*. Nonetheless, the issue of international legal responsibility of States in cases of OIPP is quite controversial. Upon the basis of international jurisprudence and legal teachings, it can be asserted that international legal responsibility can be conferred upon States, when OIPP is a war crime committed by either a State agent or a non-State actor whose acts were attributed to the State backing such person through the *Nicaragua v. USA* effective control test. States should also be held internationally accountable when it failed to undertake necessary measures to ensure personal inviolability of an IPP in violation of the customary norm codified in Art. 29 of the 1961 Vienna Convention, as well as in situations of the denial of justice in violation of the customary norm reflected in Art. 3, 4 and 7 of the 1973 IPP Convention.

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# CRIMINAL LAW AND ENFORCEMENT PRACTICES

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# A Critical Review of the Institute of Multiple Recidivism in the Modern Criminal Law of the Republic of Serbia: The Controversy of the Current Legal Solution and Possible Solutions

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***Abstract:*** After being derogated several times, the institute of multiple recidivism was re-incorporated into the Republic of Serbia's positive criminal legislation with the intention of giving intentional perpetrators of crimes punishable by imprisonment, who were previously convicted at least twice for criminal offenses committed with intent to imprisonment for at least one year, harsher penalties and disabling them from committing criminal offenses in the future. Numerous disputed scenarios required national jurisprudence to find solutions, with the challenges of calculating the criminal range and the level of the lower threshold of the imposed criminal sentence standing out in particular. The observed institute was analyzed primarily through the prism of rationality, justification, and expediency of the current normative solution, within which the author attempted to provide answers to potentially contentious issues. The findings of the conducted research indicated that the new concept of the institute of multiple recidivism is incorrect because the threshold of half the penal range is excessively high and does not leave enough space for the court to objectively weigh the circumstances of each specific case. Furthermore, the findings

suggest that in some cases, an approach based on alternative measures may be a more convenient solution, as well as that the application of the existing legal solution regarding the observed institute is merely legitimate in relation to some categories of perpetrators who are declared "incorrigible." The conducted research concludes that, due to the arguments presented in the paper, there is a high likelihood that the institute of multiple recidivism will again be derogated from the Republic of Serbia's legislation if the provision of Art. 55a of the Criminal Code remains unchanged.

***Keywords:*** recidivism; multiple recidivism; dangerous recidivism; three strikes law; penal policy; sentencing; aggravation of punishment

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## Contents



## I. Introduction

In the positive law criminal legislation of the Republic of Serbia, there are officially two types of recidivism: "ordinary" recidivism prescribed by Art. 55 of the Criminal Code (hereinafter referred to as "CC")[1] and multiple recidivism prescribed by Art. 55a of the CC.[2]

[1] Krivični zakonik [Criminal Code] ("*Sl. glasnik RS*" [Official Gazette of RS], No. 85/2005, 88/2005 — corrected, 107/2005 — corrected, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), in force from 1 January 2006.

[2] Art. 55a of the CC: "For a criminal offense committed with intent, for which a prison sentence is prescribed, the court will impose a sentence above half of the

In addition to the mentioned official sorts of recidivism, the CC also contains a "special" recidivism (it is a term that crystallized in the legal literature, while we do not find its use in the legal text), which is regulated within the provisions of Art. 57, Para. 3 of the CC, which refers to the limits of mitigation of punishment, more precisely as one of the legal reasons that exclude the possibility of mitigation of punishment.

The work aims to critically and objectively examine the current state of affairs regarding the treatment of (multiple) recidivists on the soil of Republic of Serbia, as well as to apostrophize specific problems and doubts that have not been adequately addressed in the theoretical treatment, despite the fact that they appear as alarming in practice. The most robust section of the paper refers to the proposal of concrete solutions regarding the normative regulation of the institution of recidivism and its possible variations, which would solve practical problems and favor the balancing of criminal policy with the views of renowned legal practitioners and the expectations of public opinion, or at least the direction of thinking, which would represent a guiding idea for the rest of the scientific-academic community that will deal with the issue of recidivism. Furthermore, the scientific contribution of the work consists in pointing out that it would be expedient to apply this institute exclusively restrictively, and only about certain categories of perpetrators who are declared as "incorrigible." In relation to such a narrowed field of application, alternative solutions were offered in the direction, at the discretion of the author, of the necessary modification of the current legal provision, one of which would be optional, while the other would have a mandatory character. In addition, the work's scientific contribution comprises indicating at some legislative omissions during the formulation of the provision of Art. 55a of the

range of the prescribed sentence, under the following conditions: 1) if the perpetrator has previously been convicted twice for criminal offenses committed with intent to imprisonment of at least one year; 2) if five years have not passed from the day the perpetrator was released from serving the sentence to the commission of a new criminal act." ["Za krivično delo učinjeno sa umišljajem, za koje je propisana kazna zatvora, sud će izreći kaznu iznad polovine raspona propisane kazne, pod sledećim uslovima: 1) ako je učinilac ranije dva puta osuđen za krivična dela učinjena sa umišljajem na zatvor od najmanje jednu godinu; 2) ako od dana otpuštanja učinioca sa izdržavanja izrečene kazne do izvršenja novog krivičnog dela nije proteklo pet godina."].

CC, as well as problems that occurred in judicial practice until recently when determining the penalty, that is, calculating the penalty range.

## II. *Ratio Legis* of the Institute of Multiple Recidivism and the Expedience of its Reaffirmation in Domestic Criminal Legislation

The Law on Amendments and Supplements to the Criminal Code, enacted on 21 May 2019.[3] introduced changes into domestic criminal legislation that many authors believe lack a valid legal basis (Škulić, 2020a, Kolarić, 2020, p. 212) mainly aimed at significantly tightening the legal penal policy and strengthening criminal law repression, both in the sense of the excessive spread of penal expansionism by prescribing a more significant number of incriminations and the introduction of new criminal offences (Kolarić, 2019, p. 15), as well as with regard to penal populism in the form of raising a special minimum and a special maximum for certain criminal offenses, tightening the conditions for the application of conditional sentences, expansion of the ban on mitigating punishment and finally, the introduction of "capital criminal sanctions" in the sense of life imprisonment. According to all accounts, the presented changes were mostly motivated by "extralegal factors," that is, by the significant influence of populist "marketing campaigns" aimed at collecting political points, as well as by the reactions of public opinion, mostly made up of laymen, which, in general, is particularly sensitive to criminogenic issues included in the mentioned changes, and is therefore subject to "spinning" by the mass media, as a result of which it accepts normative solutions with broad-mindedness, which in practice do not necessarily mean the reduction of crime and the creation of a "utopian atmosphere" in society. In this sense, the latest amendments to the CC have, without adequate argumentation, contributed to the creation of a distinctly "punitive atmosphere" in society, and in the continuation of the text we will focus on a narrower segment of them, which has been significantly modified in comparison with the previous

[3] Zakon o izmenama i dopunama Krivičnog zakonika [Law on Amendments and Supplements to the Criminal Code] ("*Sl. glasnik RS*" [Official Gazette of RS], No. 35/2019), in force from 1 December 2019.

legal solution,[4] while in practice it leads to results that contradict both the basic principles on which criminal law is founded, as well as the general rules of the logic of life.[5]

[4] Article 46 of the Federal Republic of Yugoslavia's Criminal Code, titled "Aggarovation of the punishment in case of multiple recidivism," stipulated:

(1) For a criminal offense committed with intent for which a prison sentence is prescribed, the court may impose a stricter sentence than that prescribed under the following conditions: 1) if the perpetrator was previously convicted two or more times for criminal acts committed with intent to imprisonment for at least one year *and shows a tendency to commit criminal acts* (Italics by J.M.); 2) if five years have not elapsed between the day of the perpetrator's release from serving the previously imposed sentence and the commission of a new criminal offense.

(2) An aggravated punishment may not exceed the double measure of the prescribed sentence or fifteen years of imprisonment, and if a prison sentence of forty years is prescribed, it may not exceed forty years.

(3) When assessing whether to impose a sentence that is more severe than prescribed, the court will consider the relatedness of the committed criminal acts, the motives from which they were committed, the circumstances under which they were committed, as well as the need to impose such a sentence in order to achieve the purpose of punishment.

Krivični zakon Savezne Republike Jugoslavije [Criminal Code of the Federal Republic of Yugoslavia] ("*Sl. list SFRJ*" [Official Gazette of the SFRY], No. 44/76, 36/77 — corrected, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 — corrected and 54/90 and "*Sl. list SRJ*" [Official Gazette of the FRY], No. 35/92, 16/93, 31/93, 37/93, 41/93, 50/93, 24/94 and 61/2001).

[5] The institute of multiple recidivism is conceptualized as a facultative aggravating factor under Montenegro's positive criminal legislation, as it was in previous Yugoslav legislation.

In this regard, Art. 44 of the Montenegro's Criminal Code, titled "Multiple recidivism", stipulates:

(1) For a criminal offense committed with intent for which a prison sentence is prescribed, the court may impose a more severe sentence than prescribed, under the following conditions: 1) if the perpetrator has previously been convicted two or more times for criminal offenses with intent to a prison sentence of at least one year *and shows a tendency to commit criminal offenses* (Italics by J.M.); 2) if five years have not elapsed between the day of the perpetrator's release from serving the previously imposed sentence and the commission of a new criminal offense.

(2) A more severe punishment may not exceed the double measure of the prescribed punishment, nor twenty years of imprisonment.

(3) When assessing whether to impose a sentence more severe than prescribed, the court will particularly consider the number of previous convictions, the relatedness of the committed criminal acts, the motives from which they were committed, the circumstances under which they were committed, as well as the need to impose such a sentence in order to achieve the purpose of punishment.

The primary focus of the work is the institute of multiple recidivism from Art. 55a of the CC. Please note that this is an institute that has been known in the domestic legislation since ancient times. Thus, its beginnings can be found in Art. 52 of the Yugoslav Criminal Code from 1929, which stipulated that "for a person who, in vagrancy, beggary or harlotry, has committed any criminal offense for which they are prosecuted ex officio, the court will issue a verdict that after serving the sentence imposed on them, they must be sent to the labor institute as a danger to public safety, *if they are found to be prone to committing criminal acts* (Italics by J.M.) and fit for work," whereby recidivists, in accordance with Art. 58 of the same code, could be issued with a security measure prohibiting them from performing professions or trades "forever" (Gavrilović, 2021, pp. 40, 42). A certain number of authors have already covered the history of the institute of recidivism and its variations, as well as the differences in normative regulation over the years and decades, so we will not delve into a deeper chronological analysis of the observed institute at this point (Đokić, 2019, pp. 308–326; Miladinović, 1982; Jocić, 2019). Nonetheless, we emphasize that a small number of authors, and under specific circumstances, were favorable to its survival in positive regulations, as evidenced by the fact that the institution of multiple recidivism was never used in practice (Kolarić, 2018, p. 82), and that, prior to the recent reaffirmation, it was repeatedly (for good reason) derogated.

From a statistical standpoint, depending on certain variables and parameters of observation (differences in the definition of recidivism, different methods of data collection, greater or lesser accuracy of statistics, different rates of return depending on the type of criminal offence), it is an almost universally accepted viewpoint in the science of criminal law that over half of the total of crime rate falls on returnees, which justifies the global effort to find, at least to some extent, a compromise solution, in contrast to the existing ones that are sorely diametrical.

Krivični zakonik Crne Gore [Criminal Code of Montenegro] ("*Sl. list RCG"* [Official Gazette of the Republic of Montenegro], No. 70/2003, 13/2004 — corrected and 47/2006 and "*Sl. list CG"* [Official Gazette of Montenegro], No. 40/2008, 25/2010, 32/2011, 64/2011 — other law, 40/2013, 56/2013 — amended, 14/2015, 42/2015, 58/2015 — other law, 44/2017, 49/2018 and 3/2020), in force from 2 January 2004.

However, the wide diversity of existing solutions in different countries' legislation is typified by one common denominator: the necessity for a specific and more powerful social reaction towards returnees, because they are, in theory, more hazardous to society than other delinquents (Zlatarić, 1968). We assume that the aforementioned denominator was the leading motive of the Ministry of Internal Affairs when submitting the initiative for amending the Criminal Code, which resulted in the fact that, a decade and a half earlier abandoned idea of the need for stricter punishment of multiple recidivists, was "resurrected" in a somewhat modified form, whereby these, at first glance, marginal modifications sparked lively debates that are still ongoing.

The *ratio legis* of the recent CC amendments appears to be particularly controversial, primarily with regard to the incorporation of the "new" Art. 55a, which (re)introduced the well-known institution of multiple recidivism into domestic legislation, though dressed in new clothes, like a "new suit of an old man," which is disputed both in terms of the legislator's intention when reaffirming the subject institute, as well as about its normative structure. When it comes to the first aspect, the legislator, most likely guided by the unscientific attitudes of public opinion and the general socio-political climate, found it necessary for the domestic penal policy to acquire a pronounced repressive component, among other things, in the form of stricter punishment for returnees and habitual offenders, and is, according to the American "*three strikes approach*" (Škulić, 2020a), the criminal legislation of the Republic of Serbia was unjustifiably "enriched" with a long-abandoned institute, which was not applied even when, in the opinion of many, it was more justly designed.

This approach of the legislator is disputed on several grounds. Firstly, the question arises as to whether capital punishment, in the first place in terms of long-term deprivation of liberty, necessarily guarantees a reduction in society's crime rate? There are numerous examples from history, starting with ancient legislation, which unequivocally indicate that the emphasized retributive approach and draconian punishments in practice do not produce the expected results, which is the reason

why they have been mostly abandoned in modern times. The same applies to the "three strikes system" which is currently used in a small number of legislations on the soil of the United States of America where it was initially created, with a tendency to be completely excluded in the near future (Škulić, 2020b, p. 38).[6] In this sense, a kind of social retaliation against the defendant who has a greater degree of conflict with the foundations of the legal order, in the sense that the defendant deserves a stricter punishment for each new delict than the previous one, and that the fear of stricter incrimination will "prevent" him and a drastically heavier punishment than the previous one "heal" him, could be portrayed as a comparison according to which giving a much stronger therapy to the patient compared to the originally prescribed or slightly enhanced one would, as a rule, result in his healing from the disease, which is certainly not the case.[7]

It is necessary to look at the problem of recidivism from a different perspective and keep in mind the bigger picture. Recidivism *per se* certainly represents a form of "social cancer," as one of the most complex and dangerous social phenomena, which is contributed by many factors such as an unsatisfactory social and economic situation in society, factors of social pathology, neglect of the early stage of "cancer," etc. (Soković

[6] Quite a number of domestic and foreign authors wrote about the marked controversy and harmfulness of the "three strikes system," which resulted in the fact that this institution of drastically tightened punishment of recidivists and habitual criminals was practically abandoned, even on home soil. The aforementioned claim, among others, was emphasized in several works by the respected leader of Serbian legal thought, Milan Škulić.

[7] According to some studies, criminal justice policies that are based on the belief that "getting tough" on crime will reduce recidivism are without empirical support. They suggest that imprisonment and other criminal justice sanctions should be used for purposes other than reducing re-offending (e.g., incapacitation of dangerous offenders, denunciation of prohibited behaviour). They also conclude that the ineffectiveness of punishment strategies in reducing recidivism strengthens the need to direct resources to evidence-based alternative approaches, and that research-based offender rehabilitation programs offer such a viable alternative for reducing recidivism.

*See*: The effects of punishment on recidivism. Available at: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pnshnt-rcdvsm/index-en.aspx [Accessed 02.06.2023].

and Bejatović, 2009, pp. 33–39).[8] We believe that the key to the proper treatment of society towards recidivism is contained in the mentioned factors, as opposed to the current solution, which consists in the simple abstraction of "incorrigible" individuals from the community. Namely, the majority of recidivists are anti-social, or rather socially maladjusted persons, who commonly live in supremely poor financial circumstances, whereby they usually originate from dysfunctional families and fail to get an education and/or find employment. Bearing in mind the above, upon their return to the social environment, they do not have a significant number of options left to provide basic existential resources (Ashworth, 2010),[9] which is significantly affected by circumstances as a distorted state of consciousness caused by long prison sentences and contact with the rest of the prisoners often convicted of significantly more dangerous crimes. In this sense, the primary focus should be on eradicating factors that favor the creation of recidivists, i.e., on paying more attention to children (Cacho et al., 2020).[10] We singled out children as a special category, since when we talk about juvenile delinquency, the results of some researches show that almost 1/3 of reported crimes remains outside the official reports and does not appear before the court due to the fact that the perpetrator did not reach the age of 14 at the time of

[8] On the criminological characteristics of juvenile offenders and the social reaction to juvenile delinquency.

[9] The literature states that the highest percentage of recidivism falls on the lightest crimes, as a rule of property nature, that is, that a higher rate of return is associated with crimes that are at the bottom of the scale of negative evaluation. In this sense, the progressive increase of the punishment for each newly committed criminal act represents an unjustified social and ethical reprimand towards the perpetrators who are not in the upper part of the scale of social danger.

[10] At the international level, a series of extensive studies devoted to the problem of juvenile delinquency in the context of recidivism have been conducted, especially from the aspect of personal characteristics and social factors whose cooperation favors the creation of repeat offenders among minors, and the importance of recognizing specific personality traits that indicate a high probability of creating recidivists among adolescents. Studies have also indicated the need for appropriate mechanisms to effectively combat recidivism, such as the introduction of specific educational intervention programs in juvenile centers, with a dual approach based on the reduction of risk factors and the enhancement of protective factors.

the commission of the crime (Šušak and Bačanović, 2020).[11] Also, the principle of the opportunity of criminal prosecution is often applied to persons who are between 14 and 18 years old at the time of the commission of the crime, in the sense of Art. 283 of the Code of Criminal Procedure in connection with Art. 58 of the Law on Juvenile Offenders and Criminal Protection of minors)[12] and minors who from an early age exhibit characteristics that indicate potential socially-conflict behavior. Furthermore, given the empirically confirmed fact that children who commit criminal acts in groups frequently become recidivists and have a negative criminological prognosis (Šušak and Bačanović, 2020), it follows that, taking into account the factors presented above, much greater emphasis should be placed on the preventive function of criminal law, compared to the existing repressive-retributive solutions, which do not work as intended. We believe that by responding to critical situations in a timely manner and properly guiding them from a young age, later criminogenic escalation would be significantly avoided, and the number of "incorrigible" members of the social community, who should be assigned/provided with special treatment in any case, would be reduced.

However, if society fails to respond appropriately during this early phase, the question of how to repair the consequent "damage," that is, how to return an individual who has gone astray to the path of legality and respect for rights, emerges. Intimidation in the form of introducing new incriminations and draconian criminal sanctions, with the goal of discouraging illegal behavior, did not prove to be particularly effective, as evidenced by numerous historical examples, e.g., "Any thief... who is caught stealing for the third time shall be sentenced to death."[13] The

[11] Art. 47, Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica [Law on juvenile perpetrators of criminal offenses and criminal protection of minors] ("*Sl. glasnik RS"* [Official Gazette of RS], No. 85/2005), in force from 1 January 2006.

[12] Zakonik o krivičnom postupku [Criminal Procedure Code] ("*Sl. glasnik RS"* [Official Gazette of RS], No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 — decision of the US and 62/2021 — US decision), in force from 1 October 2013.

[13] Art. 78, *Zakonik Danila prvog knjaza i gospodara slobodne Crne gore i brdah, ustanovljen 1855. godine na Cetinju* [Code of Danilo, the first prince and lord

answer is certainly not to be found in the exponential increase in fines on the perpetrator's account for each subsequent mistake that, in general, cannot be fully attributed to him due to the circumstances presented, and which punishments would ultimately result in the perpetrator's complete marginalization, in the sense that he is basically "sentenced to spend his entire life in prison." Contrary to the dominant utilitarian theories according to which a rigid penal policy is socially useful because it contributes to the reduction of crime and the elimination of a significant number of perpetrators of criminal acts (Milevski, 2014). We believe that an approach based on resocialization is a fairer, more expedient and, above all, more humane solution, both for the individual and for society, at least when it comes to perpetrators who belong to the "corrigible" category (Grgur, 2017, p. 259).[14] In truth, the treatment of the individual's reintegration into social flows can be extremely complex, long-lasting and financially exhausting, while positive results are not guaranteed. Nonetheless, a larger percentage of working and socially useful individuals is in the wider social interest, compared to the current "overcrowding" of prisons (Škulić, 2017),[15] which, among other things, mostly represents an expense (with possible lost profit) for the state (Hynes, 2009).[16] In this regard, security measures such as protective supervision after serving a prison sentence,[17] as contained

of free Montenegro and the hills, established in 1855 in Cetinje]. Available at: https://www.njegos.org/petrovics/danzak.htm [Accessed 14.03.2023]. (In Monten.).

[14] Of course, in judicial practice the situation is far more complex, and it is necessary to take into account a whole series of circumstances. For additional arguments about the existence of significant deficiencies in the existing system of execution of criminal sanctions, ineffectiveness of (short) prison sentences and the advantages of applying alternative measures when it comes to recidivists.

[15] There is an old anecdote that once "judges emptied prisons," and now, in relatively modern times — "judges fill prisons."

[16] The costs of alternative measures can be twice as low. In support of the above statement, we cite a comparison of the necessary costs for the implementation of the "*Drug Treatment Alternative-to-Prison program (DTAP)"* in relation to the evaluation of the costs necessary for the stay of the same person in prison in the same interval.

[17] Art. 76, Zaštitni nadzor po punom izvršenju kazne zatvora [Protective supervision after the full execution of the prison sentence], Kazneni zakon [Criminal Code] NN 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, in force since 31 July 2021.

in the Croatian Criminal Code, may be more appropriate than certain security measures that essentially amount to prolonged deprivation of liberty after serving a prison sentence, such as exist in the German, Italian and some other foreign legislations (Stojanović, 2015, p. 317; Đokić, 2020; Zlatarić, 1968).[18]

As a transitional category, we single out "conditionally corrigible" perpetrators of crimes against sexual freedom for whom the legislator has assessed that there is a possibility of social reaffirmation. Namely, in the Law on Special Measures for the Prevention of Criminal Offenses against Sexual Freedom against Minors,[19] known to the public as "Marija's Law," Art. 2 states that the purpose of the law is to *prevent* perpetrators of criminal offenses against sexual freedom against minors to continue committing these crimes. Although we are talking about the perpetrators of crimes to which the non-scientific part of the public is particularly sensitive, to the extent that the execution of "capital criminal sanctions" is massively demanded for them, the legislator is of the opinion that these do not represent the most serious crimes, and that the survival of this category of perpetrators in the social community is possible. At the same time, from Art. 5, which is entitled "Prohibition of mitigation of punishment and parole and non-obsolescence of criminal prosecution and execution of punishment," it follows that a special focus is directed at preventing recidivism in the commission of criminal acts against sexual freedom against minors (Milić and Dimovski, 2020, p. 61), which is supported by the fact that Art. 7–15 of the law prescribe special measures, special obligations and keeping special records, which indicates a serious approach, both in terms of control and supervision over the subject group of perpetrators and in terms of their gradual reincorporation into society.[20] Given the much

[18] This claim is bolstered by the fact that the measure of preventive detention (Ger. *Sicherungsverwahrung*) regulated by § 66–67 StGB, ranks among the most contentious and often criticized criminal sanctions in German criminal law.

[19] Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima [Law on special measures to prevent the commission of criminal acts against sexual freedom against minors] ("*Sl. glasnik RS*" [Official Gazette of RS], No. 32/2013), in force from 8 April 2013.

[20] The application of special measures to prevent the commission of crimes against sexual freedom against minors is regulated by the provisions of Art. 58–61

lower degree of social danger, we believe that a similar, even less rigid, model could be applied to the previously defined category of "corrigible" perpetrators of criminal offenses, and that the imposition of long-term prison sentences for minor criminal offenses, in a situation where the lawmaker has already decided to provide a conditional "second chance" to perpetrators who objectively deserve an incomparably higher degree of social-ethical reprimand, represents an extremely disproportionate and unfair legal solution. The above confirms the shortcomings of the new amendments to the CC in the domain of the purpose of punishment (Ilić, 2019, p. 127; Đokić, 2019, pp. 308–326), in the sense of neglecting guilt as a subjective element of a criminal act.

The third category consists of persons who have become "incorrigible" through original (congenital) or derivative (acquired) means (Nikolić-Ristanović and Konstantinović-Vilić, 2018, pp. 227, 230).[21] By the first, we mean people who have displayed psychopathic, sociopathic, and similar traits since childhood, for which no known medical treatment has yielded results, and who cannot be effectively controlled and prevented from committing criminal acts without some form of social distancing. Since it is not a case of insane and mentally ill people who could be placed in a "classic" health care institution, it is proposed as a solution that: "Rapists, murderers, psychopathically

of the Law on the Execution of Extrajudicial Sanctions and Measures (*"Official Gazette of RS,"* No. 55/2014 and 87/2018), in force from 23 May 2014.

[21] The typology in terms of the classification of criminal perpetrators into "corrigible," "conditionally corrigible" and "incorrigible" delinquents is given graphically and exclusively with the aim of highlighting the illegitimacy of the extensive and mechanical application of the institution of multiple recidivism, i.e., on the necessity of narrowing the field of an application exclusively to the so-called "lost" cases in which the degree and quality of the criminal wrongdoing manifested through a longer time interval justifies, moreover, it conditions a highly repressive criminal law reaction that objectively could not be embodied in a milder form. Furthermore, this typology provides a starting point that should be improved, and the criteria for exact classification into one of the proposed groups should be clarified in future works. Also, it represents a guiding idea in the direction of adapting the criminal law reaction to perpetrators who deserve varying degrees of social-ethical reprimand depending on the specific situation, i.e., defending with mechanical treatment that fundamentally contradicts the principles of justice and proportionality, by putting all delinquents "in the same basket," ignoring the specifics of each specific case and other important factors.

structured, it is best to isolate them from the normal environment for as long as possible, so that they do not get the opportunity to commit such monstrous acts, and that they do not "feel the social reaction through their stay in prison," but in specialized institutions, and in that way, even physically, they will not be able to repeat the crime" (Gracin, 1998). The second subgroup consists of individuals who, due to the influence of a dysfunctional family, trauma (Yoder, Whitaker and Quinn, 2017), social pathology, the struggle for survival and the provision of basic life resources caused by poverty and poor financial circumstances, have developed to such an extent the tendency to commit and professionalism in committing, usually the same or similar, criminal acts, that neither resocialization measures, nor prolonged sentences of deprivation of liberty within penitentiaries are effective. Finally, there is no other option except to completely exclude this subset of individuals from the social community (Hynes, 2009).[22] Equivalent treatment in the form of "lifelong removal from the street" should, in the opinion of certain authors, be applied to persons legally convicted of the most serious crimes against sexual freedom and crimes with elements of violence (murder, rape, etc.), as well as to perpetrators of basic forms of criminal acts with elements of violence if they appear as recidivists (Atanasković, 2019).[23]

## III. Nomotechnical Issues and Doubts

When viewed chronologically, the institution of multirecidivism, as a modality or "strengthened version" of the institution of recidivism,

[22] However, we will leave the claim about the "incorrigibility" of the mentioned category of persons open. Namely, studies have shown that the programs "*Drug Treatment Alternative-to-Prison Program (DTAP)*" and "*Community and Law Enforcement Resources Together (ComALERT)*" can have a positive effect on (non-violent) addicts of psychoactive substances who have previously been convicted multiple times for property crimes, where the treatment costs are twice as much as the costs of incarceration. If the stated thesis turns out to be correct, we believe that legal solutions in the context of recidivism would have to be substantially changed.

[23] We believe that long-term social marginalization has empirically proven to be justified, as a kind of *ultima ratio*, only with regard to the presented third subgroup of perpetrators of criminal acts, given that there is currently no other suitable solution in sight.

has always been accompanied by intense discussions on the question of normative conception, in addition to discussions regarding its legal basis. Numerous structural issues have been explained quite concisely and extensively in the domestic literature, and here, aware of the complexity of the challenge we have embarked on, we will try to focus primarily on aspects that we believe have not been addressed at all or insufficiently, as well as to offer solutions that we believe are expedient.

As stated in the earlier part of the text, the amendments to the CC from 2019 reintroduced the "new-old" institute of multiple recidivism into the criminal legislation of the RS, whereby the *de lege lata* wording of Art. 55a of the CC is extremely unfair, incomplete and insufficiently determined. We present several arguments in support of the aforementioned statement:

(i) the legislator made an illogical transition from an optional aggravating circumstance (which can be justified to some extent in the case of "ordinary" recidivism) to an archaic mandatory mechanism that drastically "ties the hands" of judges, in order to create conditions for harsher punishment. In truth, the judges were never completely "freehanded," because excessive discretionary powers would lead to arbitrariness and arbitrary interpretation of the law. The framework limits, both in terms of punishment ranges and in terms of procedural powers of judges, must be known. Otherwise, anarchy is inevitable. Nevertheless, we believe that in this way the principles of judge's free belief and free evaluation of evidence are significantly limited, whereby the judge is objectively prevented from acting *ex aequo et bono* and making a decision that would correspond to the specific state of affairs. Obviously, the legislator indirectly expressed distrust towards judges in the domain of penal policy, by imposing legislative penal policy to a certain extent on judicial penal policy (Cvetković, 2019, p. 47). Such an approach could be justified in the case of perpetrators prone to committing criminal offenses with a highly developed *modus operandi*, as well as perpetrators of the most serious criminal offenses, but not in the case of persons who we classified in the domain of "corrigible" or "conditionally corrigible" offenders, for whom we propose treatment

based on the application of alternative measures and resocialization,[24] so the normative regulation of recidivism in the broadest sense should be restructured in accordance with the given suggestions.

(ii) we believe that special recidivism in the sense of Art. 57, Para. 3 of the CC should be moved from the provisions concerning the limits of the mitigation of punishment to the provisions regulating the institution of recidivism, as well as that it refers exclusively to the category of "incorrigible" offenders.

(iii) as correctly stated in the literature, it is unclear why Art. 55a does not contain a part that refers to the exclusion of the possibility of judicial mitigation (Jocić, 2019).

(iv) the relationship between "conviction for a criminal offense committed with intent for the imprisonment of at least one year" and the institution of concurrence in the sense of Art. 60 of the CC (Jocić, 2019, pp. 29–36), provision that regulates the sentencing of a convicted person in the sense of Art. 62 of the CC, and the procedure for imposing a single penalty in terms of Art. 552–556 CPC, may be disputed.[25]

(v) in practice, the question of which moment is taken as relevant for the start of the five-year term calculation from Point 2 of Art. 55a of the CC, i.e., how to interpret the wording "dismissal of the perpetrator from serving the sentence" (Jocić, 2019, p. 35),[26] and whether its

[24] Although the present science of criminal law does not regard resocialization as a foundation for more carefully determining the content of criminal law, it is nevertheless given importance as one of the ways of achieving the purpose of punishment. We believe that certain elements of that approach, which are accepted in practice, should be examined when it comes to defined categories of perpetrators. In any case, it would be a fairer and more expedient solution compared to the current one, which equally affects all perpetrators who have met the requirements of Art. 55a of the CC, and disregards some of the most important postulates of criminal law, first and foremost the principle of humanity and the principle of fairness and proportionality.

[25] That the institution of recidivism is incompatible with the procedure for the imposition of a single sentence, clearly follows from the sentence from the judgment of the Court of Appeal in Kragujevac Kž1-483/2020 dated on 4 August 2020: "The provisions of Art. 55 and 55a of the Criminal Code are applied when assessing individual prison sentences, but not when combining sentences or in the procedure for imposing a single sentence."

[26] Sentence from the judgment of the High Court in Belgrade Kž1-234/21 dated on 5 November 2021: "The conditions for imposing a prison sentence on the defendant

meaning can be identified with the phrase "sentence served" in the sense of Art. 55 of the CC, is particularly controversial. We are of the opinion that it would be expedient to take as relevant the release of the perpetrator from serving the last sentence (second in order or later) in a series of sentences that meets the requirements of Point 1 of Art. 55a of the CC.[27]

(vi) some authors believe that both treating recidivism as a mandatory aggravating circumstance and prescribing a ban on judicial mitigation of punishment are meaningful, but that it is excessive and unjustified for both effects to coexist within the provisions of Art. 55 of the CC, and that it would be more principled for the legislator to opt

above half of the range of the prescribed sentence are not met when the defendant committed the criminal acts while serving the prison sentence, and not after serving the prison sentence."

[27] With the current normative solution, several disputed situations may arise. *Exempli causa*, if an offender who was released from serving a sentence that meets the conditions from Point 1. was sentenced to a single sentence of one year in prison for two almost trivial criminal acts committed with intent before he began serving his sentence (by applying the rules on accrual or in a special procedure for the imposition of a single sentence), and he commits a minor type of the criminal offense of aggravated theft within a few days after his dismissal by brazenly stealing a wallet from someone's purse, the value of which exceeds the amount of 5,000 dinars (if it is determined that the value of the wallet is less than 5,000 dinars or that the perpetrator went after it to obtain a small financial benefit, it is a criminal offense of petty theft, evasion, and fraud under Art. 210 of the CC, for which a significantly lighter punishment is prescribed, and the perpetrator could, in the last resort, be sentenced to a prison sentence of six months, taking into account the threatened punishment for the criminal act in question), he would be sentenced to a prison sentence of several decades. In the specific case, there was no opportunity to attempt his "repair" and resocialization, because the alternative measures proposed in the previous part of the text were not applied, nor does his level of guilt in the specific case deserve treatment with almost "life imprisonment." Furthermore, the section "dismissal of the offender from serving the imposed sentence" appears vague, as it is not determined which punishment it is. For example, suppose a criminal offender previously served two one-year jail sentences for intentional offenses and does not pay an RSD 5,000 fine after four years. In that case, the fine will be replaced by five days of incarceration. Assume he commits the above-mentioned minor criminal theft after three years. Does the five-year term count from the release from serving a sentence that meets the conditions under Point 1 or from the release from serving any sentence imposed on him after he has previously met the conditions from Point 1? We believe that the first solution would be more in line with the principles of fairness and proportionality.

for one of them, instead of cumulating them within the same provision (Ćorović, 2020).

(vii) some authors, who agree that the current legal solution is far from idyllic, state that the rules for assessing punishment and generally imposing criminal sanctions in the Criminal Code could have been far more radical and much worse modified, i.e., that the domestic criminal legislation could have been additionally impaired by the introduction of concise guidelines for choosing a criminal sanction and sentencing guidelines (Škulić, 2020a, p. 24), in the form of a "point system," within which the legislator determines a list of circumstances that can be taken as mitigating or aggravating, leaving the role of a "mathematician" for the judge to perform the appropriate "addition and subtraction" and formally impose the penalty resulting from such "calculation operations." In this sense, they believe that our country "did well," considering that a similar system was also in place in Macedonia for a time, until the *lex specialis* Law on determining the type and measuring the amount of punishment was repealed as unconstitutional by the decision of the Constitutional Court of Macedonia (Škulić, 2018, pp. 45–54). However, the fact that "it could have been worse" does not justify the current state of affairs in the domestic legislation, in the sense of a hasty reaffirmation of a long-abandoned institute without a particular basis, which was carried out in a rather clumsy manner, which is the reason why many call the provision of Art. 55a of the CC "strange and unusual" (Škulić, 2018). Aware of the fact that the reincorporation of the institute in question caused significant damage, as well as that "it can always be worse," we expect that soon "history will repeat itself," that is, that the institute of multiple recidivism will be derogated again in the near future, or at least substantially changed.

Taking into consideration the shown shortcomings of the current legal formulation, we propose several corrections:

(i) in relation to the perpetrators who we declared as "corrigible," for whom extensive analyzes by the competent authorities determined that there is still "hope," alternative measures should be applied, on the basis of which would be the solutions conceived according to the model

presented above from the Croatian Criminal Code and the domestic "Marija's Law" (Jones, 2014, pp. 29–30).[28]

(ii) the author's position is that the existing legal solution regarding multiple recidivism is sustainable, but only as an option and with a limited field of application, and merely in relation to the category of "incorrigible" perpetrators, i.e., people who are prone to committing the same or similar crimes (for which the other type of treatment did not achieve the desired special preventive effects), and who often have a developed *modus operandi*.

(iii) the provision of Art. 55a of the CC should include the section pertaining to the exclusion of the possibility of judicial mitigation of the penalty.

In this sense, the author believes that the amended provision of Art. 55a of the CC should read:

"For a criminal offense committed with intent, for which a prison sentence is prescribed, the court *may* impose a sentence above half of the range of the prescribed sentence, under the following conditions: 1) if the perpetrator has previously been convicted twice for the same or similar criminal acts committed with intent to imprisonment for at least one year; 2) if five years have not passed from the date of the release of the perpetrator from serving *the second or later sentence that meets the conditions from Point 1*[29] until the commission of a new criminal offense."[30] Or alternatively, "For a criminal offense committed with intent, for which a prison sentence is prescribed, the court *will*

[28] Some studies have confirmed that, though there is no evidence that alternative sentencing reduces recidivism, alternative sentencing performs no worse than traditional incarceration measures. Given that alternative sentencing is substantially cheaper, it would be preferable to traditional incarceration measures, at least in this regard.

[29] This refers to the condition that the perpetrator has been convicted two or more times for the same or similar criminal acts committed with intent to a prison sentence of at least one year.

[30] Serb. ed. 1: "Za krivično delo učinjeno sa umišljajem, za koje je propisana kazna zatvora, sud *može* izreći kaznu iznad polovine raspona propisane kazne, pod sledećim uslovima: 1) ako je učinilac ranije dva puta osuđen za *ista ili istovrsna* krivična dela učinjena sa umišljajem na zatvor od najmanje jednu godinu; 2) ako od dana otpuštanja učinioca sa izdržavanja *druge po redu ili kasnije izrečene kazne koja ispunjava uslove iz tačke 1.* do izvršenja novog krivičnog dela nije proteklo pet godina."

impose a sentence above half of the range of the prescribed sentence, *unless the law provides that the sentence can be reduced or if the law provides that the perpetrator can be released from the punishment and the court does not release him from the punishment*, under the following conditions: 1) if the perpetrator has previously been convicted twice for the same or similar criminal acts committed with intent to imprisonment for at least one year; 2) if five years have not passed from the date of release of the perpetrator from serving *the second or later sentence that meets the conditions from Point 1* until the commission of a new criminal offense,"[31] depending on whether the institute of multiple recidivism conceived in this way would be treated as optional or mandatory circumstance.[32]

## IV. Dilemma in Measuring the Penalties and Calculating the Range of Penalties from the Perspective of the Current Normative Framework

After highlighting the disputed aspects of the *ratio legis* of the institution of multiple recidivism and the nomotechnical shortcomings of Art. 55a of the CC, the text will proceed with an analytical account of the current legal solution's controversy in the context of calculating the penalty range and determining the penalty. Namely, for a long period of time it was debatable how to interpret the phrase "above half of the range of the prescribed penalty," since it was unclear how the range is calculated, that is, what constitutes half of the range of the prescribed

[31] Serb. ed. 2: "Za krivično delo učinjeno sa umišljajem, za koje je propisana kazna zatvora, sud će izreći kaznu iznad polovine raspona propisane kazne, *izuzev ako zakon predviđa da se kazna može ublažiti ili ako zakon predviđa da se učinilac može osloboditi od kazne a sud ga ne oslobodi od kazne*, pod sledećim uslovima: 1) ako je učinilac ranije dva puta osuđen za *ista ili istovrsna* krivična dela učinjena sa umišljajem na zatvor od najmanje jednu godinu; 2) ako od dana otpuštanja učinioca sa izdržavanja *druge po redu ili kasnije izrečene kazne koja ispunjava uslove iz tačke 1.* do izvršenja novog krivičnog dela nije proteklo pet godina".

[32] The illegitimacy of the extensive application of this institute is also indicated by the problem of mass incarceration, to which it inevitably leads, and which causes significant consequences for society and the state. *See*: Three strikes, you're out: mass incarceration and the tough on crime rhetoric. Available at: https://kenan.ethics.duke.edu/three-strikes-youre-our-mass-incarceration-and-the-tough-on-crime-rhetoric-february/ [Accessed 15.05.2023].

penalty (Barbir and Stanković, 2020, pp. 105–118).[33] Bearing in mind that the judicial practice on this matter was not uniform, until recently the applied methods of calculating the penalty range led to almost absurd situations. *Exempli causa*, in the case of the criminal offense of murder from Art. 113 of the CC ((Barbir and Stanković, 2020, pp. 105–118), as well as a number of other criminal offenses for which a prison sentence of five to fifteen years is prescribed (e.g., crimes from Art. 250, Para. 4, Art. 292, Para. 3, Art. 293, Para. 3, Art. 294, Para. 3; Art. 313, 314 of the CC, etc.), half of the range, according to one of the recent methods of calculating the range of penalties, represented the legal minimum of the threatened penalty. Doubts were finally resolved by the legal position of the Supreme Court of Cassation established at the session of the Criminal Division held on 11 July 2022 at which the court declared that the range of the prescribed sentence represents the distance from the minimum prison sentence prescribed for a certain criminal offense to the maximum prison sentence prescribed for that crime, and that half of the range from Art. 55a Para. 1, of the CC represents the middle number in that series of numbers, which can be calculated by subtracting the minimum of the prescribed penalty from the maximum, afterward dividing that difference by the number two, and then adding the minimum penalty to that result.[34] According to the stated position, the penalty range represents "the distance from the *minimum prison sentence* prescribed for a certain criminal offense to the *maximum*

[33] The previously adopted solution, based on the linguistic-logical-objective interpretation of the norm, meant that the range was viewed as a mathematical expression — an interval, where half of the range represents the middle of the interval value, which is expressed by the formulation: $Y = X/2 = (Xmax – Xmin)/2 + Xmin$, where Y is the range or value of the interval, Xmax is the maximum threatened penalty, Xmin is the minimum threatened penalty, while $Y = X/2$ is half of the range or half of the interval value. In addition to the above solution, it was also suggested that half of the penalty range be calculated by dividing the special maximum penalty by two, that is, half of the penalty range be obtained by dividing the sum of the special minimum and special maximum by two.

[34] Pravni stav o izračunavanju polovine raspona propisane kazne iz člana 55a KZ [Legal position on the calculation of half of the range of the prescribed penalty from Art. 55a of the CC]. Available at: https://www.vk.sud.rs/sites/default/files/attachments/Pravni%20stav%200%20izracunavanju%20polovine%20raspona%20propisane%20kazne%20iz%20clana%2055a%20KZ.pdf [Accessed 28.04.2023]. (In Serb.).

*prison sentence* prescribed for that crime" (Italics by J.M.). Therefore, the Supreme Court of Cassation explicitly declared that the minimum and maximum prison sentence are relevant for calculating the penalty range, from which it follows that the penalty according to the instructions given in this way can be measured in a range above half of the range of the prescribed prison sentence and the special maximum penalty for a specific criminal offense, which leads to the conclusion that in the end the possibility of imposing a fine is ruled out. This further necessarily raises the question of whether the institution of multiple recidivism can be applied to criminal offenses for which a fine or prison sentence is threatened? The legislator did not explicitly state whether the possibility of imposing a fine on persons who have cumulatively fulfilled the requirements of Art. 55a of the CC is excluded in situations where a fine or a jail sentence is alternatively prescribed for a criminal offense. *Exempli causa*, let's imagine that a person who was previously sentenced several times to a prison sentence of at least one year for criminal acts committed with intent, commits the criminal offense of theft from Art. 203, Para. 1, of the CC (for which, alternatively, a fine or imprisonment for up to three years is prescribed) by stealing a movable thing of minor value. On the one hand, it is debatable whether it would be fair to impose a prison sentence of more than one and a half years on such a perpetrator, while on the other hand, it is questionable whether the court could impose a fine on him, given how the minimum of the specified criminal offense is prescribed by law. It is evident that the threatened special minimum (prison sentence) in specific and similar cases would be disproportionate to the expressed degree of social danger. However, based on the linguistic-objective-logical interpretation of the norm, it is clear that the legislator's intention was to impose multi-year prison sentences on multiple recidivists, as a form of "getting them off the street" and reducing the crime rate, as well as the possibility of imposing fines does not come in consideration. This is especially due to the fact that, according to Art. 51, Para. 2, of the CC, if the convicted person does not pay the imposed fine within a set length of time, the fine will be replaced by a supplementary prison sentence of no more than six months in most situations. Apropos aforementioned, the possibility of imposing a fine on multiple recidivists would be a

suitable mechanism to deceive the purpose of criminal sanctions and the meaning of Art. 55a of the CC. In this regard, we feel that it should be explicitly and unequivocally prohibited in the current legislative framework.

The presented position of the Supreme Court of Cassation was undoubtedly a significant step forward, because it eliminated numerous controversies and illogicalities that distinguished the previously used method of calculating the penalty range, which led to unfair situations when determining the penalty that fundamentally contradicted the principle of fairness and proportionality. Nonetheless, we believe that the current legal solution still leads to a series of unfair situations from the standpoint of life logic, in which the subjective component of the criminal offense and the degree of social danger of the perpetrators are sometimes completely ignored, e.g., a multi-recidivist who commits a minor type of the criminal offense of aggravated theft from Art. 204, Para. 1, of the CC (prescribed punishment is from one to eight years in prison) by brazenly stealing a wallet whose value exceeds the amount of 5,000 dinars from someone's purse (Ćorović, 2020, p. 22) would probably be punished more severely than if he negligently took someone's life, according to the threatened punishment from Art. 118 of the CC.[35] In this sense, we are of the opinion that, if the legislator does not accept the recommended approach regarding the greater representation of alternative measures and the provision of Art. 55a of the Criminal Code remain in the RS criminal legislation,[36] it should be modified at least in accordance with the author's suggestions, because the threshold of half the criminal range is irrationally high and does not leave enough space for the court to objectively weigh the circumstances of each specific case.[37]

[35] This further leads to the questions of whether and how legitimate it is to punish the perpetrator much more severely due to his criminal past, whether the basis for a tougher criminal law reaction should rather be sometimes a trivial danger due to criminal acts that a person might commit in the future or an injury to someone else's (sometimes the most valuable) property manifested through a specific criminal act etc.

[36] *See also* Art. 46 of the Federal Republic of Yugoslavia's Criminal Code and Art. 44 of the Montenegro's Criminal Code.

[37] In this regard, as well as in the light of other arguments presented in the paper, the solutions found in the Russian Criminal Code may be more appropriate. *Exempli*

## V. Conclusion

The reaffirmation of the institution of multiple recidivism in the domestic criminal legislation, through the "strange and unusual" provision of Art. 55a of the CC, opened up many issues that are already the subject of many years of intense debate. The lack of basic empathy and the automated ostracism of antisocial multi-recidivists, who do not represent a particular danger and scourge for the community, without considering the circumstances that led to their condition and the possibility of social reintegration, indicate hasty action, superficial and, above all, incorrect dealing with the issue in question. Until possible modification or cancellation the provisions of Art. 55a of the CC, in accordance to the phrase *dura lex sed lex*, we must apply it as it is, with all the shortcomings, illogicalities and contradictions that sometimes flagrantly contradict the basic postulates on which criminal law rests, as well as the fundamental rights of man in the sense of the well-

*causa*, Art. 68 of the Russian Criminal Code, titled "Imposition of Punishment in Case of Recidivism of Crimes ", stipulates:

(1) When imposing punishment in a case of recidivism, dangerous recidivism or especially dangerous recidivism, account shall be taken of the nature and degree of the social danger of the crimes committed earlier, the circumstances by virtue of which corrective influence of the previous punishment has proved to be insufficient, and also the nature and degree of the social danger of the newly committed crimes.

(2) The term of punishment in a case of any recidivism may not be less than one third of the maximum term of the most severe penalty prescribed for the crime committed, but within the limits of the sanction of the appropriate article of the Special Part of this Code.

(3) In the event of any recidivism of crimes where a court of law establishes the mitigating circumstances provided for by Art. 61 of this Code, the term of imposed punishment may be less than one third of the maximum term of the most severe penalty provided for committing the crime but within the sanction of the appropriate article of the Special Part of this Code, while in the presence of exceptional circumstances, provided for by Art. 64 of this Code, a more lenient punishment than the one stipulated for a given crime may be imposed.

*See also*: Art. 18, Para. 1–5 of the Criminal Code of the Russian Federation No. 63-FZ of 13 June 1996, in force from 1 January 1997. The English translation can be found at: https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf [Accessed 25.06.2023].

Cf. Art. 55 and 55a of the Republic of Serbia's Criminal Code with Art. 18 and 68 of the Russian Criminal Code. *See also*: Art. 46 of the Federal Republic of Yugoslavia's Criminal Code and Art. 44 of the Montenegro's Criminal Code.

known acts of the Council of Europe, which should be the foundation of every democratically oriented state. Observed *de lege ferenda*, we anticipate that an approach based on a greater representation of alternative measures and resocialization will take root on the soil of our country in the near future, in contrast to the current extremely repressive approach, which in practice does not produce the desired results, which is why it is increasingly frequently abandoned in the legal systems on which it arose. Furthermore, if the provision of Art. 55a of the CC remains unchanged, with all the deficiencies presented above, there is a high possibility that "history will repeat itself," which means that the provision in question will soon be derogated again, but this time, permanently.

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# The Practical Experience of Financial Investigations in the Republic of Kazakhstan: Problems of Searching and Returning Assets from Abroad

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***Abstract:*** The article discusses the practical experience, prospects and vectors of development of financial investigations in Kazakhstan, the problems associated with the search and return of assets located abroad. The authors focus on the main obstacles faced by law enforcement agencies in the investigation of financial crimes, as well as existing mechanisms for the return of fraudulently acquired funds from abroad. The article highlights examples of successful and unsuccessful mechanisms for asset recovery, provides recommendations for improving the situation in this area.

***Keywords:*** financial investigations; Republic of Kazakhstan; asset search; asset recovery; foreign assets; asset recovery problems; cross-border asset search; international cooperation; anti-corruption; financial fraud; money-laundering

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## Contents



## I. Introduction

The PricewaterhouseCoopers (PwC) research showed that the statistics of economic crimes and financial fraud remains record high, having a significant impact on the financial and economic activities of companies. For instance, in 2020, customer fraud (deception of customers) took the top line and accounted for 35 % of all crimes committed compared to 29 % registered in 2018.[1] The Republic of Kazakhstan has also seen negative effects of the growth of the number of economic crimes. The course of policy taken since the end of the 20th century aimed at accelerating economic development contributes to the rapid development of legislation aimed at keeping a balanced approach in the regulation of private and public interests. However, the legislative

[1] Fighting Fraud: A Never-Ending Battle. PwC's Global Economic Crime and Fraud Survey, (2020). Available at: https://www.pwc.com/hu/hu/kiadvanyok/assets/pdf/PwC_Global_Economic_Crime_and_Fraud_Survey_2020.pdf [Accessed 10.11.2023].

framework responds to all acute social and economic challenges caused by economic shocks and policy development only with a certain lag. In September 2020, the Committee on Legal Statistics and Special Records of the Prosecutor General's Office of the Republic of Kazakhstan noted a significant increase in crimes committed in the economic sphere. Compared to 530 economic crimes registered from January to July 2019, for the similar period from January to July 2020 the number of this category of crimes has increased by at least 65 %, exceeding 870 cases.[2] The discussion around strengthening the combat against economic crimes, development and implementation of new methods for financial investigations as well as criminalization of new types of illegal activity indicate the ongoing changes of this area of law in the Republic of Kazakhstan and represent the main subject reviewed in this study.

It is worth noting that the damage caused by economic crime[3] is significant and affects not only the interests of individual companies and individuals, but also the interests of government agencies. Currently, we can identify the following most discussed problems in the field of economic crime combat:

a. the emergence of new ways and techniques of committing crimes;

b. the legislator's lag in the regulation of modern spheres of the economy;

c. impossibility, in most cases, to provide recognized evidence in support for the legal claim for discovered assets with methods and approaches currently used in financial investigations, for instance, due to corporate nontransparency or other obstacles in removing the corporate veil from unscrupulous market players.

[2] The damage from economic crime in Kazakhstan exceeded 52 billion tenge. Kz.kursiv.media. 2 September 2020. Available at: https://kz.kursiv.media/2020-09-02/uscherb-ot-ekonomicheskoy-prestupnosti-v-rk-prevysil-52-mlrd-tenge/ [Accessed 10.11.2023]. (In Russ.).

[3] According to international experts, the annual difference in the trade turnover of the SCO member states with other countries is about $ 675 bln. It is possible that part of these cash flows goes to criminal purposes, including the financing of terrorism and extremism. The Prosecutor General's Office of the Republic of Kazakhstan press release "On the meeting of the Prosecutors General of the Shanghai Cooperation Organization member states" on 23 September 2022. Available at: https://www.gov.kz/memleket/entities/prokuror/press/news/details/430268?lang=ru [Accessed 10.11.2023]. (In Russ.).

## II. Republic of Kazakhstan's Historical and International Legal Practices in Financial Crime Investigations

### II.1. Historical and Legal Prerequisites for the Institutional Development of Financial Investigations in the Republic of Kazakhstan

At present, the Republic of Kazakhstan has all necessary legal instruments to develop practice of international cooperation in the field of financial investigations. These instruments should be understood as the international law principles and concepts supported by legislator and taken into account when introducing and amending laws that regulate treatment of relationships with cross-border elements. In 2011, Kazakhstan has ratified the Convention of 8 November 1990 "On Laundering, Search, Seizure and Confiscation of the Proceeds from Crime"[4] (1990 Convention), although another important document, namely the Council of Europe Convention of 16 May 2005 "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism" remains unratified.

Despite the existence of strong prerequisites for endorsement of international norms and principles of law, it should be noted that at the moment there are unresolved local legislative problems that block the process of international conventions enactment and application.

For instance, in the process of ratification of Law No. 431-IV dated 2 May 2011, the Parliament of the Republic of Kazakhstan put forward two blocking clauses preventing application of norms of the designated 1990 Convention either directly or indirectly through other legal acts of the country.

[4] Law of the Republic of Kazakhstan No. 431-IV dated 2 May 2011 "On ratification of Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime." Information and Legal System Adilet. Available at: https://adilet.zan.kz/rus/docs/Z1100000431 [Accessed 10.11.2023]. (In Russ.).

Thus, according to the terms of ratification of the 1990 Convention, signed by the President of the Republic of Kazakhstan N.A. Nazarbayev on 2 May 2011:[5]

1. In accordance with Para. 2 Art. 2 and Para. 4 Art. 6 of the 1990 Convention, the Republic of Kazakhstan applies Para. 1 Art. 2 and Para. 1 Art. 6 of the Convention to only those offenses that lead to criminal liability in accordance with the laws of the Republic of Kazakhstan;

2. In accordance with Para. 3 Art. 14 of the 1990 Convention, the Republic of Kazakhstan applies Para. 2 Art. 14 of the Convention only in accordance with its constitutional principles and the basic concepts of its legal system.

Based on the above, the provisions of the 1990 Convention (international law act ratified by Kazakhstan), considered as not prevailing in the hierarchy of legislative acts of the Republic of Kazakhstan. This exemption from the general principle of superiority of international law leads to the abuse of law in the domestic jurisdiction, and hinders the possibility of international cooperation and information exchange in law enforcement mechanisms aimed at combating the laundering of proceeds from criminal activity, their identification, seizure and confiscation.

This circumstance leads to frequent situations where under the currently implemented legal framework as applied by the law enforcement agencies of the Republic of Kazakhstan involved into countering corruption crimes, financial fraud and money laundering, there is a certain lack of effective tools for investigation process if suspicious acts are committed by foreign entities.

In addition, one-sided and selective adoption of the norms of international law leads to complete defenselessness of a foreign investor doing business in the territory of the Republic of Kazakhstan, and reduces the possibility of interference in international disputes involving citizens of Kazakhstan (Nugmanov, 2019). Please note that in this article, we are not talking about absolute figures in the field of economic crimes, but trying to focus on qualitative characteristics of consequences for socially significant institutions of society and

[5] Ibid.

business, since the damage from such a legal policy may significantly affect the country's economy.

However, the ongoing changes in country's economy require that the state recognize that the practice of international exchange in financial investigations and dispute resolution should also develop, even if the legislative framework does not provide for established mechanisms in this area.

In 2022, the market reacted sharply to the lack of effective regulation, as damages from crimes in the sector of investment management and marketing of financial instruments more than tripled from 2019 to 2020. Such dramatic increase could have led to a huge socio-economic crisis and required urgent action from the government, which responded with the adoption of The Concept of Financial Monitoring Development for 2022–2026 (Financial Monitoring Development Concept 2026) approved by Decree No. 1038 of the President of the Republic of Kazakhstan dated 6 October 2022 (Duisenbekova, 2019).

The Financial Monitoring Development Concept 2026 contains detailed outline for the country's past reforms and achievements in improving the mechanisms of cooperation with international bodies and defines prerequisites for significant development of these relations in the near future. It is noted that the regular improvement of national system for countering the laundering of criminal proceeds and financing of terrorism "is evidenced by the trend of improvement of Kazakhstan's indicators in the international index of the Basel Institute of Management for Combating Money Laundering: from 6.27 points in 2019 to 4.87 points in 2021."[6]

Section 2.2 of the Financial Monitoring Development Concept 2026 highlights the main problems and trends in the field of countering money laundering and terrorist financing, among which are:

a. imperfect information exchange and training system in the field of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT);

b. deficiencies of the legal regulatory framework;

[6] The President's Decree No. 1038 dated 6 October 2022. Information and Legal System Adilet. Available at: https://adilet.zan.kz/rus/docs/U2200001038 [Accessed 10.11.2023]. (In Russ.).

c. underdevelopment of analytical work approaches;

d. insufficient automation of data analysis processes;

e. risks of using digital assets in money laundering and terrorist financing;

f. insufficient attention is given to the issues of discovery and return of the proceeds of crime.

The Financial Monitoring Development Concept 2026 aims to change the legislator's approach to the application of international principles and norms of law, as well as to reconsider the organization of international cooperation in the field of countering economic crimes.

It is also worth noting that the problem of return of assets located in foreign countries draws special attention. It is not uncommon that such assets recovery is required in cases of criminal prosecution, as well as in personal bankruptcies and situations involving secondary (vicarious) liabilities.

The fundamental document, the standards of which are recognized by most countries, is the Model Law on Cross-Border Insolvency of 1997, developed by the United Nations Commission on International Trade Law (UNCITRAL). In 2018, a new Model Law on Cross-Border Recognition and Enforcement of Decisions Taken in Connection with Insolvency Proceedings (UNCITRAL Model Law) was adopted. This Model Law belongs to the category of the so-called "soft law" since its development provides for advisory nature in order to implement its conceptual provisions within the system of national legislative acts.

It is important to point that current legislation of the Republic of Kazakhstan does not provide for norms regulating relations arising from the bankruptcy of foreign legal entities. The existing norms do not apply even if a branch, representative office or permanent establishment of a foreign company is located on the territory of the Republic, or all foreign company creditors are Kazakhstani entrepreneurs: it will not be possible to initiate a bankruptcy case on the territory of Kazakhstan. The same applies to the bankruptcy of Kazakhstani companies abroad, since the Republic does not recognize bankruptcy cases of its citizens and legal entities initiated in foreign jurisdictions.

The Guide to the Implementation of the UNCITRAL Model Law for Countries provides for the following recommendations in this respect:

"To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs."[7]

Current Kazakhstan's legislation does not provide for regulatory norms applicable to cases of cross-border bankruptcy or bankruptcy with a foreign element. At this stage, the Republic is in the beginning of the path of changes to its own legislation related to cross-border element in bankruptcy. Such changes could imply a global change of strategical directions defining the principles and norms of national law.

It is important to consider such direction as development of a Conceptual document at the state level, which would focus on those provisions of international conventions or model laws that would have an indisputably positive impact on the development of the legal system of Kazakhstan and at the same time would not undermine the principle of country's sovereignty. When working on such conceptual document, it would be useful to engage leading experts of the Republic of Kazakhstan, as well as to call on for help of legal community interested in the synergy of the economies of Kazakhstan and other countries.

We also propose to consolidate such conceptual document with the Decree of the President of the Republic of Kazakhstan at the state level and consider it as a leading document for the development of the legal field of the country.

However, we should also take into account the tendency of the country's pursuit for globalization of its society and economy. The rapidly developing national financial markets push for improvement of Kazakhstan's legislative framework and escalate the need for regulation in the field of cross-border bankruptcy. Establishing of effective process for asset recovery from abroad is nearly impossible without appropriate

[7] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf [Accessed 10.11.2023].

implementation of main provisions of UNCITRAL Model Law and other principles of international law in Kazakhstan's legislation.

## II.2. The Structure of Financial Investigations Based on the Current Implementation of International Law Principles in Legislative Framework of the Republic of Kazakhstan

Since the Republic of Kazakhstan's current stage of development in the field of financial investigations could be characterized as transitional, it would be of worth to analyze in detail the advantages and disadvantages of the current structure of financial investigations and the new model proposed by the government under the Financial Monitoring Development Concept 2026.

First, we have to note that current legislation of Kazakhstan does not contain a clear definition for the term of "financial investigation." The Criminal Procedure Code of Kazakhstan (definitions set out in Art. 7, provisions of Chapter 8 and Special Part Chapters 23–24) describes more general process of "pre-trial investigation" that, under certain circumstances narrowing the scope of such investigation, coincide with definition of "financial investigation" as per Interpretive Note 2 to FATF Recommendation 30, namely:

"A 'financial investigation' means an enquiry into the financial affairs related to a criminal activity, with a view to:

— identifying the extent of criminal networks and/or the scale of criminality;

— identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and

— developing evidence which can be used in criminal proceedings."

Second, we also note that Section 4.11 of the Concept of the Legal Policy of the Republic of Kazakhstan until 2030 (Legal Policy Concept 2030), approved by Decree No. 674 of the President of the Republic of Kazakhstan dated 15 October 2021) lists introduction of financial investigation into national legislation as one of the tasks within general transition to a three-tier model of criminal proceedings, namely:

"[...] when the time required for full identification, tracking, initiation of freezing and seizure of located abroad money, valuables and property of criminal origin significantly exceeds the reasonable terms for pre-trial investigation, it is necessary to provide for the possibility of opening a separate court proceeding for confiscation — on the basis of verdict that has entered into force in the criminal case raised against crimes that created grounds for such confiscation (institution of 'financial investigation' by analogy with Chapter 16.1 of the Criminal Procedure Code of Estonia[8])."

It should be noted that from the formal point of view Chapter 16.1 of the Criminal Procedure Code of Estonia does not introduce the notion of financial investigation, but provides legal basis for separate court proceedings for confiscation. This position was also supported in commentaries on draft amendments proposal to Criminal Procedure Code approved by Scientific Advisory Council of National Bar Association of Kazakhstan on 9 February 2023. Therefore, we assess the general tendency in respect of institution of "financial investigation" under Kazakhstan legislation as not pursuing introduction of such notion per se as a new separate legal category, but having intention to modify already defined under Criminal Procedure Code of Kazakhstan pre-trial investigation process. This aims to improve national legal framework so that it becomes more prompt and transparent separate proceedings for seizure and confiscation of assets found abroad or proceeds obtained from the crimes that were tried and resulted in a sentence in line with Kazakhstan court proceedings.

To fully understand this structure, here we consider "financial investigation" as a set of measures normally defined within "pre-trial investigation" legal category under a criminal procedure. It is used by specially authorized state bodies to identify, disclose and investigate crimes in cases where such crimes are related to the receipt (acquisition) of funds and (or) other property by criminal means, legalization of funds and (or) assets obtained by criminal means, as well as possession of, the use and disposal of assets and (or) monetary funds for the purpose of

[8] Kriminaalmenetluse seadustik [Code of Criminal Procedure]. Riigi Teataja. Transl. into Eng. Available at: https://www.riigiteataja.ee/en/eli/530102013093/consolide [Accessed 10.11.2023].

financing criminal and (or) terrorist activities, with the aim of further seizure and confiscation of such assets or proceeds obtained from the crime.

The structure of the financial investigation is characterized not only by its main stages, but also by its fundamental principles and objectives.

For instance, one of the main purposes of the financial investigation is to halt further operation of criminal schemes used for movement of assets or proceeds obtained from the predicate crime. Therefore, the tasks of financial investigations can be identified as:

a. identification and disclosure of criminal schemes for obtaining assets;

b. establishment of the circle of persons involved in these criminal schemes and (or) persons who committed certain criminal acts to obtain income (proceeds) in the course of criminal activity;

c. confiscation of such assets and seeking ways for possible restitution of related participants.

It is customary also to consider above tasks as the main stages of financial investigation activities. The leading role in the fight against financial fraud and corruption in Kazakhstan is assigned with the national Financial Monitoring Agency of the Republic of Kazakhstan (FMA), directly subordinated and accountable to the President of the Republic of Kazakhstan. The main activities of the Agency are countering the legalization (laundering) of proceeds from crime and the financing of terrorism, prevention, detection, suppression, disclosure and investigation of economic and financial offenses.[9] The state plans to develop the Agency into the main investigative body for combating economic crimes. For example, due to the Agency's expert efforts, it was possible to complete a complex investigation of controversial monopoly and tax evasion activities in cargo transportation from China to Kazakhstan. The Agency revealed illegal financial activities of the enterprise and setting unjustifiably overstated prices for its services.[10]

[9] The President's Decree No. 515 dated 20 February 2021. Some issues of the Financial Monitoring Agency of the Republic of Kazakhstan. Electronic Reference Test Bank of Legal acts of the Republic of Kazakhstan, as of 26 February 2021. (In Russ.).

[10] Cargo transportation from China: The investigation into the monopolist has been completed. Zakon.kz. 2 February 2023. Available at: https://www.zakon.

In addition, in order to ensure proper monitoring and conduct of financial investigations in regulated financial markets, the Agency for Regulation and Development of the Financial Market of the Republic of Kazakhstan (ARDFM) was established in Kazakhstan in 2019. It aims at ensuring an appropriate level of protection of the rights and legitimate interests of consumers of financial services, contributing to the stability of the financial system and the development of the financial market, as well as compliance with state regulation, control and supervision of the financial market and financial organizations.[11]

With the aim to establish a centralized body for judicial control over interagency cooperation and separation of scope in financial investigations, a special Asset Recovery Committee (ARC) of the Prosecutor General's Office of the Republic of Kazakhstan was established in 2023. It is engaged in the prosecution of perpetrators of economic crimes under the adopted in 2023 Law of the Republic of Kazakhstan No. 21-VIII "On the return of illegally acquired assets to the State", as well as attempts to evade compensation for damages caused. This Committee (and its preceding interagency Commission) was one of the responses of the President of the Republic of Kazakhstan Kassym-Jomart K. Tokayev to the tragic events in January 2022.[12]

Historically, the legal basis for financial investigations in Kazakhstan in the meaning of FATF Recommendations was established in 2009 with adoption of the law No. 191-IV "On Countering the legalization (laundering) of proceeds from crime and the financing of Terrorism." The corresponding part of subordinated normative acts regulates the powers, rights and obligations of governmental bodies, financial

kz/6383198-perevozka-gruzov-iz-kitaya-rassledovanie-v-otnoshenii-monopolista-zaversheno.html [Accessed 10.11.2023]. (In Russ.).

[11] Para. 1 of Chapter 1 of the Regulations on the Agency of the Republic of Kazakhstan for Regulation and Development of the Financial Market, approved by the Decree of the President No. 203 dated 11 November 2019 "On further improvement of the public administration system of the Republic of Kazakhstan." Information and Legal System Adilet. Available at: https://adilet.zan.kz/eng/docs/U1900000203 [Accessed 10.11.2023].

[12] Return of illegally withdrawn funds to Kazakhstan: how the interdepartmental commission works. Zakon.kz. 22 April 2022. Available at: https://www.zakon.kz/6012610-vozvrat-nezakonno-vyvedennykh-sredstv-v-kazakhstan-kak-rabotaet-mezhvedomstvennaia-komissiia.html [Accessed 10.11.2023]. (In Russ.).

organizations and persons involved into monitoring of money transfers in Kazakhstan banking system, whereas FMA was assigned with a role of leading agency responsible for ad hoc international search and discovery of information related to suspicious transactions. Being the designated hub for exchange and analysis of information related to financial data and requests for international assistance within FATF network, FMA has also accumulated a high level of national expertise in carrying financial investigations for purposes of ensuring the protection of the rights of persons affected by the relevant crimes. However, it is worth emphasizing that the regulation framework in the field of economic crimes in the modern world should respond quickly to exponential growth of various non-fiat means of settlement. Moreover, regulatory acts should allow for more flexibility in terms of timely confiscation and return of fraudulently acquired assets to the normal economic circulation under the due process controlled by judicial system of Kazakhstan.

Despite the fact that the provisions of the Law No. 191-IV support fundamental aspects for combating legalization (laundering) of criminally obtained funds and financing of terrorism in Kazakhstan, in practice it is not always possible to respond promptly and efficiently to emerging challenges arising due to more sophisticated schemes of fraudulent or illegal activities.

In their turn, the President and the Government of the Republic of Kazakhstan are rapidly responding to the needs of the market. On 26 January 2021, the President of the Republic of Kazakhstan Kassym-Jomart K. Tokayev made a speech at an expanded meeting of the Government. The question was raised that the fight against the "shadow" economy is not being conducted as intensively as modern realities require, therefore, a policy was announced to reduce the level of the "shadow" sector to 15 % by 2025.[13] In connection with this statement, it was decided to reorganize the work of several governmental agencies

[13] The Speech by President Kassym-Jomart Tokayev at the enlarged meeting of the Government (26 January 2021). Official website of the President of the Republic of Kazakhstan. Available at: https://www.akorda.kz/ru/speeches/internal_political_affairs/in_speeches_and_addresses/vystuplenie-prezidenta-kasym-zhomarta-tokaeva-na-rasshirennom-zasedanii-pravitelstva [Accessed 11.12.2023]. (In Russ.).

involved in countering economic crimes around FMA and ARC, thus creating a special body for monitoring financial crimes, accountable personally to the head of state.

Based on the above analysis of legal norms and reforms, it can be argued that Kazakhstan is striving to resolve the issue of combating economic crimes at both the national and transnational levels.

In the framework of financial investigations, the most problematic stage is the search and confiscation of assets obtained by criminal means. In modern economic environment, in order to search for and then return assets from foreign countries, it is necessary to have legal agreements between the participating countries or other legal mechanisms of cooperation.

This process is usually divided into two aspects:

a. the search for assets obtained by criminal means directly;

b. asset recovery.

When tracing for assets of companies or beneficiaries of businesses, official national registries containing information about property and rights of control are one of the primary sources of information. For example, France provides information about the property of individuals at official request of financial investigation state bodies or state-owned companies when it comes to large amounts of theft. Also, some countries of the Balkan peninsula provide access to their archives and registers for a fee, and in some cases — if supported by a court or court bailiff's order.[14]

However, many island countries and other "gray" jurisdictions could pose a big problem. Thus, even on an official request about the state of the debtor's or an unscrupulous beneficiary money or other account, it takes months for the inquiring side to get an answer. And sometimes the issue could be resolved only after a personal visit to the relevant authority that has the required information in archives kept

[14] Fight against corruption in Eastern Europe and Central Asia. Anti-corruption reforms in Eastern Europe and Central Asia Achievements and challenges 2013–2015, OECD 2016. Available at: https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2013-2015-ENG.pdf [Accessed 11.11.2023].

on the territory of foreign country.[15] As a result, the process of assets search is often time-consuming, ineffective or difficult due to the lack of assistance from the authorities of another jurisdiction or low levels of technical preparedness of their archives.

The problem of assets search frequently could be solved via informal and legally non-binding gentlemen's agreements, especially when the impact of investigated crimes amounts to risk levels comparable to economic security of the entire country or its key industry. As the ability to evaluate future default and recovery rates on debt or more complex financing instruments is crucial for risk management in banking and insurance, many global financial groups tend to conclude information exchange agreements. This aims at receiving industry-wide assistance in monitoring the assets of their clients and borrowers in order to curb corruption, fraud and intentional bankruptcy schemes.

To facilitate gathering information that might be important in investigating corruption crimes, Anti-Corruption Agency (ACA) has adopted the "Rules for encouraging persons who have reported a corruption offense or otherwise provided assistance in combating corruption" approved by ACA Order No. 270 dated 29 August 2023. These Rules are envisaged in Section 3 Art. 24 of the Republic of Kazakhstan Law No. 410-V dated 18 November 2015 "On Countering Corruption" and regulate national practice of rewarding whistle-blowers first introduced in 2015. However, these normative acts are of local nature and do not apply to foreign citizens and branches of legal entities.

Activities related to gathering and systematizing information on assets traced abroad under financial investigation might bring high costs due to the fees of locally outsourced investigation, litigation or other representatives. In case of bankruptcy proceedings, such expenses are effectively covered by creditors via the bankruptcy estate reduction, whereas in criminal proceedings there is no such evident "sponsor" that would bear the burden of compensation of investigation costs.

[15] Resolution of the Board of the National Bank of the Republic of Kazakhstan No. 64 dated 10 April 2019. Registered with the Ministry of Justice of the Republic of Kazakhstan No. 18544 dated 18 April 2019. (In Russ.).

To expedite international search and return of assets obtained by crime, international community ceaselessly develops various forms of cooperation among all countries. There is a number of common ways of joint international activity for assets search and recovery. These also include informal assistance that is similar to the aforementioned information exchange arrangements between large banks. Other forms include obligatory or discretionary disclosure of information at the initiative of the state where the criminal assets are located, joint work of investigative teams, sending legal requests from state bodies for mutual legal assistance, adoption of national legislation that allows for the direct or indirect enforcement of foreign court judgements and orders for compulsory transfer of assets to the territory of confiscating state, issuance, international registration and enforcement of prohibition, freeze, confiscation and extradition orders.[16]

However, comprehensive assistance may have a downside too. For example, in Liechtenstein, Luxembourg and Switzerland, the law requires that law enforcement agencies must notify the persons under investigation that a request was received from another state regarding the availability of assets. After receiving this information, persons under investigation have right to appeal the decision to disclose information about their assets to another state. Most notably, this applies to requests for information on transaction records, statements of bank accounts, or on the presence of arrests of property, liens, collateral and other interim protection claims of third parties. As a result, such requests may lead to investigated person's actions of deliberate withdrawal of assets with the aim to hinder the possibility of establishing their further location (for example, movement of funds to third country), and also greatly increases the time required for financial investigation.

As law enforcement agencies of the Republic of Kazakhstan are currently at the beginning of the development path in matters of organization of international cooperation in the field of countering economic crimes, our international experience implies that factor of informal relationships is positively affecting overall effectiveness and thus should be taken into account when planning and carrying out financial investigations.

[16] Asset Recovery Handbook: A Guide for Practitioners. The International Bank for Reconstruction and Development. The World Bank, 2011.

Although the Republic of Kazakhstan has ratified an impressive number of international treaties, in practice they might be not sufficient in themselves for effective use of international assistance in investigation of economic crimes and financial fraud. The Republic of Kazakhstan currently has a strong momentum of striving for international cooperation, and this suggests that mechanisms of informal assistance in investigation of economic crimes between Kazakhstan and a number of other countries may add even more effectiveness and build a strong foundation for positive practice in this area.

Informal assistance usually consists of any actions taken by official bodies outside the scope of a request for mutual legal assistance (MLA). In some states, provision of such assistance could be considered official as the MLA concept itself is codified into the norms of national legislation related to it, and thus enforced by designated authorities, organizations or administrative bodies.[15] Several UN Conventions, such as Convention against Corruption (UNCAC), Convention Against Transnational Organized Crime (UNTOC) and Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, specifically emphasize the importance of informal cooperation.

However, evidence received during financial investigations via informal international assistance may face obstacles in their legalization for presenting before courts, caused by specifics of foreign national regulations. At the same time, establishment of such informal relations itself may positively affect course of further investigation (e.g., by cutting off the "unfruitful" branches of analysis) and lead to improvement of relations between countries at international level.

In this article, we focus on the model of informal assistance, as the official interaction approach involves agreements and other legal arrangements regulating information exchange at state, supranational and international levels, which could be a slow and bureaucratic process. When planning the investigation strategy, it is worth considering that even if the relevant bilateral or multilateral agreements are in force, preparing and sending official inquiries and responses normally takes significant time and might be costly in terms of investigation specialists' workload. The negative effect from such extension of the timeline at assets search stage may also increase risks of assets transfers toward

jurisdictions that are untransparent, practice poor cooperation or having "not good standing parties" status to the international agreements. This may result in emergence of new cycles of fraud or corruption schemes and further deterioration of value of discovered assets for the purposes of their return or confiscation. Establishing a system of informal interactions and trust between the Republic of Kazakhstan and other countries should be a top priority in the field of financial investigation and asset search.

## III. Regulation of Fraudulently Acquired Assets Tracing, Discovery and Claiming for Confiscation in the Republic of Kazakhstan and Abroad

### III.1. Mechanisms of Legal Regulation of Issues Related to Asset Tracing in the Country and Abroad in the Republic of Kazakhstan

In this article, mechanisms of legal regulation are understood as a system of international treaties, agreements, laws and other normative acts, which could be relied upon in the task of returning of assets acquired in bad faith to their rightful owners.

Taking into account the peculiarities of legal regulation in this area in all countries of the former Soviet Union, we can conclude the following. The period when an unscrupulous entrepreneur tries to withdraw assets or transfer them to another material form is a period of financial difficulties that have already begun, but when investors, shareholders and creditors do not yet know the real state of affairs. This specific period is typically scrutinized if there is a bankruptcy proceeding launched against the company in the future. As it is widely accepted that there is already duly legal regulation of the sphere of bankruptcy, such approach makes it possible to carryout financial investigations with greatest results. However, it is much more difficult to track the period of asset withdrawal in situations when ordinary financial activities are used to masquerade the buildup of fraudulent activities.

Often fraudulent actions can be committed for years, during which the company is seriously damaged. There is also often a criminal

conspiracy or suspicion of it. When investigating the withdrawal of assets by one party, a criminal element in the counterparty's activities may also become clear.[17] "The Republic of Kazakhstan was able to prove fraud by submitting correspondence between Stati and their auditor KPMG, which shows that the financial statements referred to by Stati during the arbitration proceedings were significantly distorted and that KPMG subsequently actually withdrew the audit of these reports," the Ministry of Justice of Kazakhstan stated in its press release on 10 January 2023. The case has become more than significant for the legal world, exposing fraud on the plaintiff's side on a large scale on the withdrawal of assets from parallel arbitration disputes.

The *Stati vs Kazakhstan* case has greatly encouraged Kazakh legislators to ensure transparency of arbitration processes both within the country and abroad in the issue of the return and proof of dishonestly withdrawn assets.

In July 2022, negotiations were held between the Prosecutor General's Office of the Republic of Kazakhstan, the leadership of the US Department of Justice, representatives of the FBI and the World Bank. The result of negotiations of the working group was statement of the First Deputy Prosecutor General of the Republic of Kazakhstan Timur Tashimbayev on establishment of interdepartmental commission for combating illegal concentration of economic resources, one of the main objectives of which is the return of funds illegally withdrawn from the country. In turn, the World Bank's StAR Initiative, whose main mission is engagement in the worldwide initiatives for the return of stolen assets, announced its support for the project with Kazakhstan and intensified work on the issue of finding and returning assets to the territory of the country.

To date, negotiations between the Prosecutor General's Office of the Republic of Kazakhstan and Basel Institute on Governance in Switzerland are actively being discussed. The Institute's International Centre for Asset Recovery (ICAR) is one of the prominent international centers for asset recovery that assist law enforcement agencies in

[17] *Stati and others v. Kazakhstan*. Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (SCC Case No. 116/2010).

various countries in search for assets and investigation of economic crimes. A cooperation agreement was signed at the meeting in April 2023, where the parties agreed on the following:

a. "Analysis and recommendations on improving regulatory legal acts regulating asset recovery issues;

b. Legal and consulting assistance in conducting international investigations and preparing requests for criminal cases related to the return of assets from abroad;

c. Conducting training sessions and seminars on financial investigations and asset recovery, including on obtaining online information from the registers of beneficial owners of companies and real estate owners around the world."[18]

Another important step towards international cooperation was the open statement by France on assistance to the Prosecutor General's Office of the Republic of Kazakhstan in the investigation of criminal cases, the arrest and return of assets of unscrupulous beneficiaries to the territory of the Republic of Kazakhstan. The result of the joint activity of representatives of the Prosecutor General's Office of the Republic of Kazakhstan and their French colleagues was a number of jointly developed procedural norms aimed at proving the guilt of suspects and accused of committing crimes.

It should be kept in mind that in absence of working procedural norms on asset recovery at the international level, the parties agreed that Kazakhstan has legal mechanisms for comprehensive accomplishment of financial investigations in cases where suspects of fraudulent actions are located on the territory of the Republic. Thus, this recognition of Kazakhstan's capabilities provides grounds for temporary transfer of persons from the territory of France for investigative actions and further effective fulfillment of restraint measures appointed by the court under the laws of the Republic of Kazakhstan.

In 2023, Kazakhstan had taken further steps in development of mechanisms of legal regulation for asset search and investigation of financial crimes. On 12 July 2023, the President of the Republic of Kazakhstan Kassym-Jomart K. Tokayev signed the Law "On the return

[18] Swiss experts will help Kazakhstan to return illegally withdrawn assets. Orda.kz. 7 April 2023. Available at: https://orda.kz/shvejczarskie-eksperty-pomogut-kazahstanu-vernut-nezakonno-vyvedennye-aktivy/ [Accessed 11.11.2023]. (In Russ.).

of illegally acquired assets to the state."[19] The purpose of this law is to stimulate return of assets obtained in course of illegal economic activity to the state budget, with the following return of such assets to economic circulation in Kazakhstan. It is important to note that the law aims to eliminate the causes and conditions of illegal asset withdrawal in the future and creates mechanisms to restore social justice in society. One of its main proponents, Deputy Prosecutor General of the Republic of Kazakhstan Ulan Bayzhanov, points out that the key task of the law is for asset owners to realize that they have an option to disclose and return everything voluntarily. Only upon full compliance with this condition, will they enjoy indemnity from all types of liabilities.[20]

Based on the course of developing relations between the Republic of Kazakhstan and other countries, we can conclude that the legislators have chosen the right and weighted approach in this area. Particular agreements concluded between Kazakhstan and countries with the highest concentration of ill-gotten assets will bring more benefits in the practice of asset recovery than participation in general international agreements. However, it is worth emphasizing that despite the chosen approach in favor of separate agreements between Kazakhstan and other countries in the field of financial investigations, decisions on such investigations still need to be enforced.

### III.2. Problematic Issues in Cases of Asset Recovery from Abroad

In the course of financial investigations, foreign consultants and law enforcement agencies face difficulties in recovering established assets.

The asset recovery process can be divided into several main stages:

a. tracking;

[19] Tokayev signed a law on the return of illegally acquired assets to the state. Forbes.kz. 12 July 2023. Available at: https://forbes.kz/actual/officially/tokaev_podpisal_zakon_o_vozvrate_gosudarstvu_nezakonno_priobretennyih_aktivov/ [Accessed 11.11.2023]. (In Russ.).

[20] We are told surnames: "Why don't you take it?" How will assets be returned to Kazakhstan. Tengri News. 13 June 2023. Available at: https://tengrinews.kz/article/nam-nazyivayut-familii-pochemu-ne-berete-budut-vozvraschat-2083/ [Accessed 11.11.2023]. (In Russ.).

b. freezing/arrest;

c. seizure and confiscation.

During the tracking stage, the location and other characteristics of the fraudulently acquired assets is discovered, and a full-fledged financial investigation is carried out to provide the duly recognizable evidence to court proceedings. The main tool at this stage is the establishment of a "paper trail." Most often, a paper trail means documentary confirmation of chains of transactions with assets, first of all movement of funds on bank accounts on the basis of bank statements and payment systems electronic reports, agreements (contracts), minutes of meetings of management bodies of legal entities and other evidence confirming that these actions were undertaken with a criminal intent. Also at this stage, written requests are sent to foreign countries in order to confirm the presence of assets in the possession of suspects.

However, this process is quite time-consuming as processing and preparing responses on written requests may take months. Often there are negligent postponements and unreasonable delays in expected deadlines. But the main problem remains the assessment of the size of the withdrawn assets.

Most often, fraudulently acquired capital is sought in well-known offshore zones, since the search for assets in such zones is well understood and has a clear algorithm. Lawyers specializing in the field of financial crimes are looking for assets in reconstructed accounting records of operational legal entities, holding companies, trusts and the accounts of beneficiaries, but the lion's share of assets can be hidden in property owned through offshore jurisdictions via numerous shell entities incorporated there.

At this point, the stage of freezing and seizure of assets begins. Assets are frozen only by contacting the law enforcement agencies and courts of the relevant state. Many banks meet the law enforcement authorities of foreign countries halfway and agree to freeze financial assets if there are suspicions of the implementation or financing of fraudulent actions under AML regulations, but it is far more difficult to arrest physical assets in the form of real estate objects or luxury movable property. The stage of arrest presupposes, first of all, the impossibility of transferring

such assets in favor of third parties (Izutina, 2018). Strategically, it is frequently more effective to view the arrest and freezing of assets as aggressively sought interim measures, because if it is reasonable to believe that there is a good basis for suspicion of fraud, then it is important to stop further transactions with assets under suspicion at the very beginning and until the formal end of investigation.

In most cases, the seizure of assets requires initiation of criminal proceedings or prosecution in the territory of the country where these assets are located. For instance, in the case of the arrest of the Khrapunov and Ryskaliev bank accounts in Switzerland,[21] it was necessary to organize close interaction of law enforcement agencies of several foreign countries (USA, Switzerland, and Kazakhstan) in order to initiate criminal proceedings on corresponding fraud offences in multiple jurisdictions. The Kazakh side claimed that Viktor Khrapunov and his family participated in a criminal scheme, which resulted in damages inflicted to City of Almaty (Viktor Khrapunov served as Mayor of Almaty from 1997 to 2004). After the family fled with the fraudulently acquired money to Switzerland, they started laundering them through the purchase of real estate ownership and participation in other investment schemes in the United States.

This case is extremely resonant and has a political element, because the embezzlement resulted from the fraudulent sales of City of Almaty property amounted to several hundred million dollars. However, at the moment, investigative actions are still ongoing, which points on difficulties in moving from the stage of property arrest to its seizure and confiscation in multijurisdictional situation.

The third stage of seizure and confiscation of assets is aimed at compensation for damage caused in the course of criminal activities.

It should be emphasized that the return of assets typically viewed as a civil claim. Thus, normally a private lawsuit is initiated against assets in the territory of a foreign state for the assets acquired through corruption. Claims of this kind are often used, including bankruptcy proceedings where case is complicated with fraud offence. In the

[21] *City of Almaty v. Khrapunov*, 956 F. 3d 1129 — Court of Appeals, 9th Circuit, 2020.

framework of criminal proceedings, the refund will be carried out according to the claim of "civil action for damages." which in turn is intended to compensate victims of criminal offenses, accelerate the process and award monetary compensation.

In addition to choosing the claimant's strategy for proceedings, there is also another significant problem at the asset recovery stage. In most cases, law enforcement officers are faced with the fact that the amount of money spent on the use of asset search mechanisms and the implementation of all previous stages is several times higher than the amount by which the seized property (or expected proceeds from its sale on court order) is estimated. Such situation is especially frequent in cases where the claimed property or accounts have been under arrest for many years, which leads to the depreciation of such property and (or) complete loss of its value in principle. Also, the costs of actual asset re-possession may also be estimated in large amounts, especially when it comes to the transportation of property. In some cases, logistics expenses can exceed the value of the property by 2–3 times.

Our analysis shows, firstly, that there are difficulties in establishing the ultimate beneficiary for the assets. In this regard, there is an age-old problem of removal of the corporate veil where disclosure requirements under corporate law are insufficient. This may be due to the use of various companies and structures with the intention to conceal and dis-attach the beneficiary from controlled assets, e.g., for tax avoidance or evasion purposes. In addition, some countries may not cooperate or contact the law enforcement agencies of the Republic of Kazakhstan on the return of assets and (or) provision of information necessary for their identification, or have no interest in such cooperation.

Secondly, there are problems of different legal systems in different countries. Some countries might have their own strict laws and procedures aimed to protect confidentiality or privacy that create obstacles to asset recovery. It is important to understand beforehand what strategy of legal proceedings choice (civil or criminal) would be more advisable to return the assets. In addition, there may be problems with the enforcement of property rights protection in countries where the legal system is not reliable.

Thirdly, the asset recovery process can be delayed in time and become very expensive as a result. This is due to the legal and administrative costs associated with proceedings and asset recovery.

To solve these problems, it is necessary to further improve the legal system of the Republic of Kazakhstan and strengthen international cooperation in asset recovery. In addition, ensuring a proper and sufficient level of transparency of investigations and openness of processes (criminal, civil, arbitration) will help prevent corruption schemes. It is also important to increase awareness and accessibility of information for the public in order to increase civic engagement and support in order to combat fraud and corruption.

## III.3. Mechanisms of Interaction between States and International Bodies as to Recovery of Assets Found Abroad, Safeguards for the Rights of Participants in Financial Investigations

It is worth referring to the methodological basis for processing the return of stolen assets. In most countries, there are mechanisms for assistance from state and international bodies in the field of asset recovery and ensuring the rights of participants in financial investigations, the most important of which is cooperation between states, within which mechanisms for interaction and exchange of information between authorities are established.

Special attention should be paid to the main international agreements in this area:

— The UN Convention on Combating Corruption (UNCAC).

— The StAR Initiative of the World Bank (initiative for the return of stolen assets).

All other agreements and mutual assistance agreements are usually based on the main principles set out in these two documents.

According to the UN Convention on Combating Corruption, the global community has developed the following mechanisms for asset recovery:

a. Measures to control financial institutions for suspicious transactions with bank accounts of officials and their family members (UNCAC, Art. 52);

b. Procedures necessary for a State party, as a private person, to be able to appear before the courts of another State party (UNCAC, Art. 53);

c. Domestic legislation that makes it possible for a State to recognize a confiscation order issued by a court of another State. After that, to conduct an investigation, as a result of which to freeze and confiscate property acquired using corruption mechanisms in another state (UNCAC, Art. 54).

d. Measures that may be required to allow the confiscation of property outside of criminal proceedings, especially in the event of the death or flight of a criminal, etc. (UNCAC, Art. 55).

Important mechanisms of the StAR Initiative are to promote the creation of mechanisms at the domestic level to assist the requesting States in the search, freezing and recovery of assets.

However, in order for all of the above mechanisms to work, it is necessary that the UN Convention on Combating Corruption be ratified by the State party.

It is important to understand that practice requires more radical actions, so States take various measures to freeze and return assets related to illegal activities. For example, if money received as a result of fraud or other criminal activity is found, the state can freeze it and begin the process of returning it through the court. However, this can be a rather complicated process, since it is necessary to ensure, on the one hand, respect for the rights of participants in a financial investigation, and on the other hand not to violate the law.

Another important measure taken by States in the fight against financial crimes is the creation of specialized law enforcement departments to investigate them. Such units contribute to more effective work on asset freezing, investigation, detection of violations of the law and prosecution of criminals.

In addition, international organizations such as the World Bank, the IMF, the Organization for Economic Cooperation and Development (OECD) and others also provide support in combating financial crimes. These organizations provide loans and grants to improve the financial control system and improve the standards of good practice in the banking sector and other industries where financial fraud can

be detected (Brun and Silver, 2020). Moreover, such organizations can also provide expertise and advice in the field of financial investigation.

The most common mechanism in the matter of asset recovery and ensuring the rights of third party participants, namely the injured party, is the confiscation mechanism. It is necessary to have a transparent process of asset confiscation, as unified as possible for most countries. It is proposed to make this a condition for any State that wants to have at its disposal the full range of methods for the return of criminal assets, cooperate with other countries on their issues in investigations and fight corruption at an effective level.[22] Confiscation means the deprivation of property on the basis of a court decision or a decision of other competent authorities. After the confiscation of the property right (we believe that in this case, for the purity of legal forms, it is worth talking about title ownership), the assets become the property of the state without compensation to the previous owner of the assets.

The international community emphasizes the importance of having a confiscation mechanism in the legal order of each country, at least so that participants have a criminal confiscation system as a means of combating corruption, money laundering and other serious crimes.[23] The UN Convention against Corruption, as well as the FATF recommendations, support the seizure of assets outside the criminal case, the opening of parallel civil proceedings, as well as the creation of a "hybrid"[24] form of claim.

In addition to well-known legal mechanisms and international organizations involved in the development of law, assistance in financial investigations and promotion of initiatives at the international level, it is also necessary to mention the trend towards the creation of such organizations at the regional level. Their mission can be called one of the most important — they promote judicial cooperation between national authorities, providing direct personal contact and information exchange (Brun et al., 2011).

[22] Art. 2 UN Convention against Corruption (UNCAC), Art. 2; UN Convention against Transnational Organized Crime (UNTOC).

[23] UN Convention against Corruption (UNCAC), Art. 2, 31, 54, 55.

[24] The "civil action for damages" lawsuit is commonly called hybrid, since it implies compensation for damages in the framework of criminal proceedings.

The most known such organizations are:

a. Interagency Asset Recovery Network in Western and Central Asia;

b. Interagency Asset Recovery Network (KARIN);

c. European Judicial Network (ECN) — promotes the expansion of cooperation between the judicial authorities of the EU countries in criminal matters;

d. SkyNet is a Chinese network for tracking major corrupt officials around the world;

e. Organization of American States (Organization of American states);

f. Ibero-American Legal Aid Network.

It is extremely important that on the basis of these organizations, highly specialized specialists are trained to search for assets, negotiate, return and make effective arrests.

However, the main problem remains the inability, sometimes, to use all the above-mentioned mechanisms of legal assistance, since often countries do not have a source of funding for this.

The absence of legal norms aimed at rehabilitation is also important. It seems reasonable to propose this initiative for a more effective process of ensuring the rights of participants in the financial investigation, public order. A person who has been withdrawing assets for a long period, destroying not only the rule of law of his own country, but also causing damage to the world community, should be obliged to compensate for the damage. Often, the States that have seized the real estate of unscrupulous persons do not have funds for the maintenance of such property for the period of the criminal process. The accelerated development of the structures of contracts and principles of civil law may allow in the future the use of property under arrest to eliminate damage caused to society and the rule of law.

## IV. Conclusion

Financial investigations in the Republic of Kazakhstan are conducted quite successfully, but there are problems in organizing the search and return of assets located abroad. At the moment, the

legislator is actively moving towards international cooperation in this area, supports initiatives for mutual assistance and cooperation with key countries, and is engaged in reforms in the field of financial investigations at the domestic level.

In order to effectively combat international financial crime, it is necessary to improve the legal framework and international cooperation. The general norms of the Conventions are not enough for the successful search and return of assets, and the cumbersome principles of international agreements do not have time to react quickly to changes in criminal mechanisms and technologies.

A compromise solution seems to be the creation of a Concept document that will include the main articles from the Conventions that could be directly applied on the territory of the Republic. It seems that this legal initiative could facilitate the use of international instruments for conflict resolution, ensure transparency of the legal system of Kazakhstan in the presence of an international element in legal relations. It is proposed to consolidate this Concept at the legal level by Presidential Decree.

Kazakhstan should continue to develop tools in the field of financial investigations and improve their work within the framework of international standards. This will make it possible to fight financial crime more effectively and improve the efficiency of the justice system.

It is important to develop the practice of freezing and returning assets in a more flexible way, take into account the high cost of the process of searching and returning assets, and strive to protect participants in these legal relations. It is necessary to develop human resources in the field of financial investigations, providing special training and advanced training of law enforcement officers and other specialists, exchange experience with foreign colleagues, strive to create supranational initiative groups on the search and recovery of assets.

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# RIGHT TO ACCOMMODATION: INTERNATIONAL AND NATIONAL LEGAL ASPECTS

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## Regulations on Conditions for Foreigners' Housing Ownership in Vietnam: Inadequacies and Possible Solutions

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***Abstract:*** In Vietnam, the concept of "settling down, having a good career" becomes an important goal of each individual. It means having a stable place to live can be guaranteed when you get a job. Therefore, home ownership becomes a basic human right. In the current integration trend, when the opening to trade between countries around the world is deepening, the demand for house ownership is not only limited to Vietnamese citizens, but also to foreigners. Vietnam has also recognized the problem of foreigners owning houses in Vietnam, but there are still restrictions on the number of houses, the area of houses owned and other issues. Currently, the Government is implementing a policy to attract investment in housing in order to exploit the development potential of this field in Vietnam as well as to solve the outstanding housing problem and expand the housing market. Therefore, the issue of foreigners' home ownership becomes an important concern and is one of the research subjects to implement this policy.

The article presents the provisions of Vietnamese law, international law on home ownership rights of foreign individuals and organizations in Vietnam, as well as conditions for foreign individuals and organizations to own housing in Vietnam, a guarantee of human rights. In addition, the article also points out to the shortcomings of the national legal regulation, thus making some recommendations to overcome the difficulties of the real estate market and housing development in Vietnam.

***Keywords:*** the Constitution of the Socialist Republic of Vietnam of 2013; Law on Housing of 2014; housing development; foreign ownership of houses; real estate market

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## Contents



## I. Introduction

With a for-the-people and people-oriented view, the Communist Party and Government have promulgated various guidelines, policies, and laws to ensure that human rights are recognized and protected including housing issues of Vietnamese citizens, as well as foreign individuals and organizations. Article 59 of the 2013 Constitution, according to which "The State shall adopt housing development policies and create the conditions for everyone to have his or her own home." The phrase "everyone" mentioned shows that Vietnamese law does not differentiate between those who are Vietnamese citizens and those who are not, when it comes to the right to accommodation.

Article 32 of the 2013 Constitution continues to state that "Everyone has the right to ownership of his or her lawful income, savings, *housing,* chattels, means of production and capital contributions to enterprises or other economic entities." Thus, the term "everyone" applies to each member of society, with no distinction between Vietnamese citizens and foreign nationals. This comes from the nature of housing, housing is considered a valuable asset in social life. The need for housing is essential in any society. As Vietnam is integrating deeply with the world, foreigners are coming to live and work in Vietnam at an increasing rate, so the recognition of housing ownership rights for Vietnamese people in general and foreign individuals and organizations, in particular, is essential for the protection of human rights in Vietnam. However, the pilot issue of house ownership by foreigners was only resolved when the National Assembly Resolution No. 19/2008/NQ-QH12 of 3 June 2008 was adopted. According to this Resolution, five groups of foreigners are allowed to own houses that are condominiums in commercial projects, but not other types of houses in Vietnam. This is explained because houses are attached to the land use rights. The land belongs to the entire people and has certain territorial characteristics, thus, the recognition of ownership rights of foreign individuals and organizations must follow the roadmap with limitation. Before the Law on Housing of 2014 was adopted, the National Assembly Resolution No. 19/2008/NQ-QH12 on "pilot permission for foreign organizations and individuals to purchase and own residential houses in Vietnam" had officially recognized the ownership of houses by foreign nationals. Foreign nationals' housing ownership is respected, protected, and assured, which is exercised by the following institutions: the National Assembly, the Government, the People's Court, the People's Procuracy, and other institutions such as the Fatherland Front. However, because it is a specific type of property (Nguyen, Tran, 2019, p. 45), foreigners who want to own housing in Vietnam must meet some conditions. Furthermore, the current legal provisions still have limitations related to the limit on the number of housing, the characteristics of houses owned as well as issues related to the extension of housing ownership. The current policy of the Government is to encourage investment in housing development, to solve the current housing backlog. The potential of the housing market

in Vietnam has not been fully exploited yet. Therefore, the objective of this study is to analyze the provisions of Vietnamese law to show the national legal on the issue of housing rights of foreign nationals, in particular, the article focuses on clarifying the conditions for foreign nationals to become homeowners in Vietnam. The methods applied include the comparative method as well as the methods of analyzing legal regulations, pointing out to the inadequacies in implementing Vietnam's integration policy, contributing to perfecting the housing law.

## II. The Concept of "Housing" and "Foreigners" in Vietnam

### II.1. The Concept of "Housing"

From a social perspective, housing is one of the most important components of life as it provides shelter, safety, and warmth, as well as providing a place to rest. Housing has an essential role in the economic development of each country. European countries' statistic shows that housing-related activities account for 10–20 % of total economic activity in the country, while housing is the largest fixed asset of households.[1] Housing demand is not only one of the basic human needs but also a criterion to evaluate people's living standards. Today, besides the basic need for a house to live in, there is also a need for a house that is architecturally and environmentally friendly, tranquilizing, and economical (Henilane, 2015, pp. 93–106).

The definition of housing is offered in many different studies. The economist Smith defines housing as a commodity (Smith, 1776, p. 2), Ricardo defines housing as a tangible asset with profit potential (Ricardo, 2004, p. 13–14), and Jevons argues that it is a fixed asset regardless of whether the home is owned or rented (Jevons, 1871, p. 28). Researchers Grimes and Orville explain that in the past, the concept of "housing" was associated with a physical phenomenon and that countries' policy on supply was primarily related to the cost of construction, which can vary largely depending on the type of building materials, housing varies with building standards and quality (Grimes and Orville, 1976, p. 38).

[1] European Commission (2005). Housing Finance Systems for Countries in Transition: principles and examples. Available at: http://www.unece.org/fileadmin/DAM/hlm/documents/Publications/housing_finance_system.pdf [Accessed 10.11.2023].

In general, although the definition is different in terms of wording, the main purpose of housing is to be used for human living purposes.

In Vietnam, the definition of "house" is reflected in legal documents. Vietnamese law defines housing in Clause 1, Art. 3 of the Law on Housing of 2014, according to which "housing means any building in which households or individuals live." Thus, in order to be called "housing," the object must meet the first sign of construction work. This means, it must be (i) products built according to specific designs, (ii) made by human labor, construction materials, equipment installed in the works, that must involve human labor, use construction materials to make that work, (iii) be linked to the land, which may include the underground part, the above ground part, the part below the water surface and the part above the water, attached to a location (Ekholm, 1996, pp. 30–35) according to the provisions of Clause 10, Art. 3 of the Law on Construction of 2014, amended and supplemented in 2020. The second condition to be called a "housing" rather than a "house for office" is the purpose of the house, only used to meet the "needs for living," which can be understood as the need to live, perform basic activities of households, individuals or organizations not listed in this clause.

Also according to the Law on Housing of 2014, the types of housing listed to include separate housing,[2] apartment building,[3] commercial housing,[4] official residence,[5] house serving relocation,[6] and social

[2] Separate house means any house which is built on a detached land plot under lawful rights to use of an organization, household or individual, including villas, row houses and detached houses.

[3] Apartment building means any multi-storey building which has multiple apartments, public stairs, hall ways, private areas, common areas and common infrastructural works for organizations, households or individuals, including apartment buildings for residential use and mixed-use buildings for both business and residential purposes.

[4] Commercial housing means any house that is built for sale, lease, or lease purchase according to market mechanism.

[5] Official residence means any house rent by entities entitled to live in official residences as prescribed in this Law over the duration in which they are on duty.

[6] House serving relocation means any house provided for households or individuals who have to relocate when the State withdraw land or carry out land clearance as prescribed in regulations of law.

housing.[7] Each type of housing has its characteristics and requires meeting certain conditions. For example, to buy social housing, a subject must satisfy the conditions established in Art. 51 of the Law on Housing of 2014 and not all subjects are allowed to buy social housing.

Article 107 of the 2015 Civil Code lists types of property as real estate, including "house." Thus, "housing" is an asset in the real estate category. Housing is first and foremost a construction work, which is built to live and serve the daily life needs of households and individuals. If this purpose is not ensured, such "construction" cannot be called "housing." Besides, it is the purpose of "living and serving the daily-life needs" that are the basis of establishing individuals' ownership of houses.

### II.2. The Concept of "Foreign Individuals" and "Organizations"

According to Clause 1, Art. 3 of the Law on Entry, Exit, Transit and Residence of Foreigners in Vietnam of 2014, a foreigner is defined as a person who carries papers proving their foreign nationalities, or those without nationalities who enter, leave, transit through, or reside in Vietnam. Clause 2, Art. 4 of the Enterprise Law of 2020 stipulates that a foreign individual is the bearer of documents determining foreign nationality. Therefore, foreigners shall include persons without nationality and persons with foreign nationality.

According to the Law on Vietnamese Nationality, a foreign nationality is understood in the territory of the Socialist Republic of Vietnam as the nationality of a country other than Vietnam. In addition, a stateless person is understood as a person that has neither Vietnamese nationality nor any other foreign nationality. Determining individuals' nationality contributes to identifying a country's citizens, thereby having separate legal mechanisms for each subject.

A foreign organization is understood as an organization established under foreign law (Clause 32, Art. 4 of the Enterprise Law of 2020) or international law. The identification of a foreign organization is usually based on its operating permits. If the activities are carried out under

[7] Social housing means any house provided for entities benefitting from the policies on housing support carried out by the State as prescribed in this Law.

foreign law then the organization is considered a foreign organization, and therefore the application of the law on housing for those subjects will also be different from that of domestic organizations.

## III. Housing Ownership Conditions for Foreign Nationals according to Vietnamese Law

### III.1. Housing Ownership Rights of Foreign Nationals

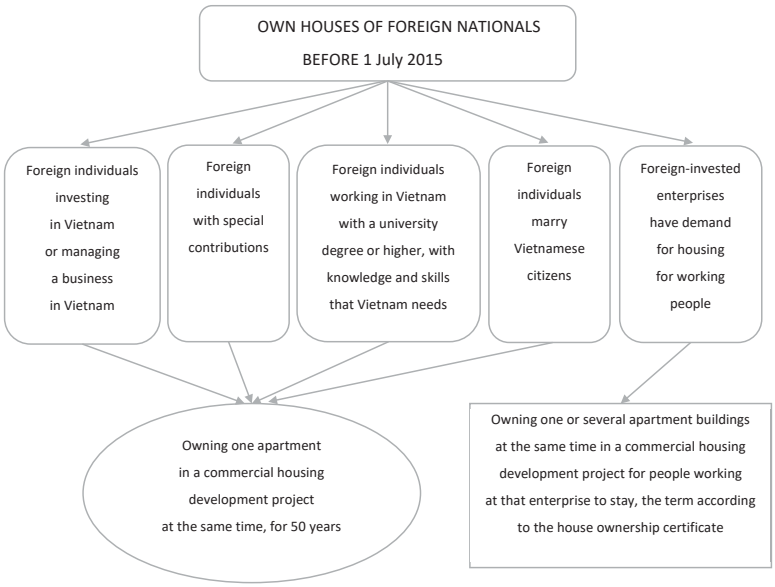
International documents that refer to the issue of housing ownership as a human right, belonging to a fundamental right, include the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Civil Rights. Article 25 of the 1948 Universal Declaration of Human Rights states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care [...]."[8] The 1966 International Covenant on Civil and Political Rights also stipulates that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation."[9] On 20 September 1977, Vietnam officially became a member of the United Nations, therefore, compliance with commitments on ensuring civil, political and human rights is an indispensable requirement for the Vietnamese legal system. In particular, housing ownership is recognized not only for Vietnamese citizens but also for foreign nationals.

On 3 April 2008, Resolution No. 19/2008/QH12 on piloting for foreign organizations and individuals to buy and own housing in Vietnam was adopted. This is the first legal document to recognize the issue of housing ownership of foreign nationals in Vietnam. Since it is only a "pilot" activity, this Resolution imposes limitations. Regarding the subjects, only five groups of subjects are allowed to own houses in Vietnam, including: (i) Foreign individuals who make direct investment

[8] Art. 25 of The 1948 Universal Declaration of Human Rights. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [Accessed 10.11.2023].

[9] Art. 17 of The 1966 International Covenant on Civil and Political Rights. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [Accessed 10.11.2023].

in Vietnam under the investment law or are hired to work as managers by enterprises operating in Vietnam under the enterprises law, including domestic enterprises and foreign-invested enterprises; (ii) Foreign individuals who have made contributions to Vietnam and are conferred orders or medals by the President of the Socialist Republic of Vietnam: foreign individuals who have made special contributions to Vietnam as decided by the Prime Minister; (iii) Foreign individuals who are working in socio-economic domains and posses: university or higher degrees, and specialists in field; which Vietnam has demand for; (iv) Foreign individuals who marry Vietnamese citizens; (v) Foreign-invested enterprises that are operating in Vietnam under the investment law but not engaged in real estate business, and wish to purchase residential houses for their employees. Regarding the quantity and time limit, an individual can only own 1 apartment at a time, the term is 50 years, after that time limit, the housing must be sold or donated. Foreign-invested enterprises may own one or several apartment buildings in commercial housing development projects for the people who are working at that enterprise to stay for the term stated in the Certificate of housing rights ownership.



The restrictions on home ownership of foreign individuals and organizations mentioned above partly affect housing investment and development policies in Vietnam, especially when Vietnam increasingly integrates into the world economy. Therefore, Clause 1, Art. 32 of the 2013 Constitution stipulates that everyone has the right to ownership of his or her lawful income, savings, housing, chattels, means of production and capital contributions to enterprises or other economic entities. The Constitution uses the phrase "everyone," meaning that the scope includes not only Vietnamese citizens but also foreigners, who also have the right to own houses. Housing with its purpose is to be used for the "living and serving the daily life needs," therefore, the right to have a house is a fundamental right of individuals. However, since real estate naturally poses the issue of geographical territory, some countries — including Vietnam — stipulate restrictions on the ownership of houses for subjects that are not Vietnamese "citizens." Some other countries such as Germany, France, the United Kingdom, Portugal, the Netherlands, Belgium, and Luxembourg do not have any restrictions on foreigners on the right to own or use land, whereby foreigners are allowed to own land on an equal basis with those countries' citizens[10] (Gardner, 1994, p. 20).

In essence, the restrictions or controls on the ownership of land and housing (attached to land) of each country are appropriate because it ensures the country's national territory. If the exchange of land or housing by foreigners is for investment, investment support, or other purposes that are not used solely for living, then it should be restricted. Because the house in these cases is not used for "living and serving the daily life needs" that the law on human rights is aimed at. International custom does not restrict the right of a state to limit or regulate foreigners' ownership of land in their territory because a state has sovereignty over its natural resources — including land[11] to which houses are attached.

[10] In Germany, Art. 14(2) of Grundgesetz provides that there is no distinction in property ownership between citizens and non-citizens. A similar provision exists in Art. 711 of the Civil Code in France. In Belgium, property ownership is a fundamental right of both Belgians and foreigners.

[11] This principle of customary international law was most recently affirmed in Principle 2 of the Rio Declaration at the 1992 Earth Summit.

On 1 July 2015, Vietnam's Law on Housing of 2014 officially took effect, restrictions established by the Resolution No. 19/2008/QH12 were gradually eased. Foreign nationals are entitled to own houses in Vietnam, but they are still subject to certain constraints. More specifically, there remain some less "strict" limitations related to the type of house, ownership period and housing transactions. Foreign organizations and individuals (including foreign organizations and individuals investing in housing construction projects in Vietnam, foreign-invested enterprises, branches, representative offices of foreign enterprises, foreign investment funds and branches of foreign banks operating in Vietnam, and foreign individuals permitted to enter Vietnam) may exercise the rights of house owners by regulations of law. According to Art. 10 of the Law on Housing, in case of housing built on leased land, they are only entitled to lease housing.

### III.2. Conditions for Foreign Nationals to Own Houses in Vietnam

To become a housing owner in Vietnam, foreign nationals must meet the requirements of being "permitted" to be legally present in Vietnam (Vu, 2018, p. 43), which appears in the following aspects:

(i) foreign entities who invest in project-based housing construction in Vietnam as prescribed in this Law and corresponding regulations of law;

(ii) foreign-invested enterprises, branches, representative offices of foreign enterprises, foreign-invested funds and branches of foreign banks operating in Vietnam (hereinafter referred to as foreign organization);

(iii) foreign individuals who are allowed to enter Vietnam.

This "legality" is reflected in the fact that foreign nationals are "licensed" by the Vietnamese government to live or operate commercially in Vietnam. This is proven through documents ensuring housing ownership conditions in Vietnam, including: (i) an investment certificate and having housing built in the project for organizations, foreign individuals investing in housing construction under projects

in Vietnam or (ii) investment certificates or papers related to being permitted to operate in Vietnam for foreign-invested enterprises, branches, representative offices of foreign enterprises, foreign investment funds and branches of foreign banks operating in Vietnam, or (iii) documents proving that they are allowed to enter Vietnam but do not enjoy diplomatic and consular privileges and immunities in accordance with the law.

Thus, Vietnamese law basically allows foreign individuals and organizations to own housing in Vietnam, as long as these subjects meet certain conditions for permits, invest in housing projects in Vietnam or are allowed to enter Vietnam. Such an approach contributes to ensuring the attraction of investment in housing construction and development as well as creating conditions to promote the potential of housing real estate market in Vietnam, and at the same time it meets the standard of human rights so that individuals — not only Vietnamese citizens — can own housing; housing can be developed and built with better amenity; it creates more competitive value and quality.

However, according to Clause 2, Art. 159 of the Law on Housing of 2014, conditions on housing ownership of foreign individuals and organizations are not limited to conditions from the subject itself. In addition, they only have the right to own housing in Vietnam through the following forms:

— investing in housing constructed under housing projects in Vietnam in accordance with the law;

— buying, renting and purchasing, receiving as a gift, or inherit commercial houses, including apartments and separate houses in housing construction investment projects, except for areas ensuring national defense and security according to Government regulations.

Buying, renting and purchasing, receiving as a gift, or inheriting commercial houses are expressed through civil transactions in the form of contracts or unilateral legal acts (such as wills), which show that the foreign organization or individual will become the owner of the house in Vietnam. It should be noted that, in the case of a foreign individual marrying a Vietnamese citizen or marrying a Vietnamese residing abroad, they cannot automatically own a house in Vietnam

but must meet the conditions in Art. 159 of the Law on Housing of 2014 mentioned above, which means you must be allowed to enter Vietnam or invest in housing construction according to projects in Vietnam as prescribed by law (Doan and Ngo, 2016, pp. 39–40). Marriage is only intended to create conditions for foreigners to own houses in Vietnam in a more stable and long-term manner than in the case of non-existence of marriage with Vietnamese citizens or Vietnamese residing abroad.

In fact, foreign organizations and individuals establish ownership of housing often through contracts with investors of commercial housing construction projects or with organizations and individuals who are a commercial housing owner.

### III.3. Conditions on Restrictions related to Housing for Ownership of Foreign Nationals

Thus, according to the enumeration of Clause 2, Art. 159 of the Law on Housing of 2014 and specified in the Decree 99/2015/ND-CP, qualified foreign individuals and organizations will be entitled to own houses in Vietnam. However, housing in Vietnam also has limits on how foreigners can own it. The first limit is about the type of the house. Housing owned by foreigners is the one provided for by investment projects to build commercial housing or individual houses, but not in areas ensuring national defense and security as prescribed by Vietnamese law, according to Clause 1, Art. 75 of the Decree 99/2015/ND-CP, as amended and supplemented by the Decree 30/2021/ND-CP. The Ministry of National Defense and the Ministry of Public Security are responsible for determining the areas that are needed to ensure security and defense in each locality and issue an official notification to the People's Committee of the province to serve as a basis for directing the Department of Construction to determine specifying a list of investment projects in the construction of commercial houses in the area, allowing foreign organizations and individuals to own houses.

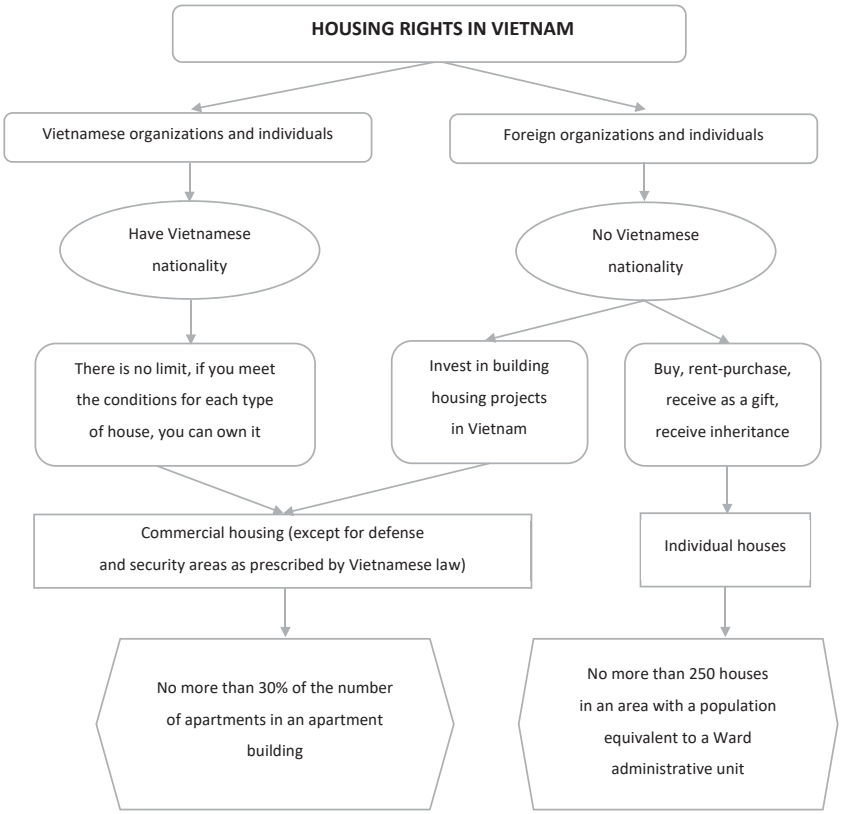
The second limit is connected with the number of houses owned by foreigners. In case the subject of housing ownership is a foreign-invested enterprise, branches, representative offices of foreign enterprises,

foreign investment funds, and foreign bank branches operating in Vietnam or foreign individuals who are allowed to enter Vietnam, the share owned by foreigners cannot exceed 30 % of the number of apartments in an apartment building; if it is a separate housing, in an area with a population equivalent to a ward-level administrative unit, no more than two hundred and fifty houses may be owned by foreigners, according to Clause 2, Art. 161 of the Law on Housing of 2014. In case of receiving a gift or inheriting a house that is not specified in Point (b), Clause 2, Art. 159 of the Law on Housing of 2014 (not a commercial house in a housing construction investment project or in the case of belonging to the national defense or security area) or exceeding the number of houses specified above, foreign organizations and individuals are only entitled to enjoy the value of that house.

The third limit is related to the time to own a house. According to Clauses 2 and 3, Art. 7 of the Decree 99/2015/ND-CP as amended and supplemented by the Decree 30/2021/ND-CP, a foreign organization is allowed to own a house for a maximum period not exceeding the statute of limitation specified in the Investment Registration Certificate issued to such organization, if expired, it will be considered for extension. This period shall not exceed 50 years. In case a foreign individual marries a Vietnamese citizen or marries a Vietnamese residing abroad, they can own a stable, long-term house and has the rights of a house owner like a Vietnamese citizen.

The fourth limit is due to conditions related to housing loans. According to Art. 2 of the Circular 39/2016/TT-NHNN dated 30 December 2016, amended and supplemented by the Circular 06/2023/TT-NHNN dated 28 June 2023, of the Governor of the Bank State banks, foreign individuals, and organizations are allowed to borrow capital in Vietnam if they meet conditions for purposes, including buying housing. However, it should also be noted that Clause 2, Art. 28 of the above Circular requires individuals with foreign nationality residing in Vietnam who want to borrow to buy housing at credit institutions in Vietnam, to ensure compliance with the deadline. The loan term does not exceed the remaining period of permitted residence in Vietnam.

Current housing laws specify housing ownership rights of foreign individuals and organizations in Vietnam; this is the implementation of human rights related to housing (Vo and Nguyen, 2018, pp. 66–68). At the same time creating favorable conditions to promote the real estate market in Vietnam has a great potential. However, it is found that the statute of limitation of housing ownership by foreign subjects has certain shortcomings, making housing ownership of foreign subjects in Vietnam difficult, hindering housing business activities, and creating difficulties in "overlapping" regulations between different legal fields. The housing ownership problem of individuals and organizations in Vietnam can be summarized as follows/



### III.4. Legal Regime on Housing Ownership by Foreign Nationals in Vietnam

When becoming an owner of a house in Vietnam, foreign nationals cannot automatically acquire all the rights of a house owner like a Vietnamese organization or individual. If foreign nationals investing in housing construction under projects in Vietnam meet the above conditions and become housing owners in Vietnam, they have the same rights as domestic organizations, households, individuals or Vietnamese residing abroad. However, it should be noted that in the case of building a house on leased land, only the right to rent the house is allowed.

According to Clause 1, Art. 161 and Art. 10 of the Law on Housing of 2014, foreign nationals investing in housing construction under projects in Vietnam who meet the above conditions and become housing owners have following rights.

— They enjoy inalienable rights to his/her lawful housing. This means that no subject is allowed to violate the legal ownership of foreign nationals investing in housing construction. Any act of arbitrary infringement without the consent of the owner is a violation of the law and the State will protect these legal rights (Ho, 2023, pp. 22–25).

— They use the house for residential purposes and other purposes not prohibited by regulations of law. The owner is allowed to use the house for residential purposes and other purposes as long as it complies with the provisions of law. The law only interferes with this right when the owner uses the house for prohibited activities, for example, storing banned substances, trading in explosive materials, etc. (Art. 6 of the Law on Housing of 2014).

— They have the right to be granted a Certificate for housing under your legal ownership. This is a legal certificate certifying from the government that this subject is the owner of the house, which is the basis for the State to manage and express the material and spiritual value of the house for the subject who owns it.

— They sell housing or transfer the agreement on housing purchase, lease, lease and purchase, gifting, exchange, inheritance, mortgage, capital contribution, lending, permission for stay, or authorize housing management. This means that, when becoming a housing owner, this

subject has the right to carry out transactions related to housing, expressing his or her right of disposal. However, since there has not been a unification of land law on land use rights of foreign individuals and organizations, issues of buying and selling houses and mortgaging houses to serve the owner's loan are very difficult to implement in practice, because the implementation of these transactions is closely linked to land use rights (Nguyen, 2023, pp. 52–53), especially for separate houses. In housing transactions, mortgage issues as well as housing sales represent the needs of the real estate market. Therefore, many studies on the Housing Law and the revised Land Law are being carried out[12] in the direction of unifying regulations to record land use rights of foreign organizations investing in Vietnam to create favorable conditions for transactions.

— They share the public utilities in that residential area as prescribed. This is an attached right when buying a house in an area with public utilities. The owner will be able to use these buildings in common, however, it is necessary to clearly determine with the investor what part is for common use and whether there are any restrictions to comply with public rules.

— They provide maintenance, renovation, demolition, and rebuilding of housing. The author of the article believes that this is both a right and an obligation of homeowners. The implementation of housing maintenance, renovation, construction, and demolition acts are according to the owner's purpose and wishes, however, these acts also demonstrate the owner's responsibility in ensuring the house is safe and aesthetically pleasing to the community.

— They receive the compensation as prescribed in regulations of law or payment according to fair market price when their house is demolished, imposed compulsory purchase order, or commandeered by the State for national defense and security purposes; for socio-economic development purposes, or in the state of war, state of emergency, or disaster situations. To sacrifice some individual rights to serve the

[12] Many major contents of the draft Land Law (amended) have been edited and supplemented. Available at: https://baochinhphu.vn/nhieu-noi-dung-lon-cua-du-thao-luat-dat-dai-sua-doi-duoc-chinh-sua-bo-sung-102231103093857006.htm [Accessed 05.11.2023]. (In Vietnamese).

greater benefit of the community, in certain cases the State will demolish and requisition houses. However, the homeowner will be compensated reasonably, and the foreign nationals in this case will also be similarly compensated according to the principles of fairness and equality.

— They file complaints, denunciation, or lawsuits over violations against their lawful ownership and other violations against the law on housing. Similar to Vietnamese individuals and organizations, foreign nationals also have the right to request competent Vietnamese state agencies to resolve cases to protect their legitimate rights when their rights related to housing ownership are violated. Competent Vietnamese agencies cannot refuse settlement because this is a foreigner's house. This demonstrates Vietnam's commitment to comprehensively ensuring housing ownership rights of foreign nationals.

Consequently, despite being recognized as housing owners, foreign nationals are limited in certain rights compared to domestic owners. However, a general assessment is that the regulations largely ensure the freedom of foreign nationals to participate and conduct transactions in the Vietnamese real estate market. The evidence is that policies to encourage the development of the housing market in Vietnam create conditions for foreigners to participate in the process of investing and owning housing in Vietnam and have the same rights as Vietnamese citizens. Absoluteness in regulating the issue of housing ownership for foreigners is difficult to guarantee because of national sovereignty and security issues; housing is real estate associated with a particular geographical area, so foreigners have limitations on conditions for home ownership compared to citizens of a country. Nonetheless, legal policies are changed in each period to suit the trend of international integration while ensuring the stable development of the people in the country.

## IV. Some Inadequacies and Recommendations

From the regulations related to the ownership of houses by foreign subjects mentioned above, there are several unresolved issues. First, there remains the inconsistency between the Housing Law and the current Land Law. The nature of land law in Vietnam is that land is owned by the entire people and the State is the representative of the

owner's rights (Art. 53 of the 2013 Constitution of the Socialist Republic of Vietnam). Therefore, land is granted to individuals and organizations in the form of land use rights, not ownership rights to land (Ho Chi Minh City University of Law textbook, 2017, pp. 29–30). When building houses on land, organizations and individuals can become house owners but only have the right to use the land area used to build houses. For foreign organizations and individuals, home ownership is recognized by law, so the question is whether this right can be attached to land use rights.

Clause 2, Art. 159 of the Law on Housing of 2014 and Art. 75 of the Decree 99/2015/ND-CP, as amended and supplemented by the Decree 30/2021/ND-CP, foreign organizations, and individuals are allowed to own commercial housing means apartment buildings and separate houses in a housing construction investment project. However, for some type of housing such as separate housing, the peculiarity is that it is associated with land use rights, but Art. 5 of the 2013 Land Law does not stipulate whether foreign individuals and organizations who met the conditions set in the Law on Housing were entitled to use land. This leads to a lack of consistency between the two areas of housing and land law, as foreigners are allowed to own houses that are attached to land but do not have land use rights.

As a neighboring country of Vietnam, China — the third largest country in the world — stipulates that land in the cities is owned by the State (Art. 10 Constitution of the the People's Republic of China).[13] Foreign individuals working or studying in China as well as branches and representative offices established by foreign organizations located in China can buy housing or offices in China for their use. Foreign individuals and businesses can receive urban land use rights and participate in land development (Zhang, 2023, pp. 5–6). Promoting the real estate market in China by attracting investment from foreign individuals and organizations is increasingly emphasized (Hui and Chan, 2014, pp. 232–233).

[13] Available at: http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/ 2007-11/15/content_1372963.htm [Accessed 05.11.2023].

Indonesia being a member of the Association of Southeast Asian Nations (ASEAN) like Vietnam, has its own concerns about economic and social conditions, especially implementing its "open door policy." It has regulations on housing and land that create favorable conditions for foreign investment in this country. In Indonesia, housing is not only a fundamental need but also a basis for promoting foreign investment and economic development. Land use rights that come from the government may be granted to individuals, citizens of the Republic of Indonesia, foreigners, a group of persons, and private or public legal entities. This is reflected in the provisions on rights to land as provided for in Art. 4, Clause 1 of Law No. 5 of 1960 on Basic Regulation of Agrarian Principles.[14] The regulation of land use rights is important because it grants rights to a subject, even though it is the right to use land — which consists of the layers of land, water, and space above it — including the issue of property rights. Housing ownership or housing owned by foreigners residing in Indonesia is closely related to land use rights. The right to use a type of land right granted to foreigners residing in Indonesia, as well as to foreign legal entities with representation in Indonesia in accordance with Art. 42 of Law No. 5 of 1960. This provision creates the legal basis for foreigners or foreign legal entities to use land. The introduction to the Vietnamese Government's Regulation No. 103 in 2015 related to housing or housing ownership of foreigners facilitates the exercise of housing ownership by foreigners, avoiding conflicts caused by permitting housing ownership, but not foreigners' rights to use land. Realizing that Indonesia is also a member of the ASEAN, there are basically similarities with the economy and society in Vietnam, Indonesia's "open door policy" on housing and land brings this country many benefits (Wong, Higgins and Carlson, 2018, pp. 89–90). Therefore, it is important to approach these empirical values to resolve conflicts in national legal regulations to ensure harmonization, therefore, the authors propose the following recommendations.

[14] Para. 1 Art. 4 provides as follows: On the basis of the right of control of the state of land as referred to in Art. 2, it is determined that there are various kinds of rights to the surface of the earth, called land, which can be acquired to and possessed by people, either alone or together with the others as well as legal entities.

The first recommendation would be to add foreign individuals and organizations that meet the conditions set by the Housing Law as also one of the "land users" according to Art. 5 of the Land Law of 2013.

As far as the time limits for foreign owners are concerned, it should be noted that previously, Resolution No. 19/2008/QH12 of the National Assembly did not allow the extension of time for foreign owners to housing in Vietnam. However, with the current Housing Law, the right to extend the term of house ownership has been recognized. As mentioned above, the statute of limitation for foreign organizations to own housing in Vietnam is according to the period of the Investment Registration Certificate and could be extended after the end of that period depending on the review by competent state agencies. As it is, the right to renew belongs to the State, which is appropriate, in our opinion, because the State is the representative of the people. However, in order to decide whether to extend or not, what is the basis for the State to approve and decide, what conditions must be met by organizations and individuals wishing to be extended in terms of capital, investment process... the law has yet to answer. Article 77 of the Decree 99/2015/ND-CP also stops foreign individuals and organizations to submit applications and the provincial People's Committees to consider them. If a foreign individual or organization, after the expiration of the statute of the limitation stated on the Certificate, wants to extend the period to continue investing in their housing business or continue to exercise the right to "live," the conditions to "apply for an extension" of that validity period have to be additionally specified.

The second recommendation deals with possible amendments to Clause 3, Art. 77 of Decree 99/2015/ND-CP, following the direction and regulation of foreign individuals and organizations if the statute of limitation expires. In Clauses 1 and 3 Art. 7 if the owner wishes to extend, in addition to the requirements on procedures mentioned in Clauses 1 and 2 above, a foreign individual or organization must also satisfy all conditions to be entitled to own a house according to the Law on Housing at the time of applying for the extension. Provincial-level People's Committees shall consider their application if foreign individuals or organizations meet the conditions for housing ownership as prescribed by law. They shall decide to continue extending the time

limit for housing ownership. The addition of such regulation can reduce the refusal of extension applications without grounds by competent state agencies, affecting the right to housing, which is a basic human right related to the continued investment in housing development in the Vietnamese market.

Regarding the limit on the number of houses that can be owned, the real estate market situation, especially for the housing business, is currently facing great difficulties, stemming from capital sources, foreign currency exchange rates, investment, and "housing consumption." On 14 December 2022, the Prime Minister issued the Official Letter 1164/CD-TTg on resolving difficulties for the real estate market and housing development, in which the Prime Minister directed government agencies to review and propose amending legal regulations according to their authority. It is overlapping and inadequate, causing obstacles in the implementation of real estate projects in the fields of construction, planning, urban development, housing, and real estate business. Foreign individuals and organizations are potential participants in the housing real estate market. Moreover, the limitation on the duration of housing ownership as well as the aforementioned conditions on the subject can partly reflect the policy on the national sovereignty of our country. Therefore, the limit on the number of houses that could be owned according to Clause 2, Art. 161 of the Law on Housing of 2014 generally creates a barrier for the market, while investment projects on commercial housing still have a lot of backlog due to the lack of available clients. In Indonesia and Japan, there is no limit on the number of houses that foreigners could collectively own, as long as they meet the conditions on the subject and the conditions related to land use rights.

Therefore, the limit on the number of houses that can be owned, generally creates a barrier for this market, while investment projects on commercial housing still have a lot of backlog due to the absence of clients. The number of real estate inventories in Vietnam is still quite high, especially in the segment of medium and high-class apartments, tourist apartments, and resettlement houses.[15] Moreover, when allowed

[15] Available at: https://mof.gov.vn/webcenter/portal/ttpltc/pages_r/l/chi-tiet-tin-ttpltc?dDocName=MOFUCM187328 [Accessed 07.08.2023]. (In Vietnamese).

to enter and reside in Vietnam, foreign individuals and organizations are subjects with "capital" sources. Therefore, allowing an unlimited number of houses to be owned (except for housing in national defense and security projects) by foreign individuals and organizations in Vietnam, contributes to solving the problem of "inventory is residential real estate" and promotes investment capital. In addition, the regulations on housing ownership conditions, the issue of extending the home ownership term and other contents have become a solid basis for the implementation of state management of housing. Based on the analysis of the experience of a Indonesia, another ASEAN member, it can be seen that this country does not set a limit on the number of housing that foreigners can own, either, as long as they meet the related conditions regarding land use rights.

Thereby, the authors develop a third recommendation. It is necessary to amend the limit on the number of houses that foreign organizations and individuals could own according to Clause 2, Art. 161 of the Law on Housing in the direction of increasing the number of housing units, thereby solving the backlog of many commercial real estates and promoting the development of the real estate market.

## V. Conclusion

Housing ownership is a basic right of each individual, a human right stipulated in the 2013 Constitution, laws and international treaties to which Vietnam is a party. In developing the real estate market in general and solving housing market problems in particular, Vietnam is reviewing legal regulations and looking for solutions, including paying attention to issues of housing ownership of foreign individuals and organizations. However, it is found that the regulations are still inadequate and overlapping.

From the above studies, the regulations of housing law and land law are still not unified. Furthermore, the issue of the housing ownership period of foreign individuals and organizations and the number of houses that foreign nationals can own also have many inadequacies. Therefore, the authors propose to improve the provisions of housing

law in the direction of creating more favorable conditions for foreign individuals and organizations to invest and own housing in Vietnam.

Besides, to own a house in Vietnam, foreign individuals and organizations also need to understand the legal nature of the real estate market in Vietnam and conditions to become a house owner, and their obligations after establishing rights. The article can provide some basic understanding for relevant audiences to access useful information.

Thus, the study and improvement of legal policies on housing, which focus on policies and laws for foreign individuals and organizations, are crucial because Vietnam is on the path to international integration. Improvement of housing policies for foreign individuals and organizations will guarantee Vietnamese commitment to international treaties and also promote human rights that the Vietnamese have been always aiming for.

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# JUDICIAL PROCEEDINGS: USE OF SPECIALIZED KNOWLEDGE AND INTRODUCTION OF AI

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## Explainable Artificial Intelligence (xAI): Reflections on Judicial System

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***Abstract:*** Machine learning algorithms are increasingly being utilized in scenarios, such, as criminal, administrative and civil proceedings. However, there is growing concern regarding the lack of transparency and accountability due to the "black box" nature of these algorithms. This makes it challenging for judges' to comprehend how decisions or predictions are reached. This paper aims to explore the significance of Explainable AI (xAI) in enhancing transparency and accountability within contexts. Additionally, it examines the role that the judicial system can play in developing xAI. The methodology involves a review of existing xAI research and a discussion on how feedback from the system can improve its effectiveness in legal settings. The argument presented is that xAI is crucial in contexts as it empowers judges to make informed decisions based on algorithmic outcomes. However, the lack of transparency, in decision-making processes can impede judge's ability to do effectively. Therefore, implementing xAI can contribute to increasing transparency and accountability within this decision-making process. The judicial system has an opportunity to aid in the development of xAI by emulating reasoning customizing approaches according to specific jurisdictions and audiences and providing valuable feedback for improving this technology's efficacy.

Hence the primary objective is to emphasize the significance of xAI in enhancing transparency and accountability, within settings well as the

potential contribution of the judicial system, towards its advancement. Judges could consider asking about the rationale, behind outcomes. It is advisable for xAI systems to provide a clear account of the steps taken by algorithms to reach their conclusions or predictions. Additionally, it is proposed that public stakeholders have a role, in shaping xAI to guarantee ethical and socially responsible technology.

***Keywords:*** explainable AI; black box; artificial intelligence; reasoned decisions; judicial system

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## Contents



## I. Introduction

The realm of intelligence (AI) is experiencing growth and holds the potential to revolutionize various industries, such, as the legal sector. However, the integration of AI, into the system raises ethical and legal considerations (Naik et al., 2022). The absence of transparency and explainability in AI systems is one of the primary causes for concern since it can result in bias and a lack of accountability (Markus, Kors and Rijnbeek, 2021). In this paper, the theory of Explainable Artificial Intelligence, sometimes known as xAI will be investigated, as well as the ramifications that this theory may have for the legal system.

The incorporation of AI into the legal system has the potential to improve efficiency while simultaneously reducing costs; yet it also raises issues about bias and impartiality in the system (Goodman, 2019). Similarly to how humans, AIs can only function as well as the

data they are fed in order to learn from, which means that biased input will lead to biased results, therefore the quality of AI depends on the quality of the data used to train it (Belenguer, 2022). In addition, it may be challenging to comprehend how an AI system came to a certain conclusion, which makes it challenging to hold the system accountable for its actions (Santoni de Sio and Mecacci, 2021). Explainable artificial intelligence or xAI is a technology designed to address these concerns by ensuring transparency and understandability, for users.

The use of AI, in our system is a nuanced matter. It is important for us to approach this issue by considering both the advantages and disadvantages it presents. Exploring the concept of Explainable AI (xAI) can provide insights into how we can incorporate AI into the system while maintaining transparency, accountability and fairness (Deeks, 2019). As we move forward it remains crucial for us to have discussions about the implementation of AI, in our system and together we must ensure that its utilization benefits all parties involved (Reiling, 2020).

There is much hype regarding AI these days. Almost every organization plans to include AI, is currently employing it, or is rebranding its old rule-based engines as AI-enabled solutions. The need for transparency into the decision-making processes of these models is increasing in importance as more and more organizations adopt the use of AI and advanced analytics within their decision-making processes (Sjödin et al., 2021). Problems arise while utilizing machine-learning techniques because of their operation's "black box" nature (Petch, Di and Nelson, 2022). It is not simple to understand how and why these algorithms arrive at the results they do because they are constantly adjusting the weights, they assign to inputs to improve the precision of their predictions (Sarker, 2021).

Still, explanations to the questions "Why?" and "How do you know?" are sought after and required by both humans and the law. How do we achieve this transparency while embracing the efficiencies AI brings (Stevenson and Slobogin, 2018)? Here is where xAI comes in; it is a subfield of AI that focuses on creating systems that can explain the thought process behind an algorithm's output, might be able to help address the "black box" problem (Gunning and Aha, 2019).

"Explainable AI" describes approaches to AI that allow human specialists to comprehend the outcome (Barredo Arrieta et al., 2020). This contrasts the "black box" approach to machine learning, which holds that not even the AI's creators know how the AI arrived at a particular choice (Wulff and Finnestrand, 2023). XAI realizes the right of society to an explanation (Ankarstad, 2022). In its simplest form, AI is a system that receives data and uses it to make decisions. Explainable AI is an AI system demonstrating how input changes affect the final result.

In this research paper, the concept of artificial intelligence (xAI) and its possible repercussions for the legal system is investigated. Firstly, the importance of explicability in relation to xAI and the legal system will be discussed in Part II. In Part III we will explore how algorithms are being used in government agencies' rulemaking and adjudication processes, as well as the potential for explainable AI (xAI) to improve transparency and accountability in these procedures. Furthermore, we will examine the advantages and obstacles linked to implementing xAI in the system well as the necessary measures to ensure ethical and fair utilization of AI in this context.

## II. Why Explainability Matter?

Artificial intelligence (AI) has emerged as a tool, for making decisions. Nevertheless, it is essential to recognize that AI's influence on outcomes can have both adverse effects. Consequently, comprehending the decision making process of AI is akin, to employing individuals to manage an organization. Despite interest in AI, stakeholders often hesitate to fully trust models to make essential decisions on their behalf. Hence, explainability has emerged as a crucial factor in shedding light on the reasoning behind the models' decisions.

The concept of "intelligence" can sometimes be ambiguous as it can have interpretations depending on the perspective. When experts discuss intelligence they are usually referring to a set of technologies such, as natural language processing, machine learning, image recognition and speech recognition. The advancements we have witnessed in AI lately primarily stem from the integration of machine learning systems and

algorithms. These systems can learn on their own and find patterns in sets of data to make highly accurate predictions or probabilities (Coglianese and Lehr, 2019).

While machine learning is a powerful tool, it has raised ethical concerns regarding its impact on individuals' autonomy, security, and privacy. One of the concerns raised about machine learning is that the data used to train algorithms can reinforce and amplify existing biases especially when it comes to marginalized communities. This can result in decision-making and discrimination, in areas, like employment, lending and healthcare.

Another consideration revolves around the dependability and precision of forecasts generated by machine learning systems. Critics contend that these systems, especially when utilized in the justice realm may produce accurate forecasts of recidivism compared to human professionals. This could result in inequitable outcomes for marginalized individuals (Dressel and Farid, 2018).

In addition, the implementation of machine learning into the decision-making process raises concerns around accountability and transparency. Who is to blame when a machine learning system makes an error, or when it makes a judgment that is discriminatory? How can people understand the decision making process of a machine learning system? Is it possible to offer feedback to enhance it? These inquiries must be addressed to guarantee the responsible use of machine learning.

The issue of the "black box," which refers to the lack of transparency in how the algorithm operates (Citron, 2008), is a concern. People who are affected by the algorithms' recommendations may suffer if they cannot comprehend why the algorithm made decisions. In the justice system algorithms that lack transparency can undermine a defendants ability to present a defense and erode trust and confidence, in the governments' fairness.

To tackle these worries experts have introduced the concept of xAI. It encompasses a range of studies focused on communicating the logic behind a particular machine learning models results to humans (Wachter, Mittelstadt and Russell, 2017). xAI has several uses and advantages: it can help people feel more comfortable interacting with

the system, point out when the system is unfair or biased, and improve our understanding of the world.

In the legal world, the use of xAI can be more fruitful for judges and litigants who give emphasis to algorithms for their decision-making, and for defendants who want to contest predictions about their danger (Smith, 2017). However, making an algorithm more human-understandable might have unintended consequences, the most notable of which is a drop in performance.

Fortunately, several versions of xAI already exist, and computer scientists are constantly developing new ones. Some ML models are designed to have an explanation built-in, but this usually means they are more straightforward and produce less reliable results. Nevertheless, another class of models cannot be explained in their terms. There are two primary schools of thought among computer scientists for these models.

One category (called an "interpretable model" (Edwards and Veale, 2017)) focuses on designing models that are inherently more transparent and easier to interpret. These models often have simpler structures and decision-making processes, making it easier for humans to understand how they arrive at their predictions. However, they may sacrifice some accuracy in order to achieve this interpretability.

Interpretable models are more desirable, in situations where transparency's of importance like in legal or medical decision making. However there are instances where "black box models" (Guidotti et al., 2018) are required, particularly when accuracy takes precedence such as, in modeling or speech recognition. In scenarios, it becomes crucial to incorporate hoc explainability methods to guarantee transparent and accountable decision-making processes by the models.

It is important to note that while xAI can assist in addressing the concerns related to machine learning, it is not a solution. There are still limitations when it comes to the accuracy and reliability of machine learning systems. Additionally, the data used to train these systems can still be incomplete. Furthermore, with methods for explaining AI outcomes it may not always be possible to fully comprehend or predict the results of complex machine learning models.

Therefore, it is crucial for courts and legal systems utilizing AI technology to remain vigilant and transparent about their decision making procedures. This includes being open about the data used for training machine learning models and providing explanations for how these models make predictions and decisions. It also involves monitoring and evaluation of the models performance to ensure they are making responsible choices.

An important reason to support the advancement of AI is its potential to reduce bias and discrimination in machine learning systems. As discussed earlier machine learning models have the ability to perpetuate and worsen biases against marginalized communities. Explainable AI plays a role in ensuring fairness and equality by shedding light on how decisions are made by these models. By providing transparency and insight it enables us to identify and rectify any biases or discriminatory outcomes that may arise.

Moreover, the lack of transparency and accountability in machine learning systems can erode trust in systems. When individuals cannot comprehend the decision making process or contribute feedback to enhance the system, their trust and reliance on it may diminish. This has implications in vital areas like healthcare where trust is paramount for patient's well-being and satisfaction.

Another reason to support the development of xAI is its potential to enhance the precision and dependability of predictions made by machine learning models. While intricate "black box" models (Chaudhary, 2020) might achieve accuracy, in their forecasts they can also be more susceptible to errors and biases. By shedding light on the decision making process of these models explainable AI can assist in identifying and addressing errors and biases ultimately boosting the accuracy and reliability of the models predictions.

Furthermore, explainable AI can offer advantages in terms of accountability and adherence to regulations. In regulated industries like finance and healthcare, it is crucial to ensure that machine-learning models operate within frameworks while also allowing their decisions to be audited and explained. Explainable AI can promote transparency and accountability, in these contexts ensuring ethical use of these models.

1. Legal and Regulatory Obligations: Lawmakers and regulators are increasingly in agreement that AI systems should be transparent and capable of explanation. For instance, the General Data Protection Regulation (GDPR) of the European Union guarantees individuals the right to understand the reasoning behind automated decision-making processes that impact them (Art. 22). Furthermore, the Federal Trade Commission (FTC) in the United States has expressed the need for companies to provide explanations on how their algorithms reach decisions in domains such, as credit and employment (Smith, 2020).

2. Risk Mitigation: When it comes to domains like healthcare, finance and criminal justice, using black box AI systems can have consequences if they make incorrect or biased decisions. Explainable AI can help reduce these risks by providing users with an understanding of how the system reaches its decisions. This way they can rectify any errors or biases that may arise.

3. Increased Trust: Transparency and explainability are crucial in maintaining trust in AI systems especially when they are employed in areas like healthcare or criminal justice where the stakes are high. By enhancing the transparency and comprehensibility of AI processes users are more likely to have faith in the decisions made by these systems.

4. Collaboration: Many applications of AI require collaboration between humans and machines. Explainable AI plays a role in facilitating this collaboration by offering humans an insight into how machines arrive at their decision making process. This understanding enables them to work together effectively as a team.

5. Social Responsibility: Lastly, there is an argument for AI based on social responsibility concerns. Given the impact of AI on society, at large it becomes our responsibility, as developers and users, to ensure that these systems are deployed ethically and responsibly. Explainable AI plays a role in attaining this objective as it empowers users to identify and rectify occurrences of bias, discrimination or any other unfairness.

The advancement of AI is a stride, in guaranteeing the ethical and responsible utilization of machine learning. By shedding light on the decision-making mechanisms of machine learning models researchers can help alleviate the risks of bias and discrimination. Nevertheless, the development of AI is an endeavor and there remains a significant

amount of work to be accomplished in order to ensure that machine learning is employed transparently with accountability and for the overall betterment of society.

## III. Algorithms in Adjudication

In years, there has been an increase in researchers' interest in integrating machine-learning algorithms into the operations of government agencies. While national security and law enforcement departments have already adopted these technologies, various other government departments are also exploring the opportunities presented by machine learning (Lehr and Coglianese, 2017). Given the recognition of the potential of these algorithms in policy contexts and at all levels of government additional research, into their potential applications is urgently needed.

The use of machine learning algorithms, in government agencies rulemaking and adjudication processes is an area of research (Lehr and Coglianese, 2017). By incorporating machine learning, we can enhance transparency, accountability, efficiency and effectiveness in these procedures (Lehr and Coglianese, 2017). However, it is crucial to acknowledge that integrating these algorithms into government operations raises legal concerns related to bias and accountability.

Despite these concerns, researchers generally agree that the utilization of machine learning algorithms in government operations will continue to grow in the future (Cuéllar, 2017). Therefore, policymakers and academics should engage in dialogue and research to fully comprehend the implications of these technologies and ensure their implementation into government operations.

Integrating machine-learning algorithms into the process could potentially enhance its effectiveness. For instance, one possible application is utilizing algorithms and neural networks to make decisions about setting appropriate rules. According to the proposal put forth by Justice Mariano Florentino Cuéllar (Cuéllar, 2017) this approach has the potential to enable rulemaking in specific domains.

For instance, when it comes to overseeing practices machine learning algorithms can be utilized to create simulations that explore

the balance between factors like market stability and economic growth. These simulations can provide insights for regulators in the securities and exchange industry helping them make decisions on high-speed electronic trading regulations. Additionally, these simulations can assist finance departments in evaluating risks based on real time market fluctuations.

Moreover, a multi agent system could be implemented where various machine-learning algorithms simulate scenarios considering the tradeoffs, between market stability and economic growth. Another machine learning system would then select the model that maximizes objectives chosen by humans. This approach enables evaluations of impacts of specific rules encompassing a more nuanced perspective.

However, it is worth mentioning that incorporating these algorithms into the process brings up ethical and legal considerations, including concerns, about bias and accountability. It is essential for policymakers and academics to have discussions and conduct research to thoroughly comprehend the impact of these technologies and guarantee their integration into the regulatory process.

Machine learning algorithms may also find application in the government sector by helping agencies make sense of the mountain of public feedback they get during the regulation process known as "notice and comment" (Mortazavi, 2017). Further, as was previously said, authorities may use machine learning to assist in the adjudication process. There are many applications for algorithms, such as determining whether or not an applicant is competent to fly a plane, estimating the impact of a merger on the market, or settling disability claims. While machine learning-based rulemaking and adjudication may incorporate multiple opaque and hard-to-trace decisional steps, it will not be possible to eliminate the need for human involvement. The minimum requirement is for computer scientists to encode agency "values" as ones and zeros into the algorithms.

The application of algorithms by government organizations is the area of law and policy that is constantly changing and is expected to be the focus of legal disputes. According to the Administrative Procedure

Act (APA)[1] US courts have the power to examine the actions of government agencies including their use of algorithms. In several cases, the court has the ability to overturn factual findings or discretionary decisions made by agencies if they are deemed arbitrary, capricious or an abuse of discretion.[2]

The US Supreme Court has established a guideline for reviewing agency actions under the APA. According to this guideline, agencies are required to assess the evidence and provide a reasonable justification for their decisions.[3] This includes establishing a connection between the facts considered and the ultimate decision made. In years, there has been a renewed emphasis on agency transparency and accountability in relation to their use of algorithms.[4]

Apart from adhering to this review standard agencies also have an obligation to address the concerns raised by the public regarding algorithm usage.[5] These concerns may include issues related to bias, fairness, transparency and potential impacts on populations.

However, when agencies make forecasts within their specialized domains courts tend to give weight and consider these forecasts as highly reliable. This is known as the "frontiers of science" doctrine that acknowledges that agencies with expertise may possess an understanding of complex technical matters compared to courts.[6]

### III.1. The Role of xAI in Decision-Making and Judicial Review

There is a likelihood that government agencies using algorithms will face legal battles because this field of law and policy is complex and ever changing. The courts have a role in ensuring that government agencies are transparent and accountable when it comes to their use

[1] *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

[2] 5 U.S.C. § 706(2)(A).

[3] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[4] *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

[5] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

[6] *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).

of algorithms. At the time, they recognize the knowledge and expertise that these agencies possess in technical areas. Therefore, it is crucial for agencies to provide well thought out justifications for their actions while actively engaging with and addressing concerns regarding algorithm usage.

Thus, agency justification is essential to maintaining the standards that agencies establish. However, machine-learning algorithms can complicate, if not wholly confound, the ability to give reasons. Consider taking legal action against a government organization that gave undue weight to a machine-learning algorithm's forecast of an effects of chemicals on vulnerable species populations or human health. If that happens, the government agency might have to reveal its source data, the specifics of the machine-learning model, the percentage of errors produced by the resulting algorithm, and even the system's inner workings. The exact requirements that courts will place on agencies in this context, as well as the responses of agencies, are unclear at this time.

Some academics are optimistic about the courts' ability to accommodate the increasing prevalence of agency usage of algorithms. Agencies may meet this criterion if they demonstrate that the algorithm worked as expected and accomplished a reasonable goal. Complex modelling-based agency rulemaking is viewed with deference by the courts. The views of some academics are more skeptical. For instance, scholars worry about how opaque algorithms impede effective judicial review since courts cannot grasp the rules imposed in a given case (Citron, 2008). A court might consider a government agency's conclusion if it determines that the agency is basing its prediction on private sector expertise rather than its own when it uses a black-box algorithm it has acquired.

The integration of explainable artificial intelligence (xAI) in government organizations has garnered attention from academics, with varying perspectives on its potential implications. Some view xAI as a means of increasing transparency in decision-making processes, as it facilitates the identification of factors that drive a particular outcome. This could potentially assist government agencies in resisting court scrutiny. However, it is important to note that the effective utilization

of xAI requires its use in conjunction with the underlying algorithm (Vilone and Longo, 2021).

Scholars also recognize that xAI has the potential to support government agencies in their use of machine learning techniques. Even if algorithmic prediction is employed on a basis agencies can employ strategies to provide explanations for their actions. Data scientists are actively working on developing a range of techniques that can be easily understood by the public. Machine learning algorithms have the ability to enhance transparency by facilitating the identification of factors that contributed to an outcome as mentioned by Justice Cuéllar. This enhanced transparency could assist agencies in defending themselves against scrutiny (Coglianese, 2021).

Although it is evident that xAI holds advantages, for government decision making its implications for the system have not been thoroughly examined. The incorporation of xAI in institutions is expected to play a role in the transition towards greater dependence, on machine based decision making. However, further research is needed to fully understand the implications of xAI on the judicial system and how it can be effectively integrated within the legal framework.

### III.2. The Role of Courts in Fostering the Growth of xAI

As courts start the use machine learning algorithms to adjudicate administrative law disputes, courts will be instrumental in fostering the growth of the xAI ecosystem. The majority of discussions about xAI today are conceptual. However, if courts show a desire to test alternative hypotheses or request details regarding the inputs, outcomes, and dependability of agency algorithms, it will become more formal. Agency algorithms in regulatory situations may be subject to judicial scrutiny, which could encourage developers to adopt exogenous xAI strategies based on model-centric explanations of the algorithm's inner workings and dependability. In contrast, developers may use a decompositional approach to agency algorithms in adjudication, providing subject-centric explanations for the individual adjudicatory choices.

The notion that courts have the ability to choose the xAI tool for a particular case is quite promising as it upholds several aspects that

we highly value in the common law system (Rachlinski, 2006). This concept implies that judges can utilize xAI tools to aid them in making informed judgments. This approach is encouraging because it enables judges to maintain characteristics that are crucial to the common law system, such as reasoning through analogy considering past cases, for guidance and prioritizing personalized justice.

The judicial system can proceed "cautiously and incrementally" as it determines the best and most feasible methods of xAI for explaining various agency algorithms (Devins and Klein, 2017). When confronted with concrete evidence, the courts can make contextually appropriate decisions and avoid trying to stifle innovation in xAI. Courts will build upon precedents, adapting them slightly to address the novel issues raised by the development of this technology (Barak, 2008).

Additionally, xAI can potentially lessen the legal reforms that may be necessary for response to the technological disruptions brought on by machine learning. For instance, xAI could assist ease concerns expressed by courts on the continuation of deference accorded to agency decision-makers who rely primarily on algorithms or grant a "presumption of regularity" (Cuéllar, 2017) to opaque algorithmic decision making. Government agencies may see xAI to mitigate the adverse effects of doctrinal shifts by addressing judicial concerns upfront (Strauss, 1996). While a federal xAI regulation may provide more certainty at the outset, common law xAI may be more adaptable to technological advances in xAI and more attentive to what is both essential and possible in a given context.

## IV. Conclusion

Courts will encounter machine-learning algorithms in many areas of law, not simply agency rulemaking and criminal justice. The use of machine learning algorithms in various areas of law presents challenges for the judicial system. The courts will need to determine what level of explanation is required in each case involving algorithmic decision-making and how to address any biases or flaws in the algorithms. Courts resolving xAI-related problems should prioritise two concepts that can advance public law values: (1) matching the needs of target groups with

the optimal application of xAI in a specific situation, and (2) maximising the ability of xAI to help detect flaws and biases inside the algorithm.

The global impact of xAI is significant and nations worldwide are wrestling with the legal and ethical concerns it presents. The General Data Protection Regulation, in the European Union and the French Digital Republic Act serve as illustrations of guidelines that tackle the necessity for decision making to be explained. These guidelines emphasize the importance of transparency and accountability, in utilizing xAI as the significance of informing individuals about how automated decisions are reached. It is important to note that while the legislative branch has the authority to mandate the use of xAI in executive agencies and shape its implementation across industries and inside government, any legislation intended to govern the application of xAI must be broad enough to account for the dynamic nature of the field. Past actions by the legislature on complex technological matters suggest that it may struggle to act in this area. In contrast, xAI in legal system and adjudication holds great promise as we progress into the age of algorithms. While the court's ability to address xAI issues will be constrained, the work done by machine learning algorithm creators and users in response to xAI developments in other doctrinal areas may be sufficient to address the issues that arise. As the field continues to evolve and develop, common law rulings can provide guidance and create legal precedents that can help shape the responsible development and use of xAI.

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# Forms and Types of the Use of Specialized Knowledge in Russian Legal Proceedings: Current State and Prospects

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***Abstract:*** The work of knowledgeable persons involved in legal proceedings by officials conducting legal proceedings is of primary significance. The work of knowledgeable persons is inter-procedural in nature. The use of specialized knowledge is characterized by a special form. The paper presents the opinions of researchers and the author concerning classification of forms and types of the use of specialized knowledge in Russian legal proceedings. The author concludes that classifications are important for the development of academic thought and practice in relation to different types of legal proceedings. The majority of researchers are in favor of distinguishing two forms of using specialized knowledge — procedural and non-procedural forms. Forensic examination is one of the main and common types within the procedural form. In addition, the author focuses on participation of a specialist in production of procedural (including investigative) and judicial actions, consulting an expert and other procedure participant. The types of the use of specialized knowledge within the framework of the non-procedural form in terms of content, to a certain extent, are compatible with the types identified within the framework of the procedural form. Specific types can also be identified, e.g., medical forensic examination (expertise), revisions, audits, etc. Alternative expertise takes a special place among the types of the use of specialized knowledge in the non-procedural form. Its normative regulation has not developed, and the use of its results in legal proceedings as evidence is still in question. At the same time, many types within the framework of the procedural form

are normatively regulated. However, the shortcomings of normative regulation as well as not fully developed methodological aspects prevent the use of the results of these types of forensic examination (expertise) in legal proceedings. In relation to some types within the framework of the non-procedural form, the results of which are now actively used in legal proceedings, there is neither normative regulation nor theoretical justification based on a unified approach. In this regard, it is especially important to unify not only the forms of using specialized knowledge, but also the types, based on a general theoretical expert approach, as well as ways to use their results in legal proceedings.

***Keywords:*** forms and types of the use of specialized knowledge; forensic examination; participation of a specialist; specialist advice; forensic activities; forensic expertology

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## Contents



## I. Introduction

For a long time, the use of specialized knowledge in legal proceedings has not been an unusual way of establishing facts significant for the case. Having passed a long way of formation and developing following the development of science and technology, the use of specialized knowledge in legal proceedings is now in demand and sometimes

an indispensable technique. Considering that legal proceedings are formalized, all processes occurring during legal proceedings must comply with the form established under procedural law. They must be carried out in compliance with the accepted procedure. Indeed, many types of the use of specialized knowledge are already well-established, normatively regulated and correspond to the procedural form. But practice, responding to the needs of the parties involved in the case, forms "new" types of the use of specialized knowledge, the normative regulation of which is either absent at all or is minimally represented. In this regard, there are problems in the use of special knowledge in legal proceedings, the solution of which depends primarily on theoretical research and subsequent legislative improvement.

## II. The Science of Forensic Expertology as a Theoretical Foundation for the Forms and Types of the Use of Special Knowledge

The use of specialized knowledge is a specific activity involving persons conducting legal proceedings or other jurisdictional proceedings engaging knowledgeable persons in order to obtain information relevant to the exercise of their procedural function, or to provide other assistance in a procedural manner. Like many other activities, the use of specialized knowledge is based on a theoretical basis, which at present can rightly be recognized as the science of forensic expertology.

Expertology as a new science was born relatively recently. It served as a kind of response to the need of forensic examination practice in a uniform scientific, methodological, legal, and organizational foundations for various forms and types of forensic expertise. There are practically no analogues of such a science in the world that completely coincide in subject matter and objects. Its founders and developers include A.I. Vinberg, A.R. Shlyahov, Yu.G. Koruhov, I.A. Aliev, E.R. Rossinskaya, T.V. Averyanova, N.P. Majlis, T.F. Moiseeva, I.N. Sorokotyagin, M.Ya. Segaj, S.F. Bychkova, K.N. Shakirov and many others, followers and students of the scientists-luminaries named above.

The path of the formation of the science is always thorny. In previous years, there were many discussions about the subject matter

and object, principles and methods, the place of the science in the system of scientific knowledge, its independent or subordinate status, interaction with other sciences.

Nevertheless, expertology has withstood the test with honor and has become the science that adequately combines the totality of theoretical knowledge accumulated over many years. Currently, there are hardly any scientists engaged in research in the field of criminology and forensic expertise who are not aware of the essence of expertology. It should be noted that not all researchers unanimously support the independence of expertology, considering it as a part of forensics. This aspect has been discussed many times at various discussion platforms — within the framework of international scientific and practical conferences — and has actually been resolved in favor of the development of expertology as it has outgrown the framework of criminology for many years.

The subject matter of forensic expertology, according to E.R. Rossinskaya, covers theoretical, legal and organizational patterns of the implementation of forensic expert activity in general; patterns of the emergence, formation and development of classes, genera and types of forensic examination and their particular theories based on a uniform methodology, uniform conceptual apparatus with due regard to the constant updating and modification of forensic examination and developed on the basis of knowledge of these patterns unified expert technologies for all types of legal proceedings, standards of expert competencies and certified expert laboratories, unified legal and organizational support of forensic expert activity (Rossinskaya, 2013a, p. 427). This definition is justifiable, but it can be supplemented by the inclusion of theoretical, legal and organizational patterns of application and use of special knowledge in other types of jurisdictional activities. Since in many types of jurisdictional activities they are used within the framework of customs and tax control, in enforcement proceedings and notarial activities.

Such legal aspects as an integrated approach will allow to overcome fragmentation and inconsistency of the legal regulation of forensic expert activity. This can be justified as follows. First, a forensic expert studies the general patterns that characterize forensic expertise, including the process of its commission and performance. Second,

these patterns are inextricably linked with legal proceedings and other types of jurisdictional activities, which does not allow narrowing the subject of research only within the criminal procedural sphere, since forensic expertise, as a legal institution, is used in all types of legal proceedings, as well as in enforcement proceedings, notary, customs and other jurisdictional activities. In fact, the above confirms the need to unify the legal foundations of forensic examination, regardless of the type of legal proceedings or jurisdictional activity. Unification of the legal foundations of forensic examination cannot be achieved if these foundations are studied exclusively by criminal procedure law or some other procedural branches. It will be impossible to implement uniform provisions to forensic expertise in practice.

Forensic expertology has devoted its research to various uses of special knowledge and is constantly inventing new methods and opportunities for solving expert problems, researching new, previously non-existent objects.

Thus, it is forensic expertology that acts as the substantiating knowledge for the normative regulation and implementation of legal institutions of forensic examination, the participation of a specialist, as well as expertise in other types of jurisdictional activities and other legal institutions related to the use of specialized knowledge in various types of jurisdictional activities. The provisions developed by forensic expertology act as a scientific foundation for unification of intersectoral legal institutions that form a macro-institute for the use of specialized knowledge in Russian legislation (Dyakonova, 2017).

## III. Classification of Forms and Types of the Use of Specialized Knowledge

Researchers conducting research in the framework of criminal or civil proceedings have put forward opinions on the existence of certain types of the use of special knowledge. Most scientists agreed on the existence of procedural and non-procedural forms of using specialized knowledge.

The forms of using specialized knowledge are different, depending on the classification criteria, external expressions of cognitive and

certifying activities of knowledgeable persons participating in legal proceedings or other jurisdictional activities of the EAEU member states, having their own purpose and methods of implementation. Within each form, it is possible to distinguish from two or more different types of the use of specialized knowledge. The number and titles of the forms and types identified by scientists vary depending on the criteria that the authors define. So, if we take into account that specialized knowledge is a broad category and legal knowledge is also specialized, then as one of the types, some scientists distinguish the use of specialized knowledge by an investigator and a judge, respectively, in the investigation of criminal cases and the consideration and resolution of cases of various categories (Shikanov, 1980, p. 39). However, it should be considered an important feature is the presence of a special subject — a carrier of special knowledge, which in theory can be called a knowledgeable person. A knowledgeable person is a participant in legal proceedings or other type of jurisdictional activity who has specialized knowledge that he acquired in the course of professional training or retraining and is attracted to assist through the application of this knowledge by persons conducting the process, as well as other participants interested in the legal outcome of the case. Based on this, the investigator and the judge cannot be subjects of the application of specialized knowledge. They can only indirectly, through knowledgeable persons, use them in the proceedings. Knowledgeable persons in the terminology of legal proceedings enshrined in law, include: an expert and a specialist. Among other things, knowledgeable persons are characterized by competence, disinterest in the outcome of the case, and they are engaged in the proceedings by persons who carry it out in the form prescribed by law.

E.R. Rossinskaya, E.I. Galyashina, and A.M. Zinin believe that the procedural forms of the use of specialized knowledge, when the results of their application have evidentiary value, include: the use of specialized knowledge in the production of investigative or judicial actions; the use of specialized knowledge in the preparation of protocols on administrative offenses and consideration of administrative cases by members of collegial bodies and officials; consultations and expert opinions; forensic examination (Rossinskaya, Galyashina and Zinin, 2022, p. 16).

In fact, scientists are unanimously recognized as existing in the currently available types of Russian legal proceedings (constitutional, civil (including arbitration), administrative and criminal) the following types of the use of special knowledge within the procedural form: forensic examination, participation of a specialist in procedural actions in order to provide technical (scientific and technical) assistance, participation of a specialist in procedural actions for the purpose of giving advice, the participation of an interpreter (sign language interpreter).

E.A. Zaitseva believes that the classification of forms of special knowledge in criminal proceedings according to normative regulations is of the greatest interest. It is assumed that the form of using specialized knowledge is provided for by the current criminal procedure legislation; the results of their application appear as independent types (sources) of evidence (except for the participation of an interpreter). In this regard, the procedural form of using specialized knowledge, in her opinion, includes the following types: a) commission and performance of forensic examination; b) participation of a specialist in investigative and other procedural actions (scientific, technical and consulting assistance by a specialist to persons conducting criminal proceedings and an advocate); c) participation in criminal proceedings of witnesses with special knowledge (a knowledgeable witnesses[1]); d) participation of an interpreter in the proceedings (Zaitseva, 2008, p. 205). The allocation of the participation of knowledgeable witnesses within the framework of the procedural form is a debatable issue. Interrogation of knowledgeable witnesses has its own specifics in a meaningful sense. A person possessing specialized knowledge can give valuable information taking into account the fact that he perceives it through his knowledge and can explain implicit moments during interrogation. In addition, if we consider that the interrogation of a witness is regulated in procedural codes, and a person with specialized knowledge may well be interrogated as a witness, then we can conclude that there is such

[1] Under Russian law, a *knowledgeable witness* is a procedure participant who is not interested in the outcome of the case, who has specialized knowledge and possesses the information necessary to establish facts relevant to the case. A knowledgeable witness is called for questioning by the official (body) conducting the procedure to testify, and is subject to responsibility for giving deliberately false testimony.

a type of use of specialized knowledge. However, in court proceedings, all participants have their own name corresponding to the function they perform. And such a participant as a "knowledgeable person" is not singled out in any procedure. This means that in theory it is quite acceptable to single out the participation of knowledgeable witnesses in criminal proceedings, but in practice, in accordance with strict normative regulations, there are no grounds for this yet.

The non-procedural form is characterized by either the absence of normative regulation in general or by such regulation provided beyond procedural codes, for example, in federal laws, departmental orders and instructions. The results of the application of specialized knowledge are drawn up in the form of acts provided for by federal laws (for example, the auditor's report) or departmental orders and instructions (expert certificates, forensic medical examination reports, audit reports), which can be attached to the case as evidence, but in the form of a written or other document. Within the framework of the non-procedural form, various types of the use of specialized knowledge are distinguished, but mostly scientists enumerate the following: forensic and psychiatric examinations; documentary tax and fiscal audits, audits and inventories, non-judicial (including alternative or independent) examinations, departmental investigations, etc. (Rossinskaya, Galyashina and Zinin, 2022, p. 17; Zaitseva, 2008, p. 205).

However, there are other types of the use of specialized knowledge in criminal proceedings, e.g., some preliminary studies. At one time, they appeared as a response to the need for practice in conducting express methods of investigation of objects found at the scene. Until 2013, commission and performance of a forensic examination before the initiation of a criminal case was not allowed. Regulatory consolidation of the possibility of conducting forensic examinations before initiating a criminal case was established only by the Federal Law No. 23-FZ dated 4 March 2013 "On Amendments to Art. 62 and 303 of the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation."

Legislative regulation of issues related to preliminary studies is carried out by the following provisions. Although this conclusion is not indisputable.

Paragraph 5 Art. 6 of the Federal Law dated 12 August 1995 "On operational investigative activities" provides for the research of objects and documents as one of the operational investigative measures. Paragraph 18 Art. 12 of the Federal Law dated 7 February 2011 "On the Police" establishes the obligation for the police agency to conduct, in accordance with the legislation of the Russian Federation, examination during criminal proceedings, administrative proceedings and examine the materials of operational investigative activities when verifying statements and reports of crimes.

Under "The instruction on the organization of forensic activities in the system of the Ministry of Internal Affairs of Russia (approved by the Order of the Ministry of Internal Affairs of Russia dated 11 January 2009), one of the main types of participation of officers of forensic units in the operational investigative activities of internal affairs bodies includes participation in the research of objects (substances) and documents to identify crimes (Para. 37.1). In Para. 39 it is established that "the examination of objects (substances) and documents" is used as equivalent to the term "preliminary examination." At the same time, a forensic officer who can conduct preliminary examination is required to have the right to independently conduct forensic examinations obtained (confirmed) in accordance with the procedure established by the Ministry of Internal Affairs of Russia in compliance with the nature of the examination being performed (Para. 39.2). According to the results of such a study, a certificate of the examination is compiled (Para. 42).

At the same time, in Section IV of the Instruction, it is established that with the participation of forensic officers as specialists in checking reports of crimes, they conduct examinations of objects, the result of which is also a certificate of the examination.

Strictly speaking, based on the provisions of the Instruction, a preliminary examination can only be considered conducted within the framework of operational investigative activities. Since preliminary investigations and investigations of objects when checking a crime report differ in the order of commissioning and timing, the methodological aspects of the implementation of these studies coincide. It is of interest that in Para. 55 of the Instruction, which contains requirements for the study of objects carried out when checking reports of crimes, there is no

indication of a requirement for a forensic officer similar to Para. 39.2 of the Instruction. Does its absence mean that such examinations can be carried out by officers who do not have the right to independently conduct forensic examination? We believe not, since practice confirms that object examinations and preliminary examinations are carried out by the same officers.

The Instruction on the organization of the formation, maintenance, and use of forensic records of the bodies of internal affairs of the Russian Federation, approved by the Order of the Ministry of Internal Affairs of Russia No. 70 dated 10 February 2006 also provides for the conduct of examinations of objects in order to identify, consolidate forensic information before including it in forensic records (Para. 7, 23.2, 27.1). The result of such a study is the registration of a certificate of the results of the study to inform the authorities who submitted the objects (Para. 27.1).

Interestingly, the provision of Para. 29.2 of this Instruction establishes that an inquirer, investigator or operative officer independently or on behalf of a person or body conducting a preliminary investigation, if necessary, involving a specialist, submits the objects obtained to forensic units for examination or research in order to identify and consolidate forensic information, determine its suitability for comparative research and, in case of its suitability, to exclude traces that are not relevant.

A forensic officer on behalf of his supervisor, examines the received object in accordance with the established methods (Para. 30.1 of the Instruction). Based on the results of the examination, a forensic officer draws up a certificate of the suitability or unsuitability of the object for comparative research, which he submits to the official who submitted the object for research, as well as to the properly authorized forensic officer.

In addition to what is specified in Part 1 Art. 144 of the Code of Criminal Procedure of the Russian Federation, the right of the inquirer, the body of inquiry, the investigator, the head of the investigative body "to demand the performance of... examination of documents, objects, corpses, to involve specialists in these actions" is established. At the same time, it is not explained anywhere what is meant by these

"examinations," whether they are "preliminary," what is their difference from forensic examination, the commission and performance of which before the initiation of a criminal case is also provided for in Part 1 Art. 144 of the Criminal Procedure Code of the Russian Federation.

Thus, there is no normative definition of *preliminary examination*. However, it is obvious that scientists call all the above-mentioned types of "examination" "preliminary," probably in order to emphasize their preparatory, tentative nature before a full-fledged forensic examination.

V.D. Korma, after analyzing the opinions of scientists, gives a classification of the preliminary examination depending on the venue:

— in stationary laboratories of expert institutions on the basis of the tasks of the body of inquiry, authorized to carry out operational investigative activities;

— in mobile forensic laboratories in the conditions of inspection of the scene;

— at the scene of the incident and other investigative actions (out-of-laboratory research or in the field);

— in the Forensic Center of the Ministry of Internal Affairs of Russia (its local units) when checking objects according to several records of forensic institutions, which are presented as samples for comparative research (Korma, 2022, p. 148).

At the same time, V.D. Korma considers it expedient to distinguish three types of preliminary examination of material traces:

1. Examination conducted during the inspection of the scene of the incident (other investigative actions).

2. Examination carried out in laboratory conditions on the basis of a written assignment of an operational body of inquiry, authorized to carry out operational investigative activities.

3. Examination carried out during the inspection of objects according to forensic records (Korma, 2022, p. 149).

The above classification is quite relevant. However, it seems that it is more accurate to divide the preliminary ones by the criterion of "the type of activity within which they are carried out." In this case, the preliminary examinations are divided into:

1) examinations of objects carried out in the process of verifying a report of a committed crime;

2) examinations of objects carried out during the investigation of crimes in order to identify and consolidate forensic information before placing such objects on the forensic register;

3) examination of objects carried out in the framework of operational investigative activities.

All these types of examinations are preliminary in relation to the possibility and necessity of subsequent forensic examination of the same object. They can be carried out both in laboratory and outside laboratories, since this factor does not affect the essence of such a study.

The need for preliminary examination in the framework of operational investigative activities is not disputed. But as part of the verification of a crime report and a preliminary investigation, the existence of two types of use of specialized knowledge that are identical in content seems superfluous.

The main features characterizing preliminary examinations as verification activities are the following: 1) preliminary examination is carried out in relation to objects, the safety of which is difficult to ensure for further expert examination, thus the study should be carried out immediately after the discovery and fixation of the object; 2) preliminary examinations are carried out through the use of methods and techniques that allow this to be done in the conditions of investigative actions or operational investigative measures, without the use of complex laboratory equipment; 3) preliminary examinations do not take a long time to obtain a result, unlike many types of forensic examination. Thus, the preliminary examination is based on the same methodological basis as the forensic examination. The main thing is the time factor, the need for immediate examination of the object. Even though at the stage of initiation there is a possibility of commission and performance of a forensic expertise, the formation of an expert opinion by a forensic expert.

Thus, the question of the need for simultaneous existence of preliminary examinations and forensic examination remains open. It is necessary to support the position of scientists who insist on excluding all kinds of examination, in addition to forensic examination, in the framework of criminal procedural activities (Dyakonova, 2019, p. 16).

The authors' opinions on the separation of the forms of the use of specialized knowledge may indicate the use of different criteria for classification, although, in fact, the separation should be carried out with the joint use of these criteria. The criteria "evidentiary value of the results of the application of specialized knowledge" and "normative regulation (consolidation)" should be considered together, since they are closely interrelated, reflect the form and content of classification. The criterion "evidentiary value of the results of the application of specialized knowledge" is responsible for the substantive side of the classification, and the criterion "regulatory regulation (consolidation)" — for the formal one (Ivanova, Dyakonova, 2017, p. 47).

In fact, there are only two forms of using specialized knowledge, within which it is possible to identify species characterized by general and particular characteristics.

Signs of the types of the use of specialized knowledge within the framework of the procedural form: a) there is a normative regulation in the procedural code of the procedure for contacting a knowledgeable person, his involvement in the process, depending on the purpose of participation; b) there is a normative regulation in the procedural code and special legislation of the result of the use of specialized knowledge, the form and content structure of such a result. A *special law* is referred to Federal Law No. 73-FZ dated 31 May 2001 "On State forensic expert activity in the Russian Federation" (On SFEA), which establishes the foundations and individual aspects of the legal regulation of the institute of forensic examination; c) there is a normative consolidation in the procedural Code and special legislation of the rights, duties and responsibilities of the subjects of the process involved in the use of specialized knowledge — from persons leading the proceedings, knowledgeable persons (expert, specialist) to procedure participants interested in the legal outcome of the case. Special legislation in this regard, in addition to the above-mentioned Federal Law On SFEA, is the Criminal Code of the Russian Federation and the Code of Administrative Offenses of the Russian Federation.

The features of the types of the use of specialized knowledge within the framework of a non-procedural form: a) are characterized by the absence of normative consolidation in the procedural code of the

procedure for contacting a knowledgeable person, his involvement in the process, depending on the purpose of participation; b) there is no normative regulation in the procedural code of the result of the use of specialized knowledge, the form and content structure of such a result. In this case, special legislation may be applied, which may regulate the form and structure of the result. For example, the provisions of subsection 2 of Part 1 of the Civil Code of the Russian Federation and some chapters of Part 2 of the Civil Code of the Russian Federation regulating certain types of contracts; c) there is no normative consolidation in the procedural code of the rights, duties and responsibilities of subjects who apply outside of legal proceedings to knowledgeable persons (expert, specialist). At the same time, the provisions of subsection 2 of Part 1 of the Civil Code of the Russian Federation and some chapters of Part 2 of the Civil Code of the Russian Federation regulating certain types of contracts may also be applied; d) there is a risk of not accepting the result of using specialized knowledge in a non-procedural form in court proceedings, despite the methodological correctness and reliability of the information contained therein.

Thus, there are many types of using specialized knowledge, but they are all united by a common problem. If there are only two forms in different proceedings, there is no unified approach to the same type of use of special knowledge. This leads to the appearance of different varieties of the same type in essence (for example, a specialist's consultation, a specialist's opinion and a specialist's review of a forensic expert's opinion).

## IV. Forensic and Alternative Examination

Forensic examination is the most common type of the use of specialized knowledge within the framework of the procedural form. Forensic examination is a procedural action, i.e., a set of cognitive actions aimed at obtaining answers to questions that require the use of specialized knowledge in various fields of science, technology, art, craft, including the appointment and production of expert research performed by the subject conducting the proceedings and the expert, as well as drawing up an expert conclusion based on the results of the examination

and its assessment by the participants of the process. Speaking about conducting expert research in other types of jurisdictional activities, it should be borne in mind that such an examination cannot be called "judicial," but this does not change the essence of the expert's activity. Such examination may be referred to as expertise in other types of jurisdictional activities. Given this provision, we can talk about forensic examination not only as an institution of criminal procedure law, which does not detract from the achievements and developments related to improving the regulation of the institute of forensic examination in court proceedings and other types of jurisdictional activities. The commission of a forensic examination is the first stage of a procedural action, consisting of determining the type of forensic examination, preparing objects and materials for research, formulating questions to an expert, issuing a resolution or ruling on the commission of a forensic expertise by a person (body) authorized by law, performing a set of actions to ensure that participants in the proceedings exercise their rights, and submitting these objects and materials to the expert organization (expert). This is a set of actions, the purpose of which is to carry out preparatory actions in accordance with the procedure established by law, aimed at ensuring the proper performance of forensic examination. Performance of examination is an activity that consists of examination conducted by an expert using a special technique (using a certain method, methods) based on the materials received and objects submitted for examination and the presentation of the examination result to the person (body) who commissioned the expertise.

Forensic examination is currently one of the most common types of the use of specialized knowledge in legal proceedings. However, the elements that make up a forensic examination as a procedural action and characterize it also act as signs of an expertise commissioned in other types of jurisdictional activity. The general functional essence of forensic examination and expertise in other types of jurisdictional activity suggests the need to study these examinations within the framework of one science and uniform regulation, taking into account the specifics of jurisdictional activity, but on a single scientific basis.

Forensic examination significance for a particular stage includes:

1) characterizing the purpose of forensic examination: a) procedural form — the procedure for commissioning a forensic examination regulated by law; b) the subject conducting the process in need of expert assistance; c) the purpose of commissioning and performing a forensic examination; d) the object (as an object of material or immaterial, but reflected in the material), the study and evaluation of which from the point of view of proof is difficult; e) specialized knowledge, the presence of which is necessary for the examination of the object; f) a subject with specialized knowledge — an expert; g) exercise of the rights related to the commission of a forensic examination by the participants in the process, to whom this right is granted by law;

2) characterizing the production of examination: a) the procedural form — the procedure for conducting a forensic examination regulated by law; b) the use of specialized knowledge; c) the subject with specialized knowledge — an expert; d) the object and subject of forensic examination; e) the purpose of the examination is to obtain the results of the examination and formulate results to reflect them in the conclusion; f) examination methods (techniques); g) expert opinion; h) the subject conducting the process, who appointed the forensic expertise; i) exercise of the rights related to the examination by the participants in the process, to whom this right is granted by law;

3) characterizing the assessment of the expert's opinion submitted by the participants in the proceedings: a) procedural form — the procedure regulated by law for submitting the expert's opinion to the person conducting the process and its assessment by the participants in the proceedings; b) the expert's conclusion; c) the subject conducting the process who commissioned the forensic examination; d) the assessment of the expert opinion by the subjects of the process defined by law; e) the object and subject of forensic examination; f) research methods (techniques); g) a subject with specialized knowledge — an expert.

The systematization of the features of forensic examination made it possible to determine the features of this form of using specialized knowledge in contrast to others, primarily from the participation of a specialist in legal proceedings. Thus, forensic examination is distinguished by the procedural form of all its elements; conducting

research based on specialized knowledge; the presence of a competent person who has received the status of an expert by the decision of the investigator or the definition of a judge (court), in connection with which the subject conducting the examination is an expert who has procedural independence and bears individual responsibility for the formulated conclusions; the appearance of new knowledge that did not exist at the time of the appointment of the examination, which the expert receives as a result of the study; direct examination by an expert of the objects of examination; objective and comprehensive forensic examination (lack of interest of the expert in obtaining certain research results); procedural registration of the results of expert research — the progress and results of expert research are formalized by a special document — expert opinion, which is an independent type of judicial evidence provided for by procedural law; methodological and procedural features of the evaluation of expert opinion.

Some scientists propose criteria for classifying judicial and non-judicial uses of specialized knowledge. So, E.V. Ivanova suggests dividing by the criterion of "the subject of the examination" into state (departmental) and private. Private, in turn, can be both judicial and non-judicial. "Private non-judicial examination is carried out on a contractual basis, as a rule, in some forensic expert institution. State (departmental) expertise is carried out for the needs of a certain department" (Ivanova, 2016, p. 275). At the same time, E.V. Ivanova believes that "non-judicial examination falls under the generic characteristics of a special study, characteristic of forensic examination. However, the results of a non-judicial special study cannot be equated in their procedural status with the expert's conclusion as judicial evidence: the procedural form that constitutes the expert's conclusion is the procedural form that is not peculiar to non-judicial expertise and its results" (Ivanova, 2016, p. 275). Agreeing that the so-called "non-judicial examination" lacks a procedural form, we note that this is due to the imperfection of legal regulation, therefore, the conclusion of E.V. Ivanova that "the use of the results of non-judicial expertise for evidentiary purposes is subject to independent procedural regulation" (Ivanova, 2016, p. 275) is correct. However, we believe that the very basis of the classification, as well as the selected species, are not formulated quite well.

It seems more accurate to separate the types of use of specialized knowledge based on expert research, the results of which can be used as evidence in the case, depending on the subject commissioning the forensic examination, and the result obtained, as well as the scope of its application. Such a criterion is complex and in connection with it, the following types can be distinguished: judicial (within the framework of legal proceedings in the narrow sense and preliminary investigation), expertise in other types of jurisdictional activities — tax, customs, notary and others, alternative expertise — research that can be used as an alternative to examination, commissioned by persons or bodies conducting the process in various types of jurisdictional activities. This classification is of significant practical importance, since it allows at this stage of the development of the legislative regulation of expertise to give shape to those examinations that are carried out beyond the proceedings, but the results of which can later be used in the procedure.

Other authors also pay attention to the use of the results of alternative (in the terminology of some scientists — independent) examination in legal proceedings (Zaitseva, 2010, p. 28; Karpukhin, 2013). It seems incorrect to use the term "independent examination," since the classification of examination based on "dependence" on something or someone violates the principles of logic and discredits jurisdictional activity. Of course, on the websites of many non-governmental expert organizations, and in their names, you can see a proposal to conduct an independent examination. The presence of such proposals indicates terminological uncertainty, which was also pointed out by other authors (Vnukov and Zaitseva, 2008, p. 27; Shishkov, 1994, p. 37). The name "non-judicial expertise" is also not suitable, because it characterizes the production of examination outside of any judicial process in general, for example, the state examination of project documentation. It is necessary to support the opinion of E.R. Rossinskaya, who suggests using the term "alternative examination" (Galyashina and Rossinskaya, 2006, p. 1046).

Thus, alternative examination differs from judicial ones, firstly, by the order of appointment, secondly, by the procedural and legal status of subjects who have the opportunity to determine the need for expert

research and entrust its production to a specific expert, and thirdly, by the peculiarities of legal registration (contractual relations).

Alternative examination can be called, which are carried out on the initiative and on behalf of persons participating in the case, in civil, arbitration and administrative proceedings, the defense party in criminal proceedings, the defender and the representative in administrative proceedings on administrative offenses. That is, in this case, persons who have a legal interest in the outcome of the case, or their representatives, turn to the expert. Legal interest, according to the majority of processualists (G.L. Osokina, V.M. Gordon, A.A. Melnikov, etc.), is a prerequisite for the emergence of the right to a claim. In our opinion, legal right is a manifestation of legal interest. In relation to the sphere of criminal proceedings, there is also a legal interest in the outcome of the case, however, in this situation, it is inherent not to all participants from one side or another, but only to those whose interest is personal, i.e., the victim, the civil plaintiff and the civil defendant, their representatives, the suspect, the accused, their defender. A similar situation is developing in administrative proceeding. In civil, arbitration, and administrative proceedings, with rare exceptions, the persons involved in the case have a personal interest in its outcome.

In an alternative examination, the design of its results and the possibility of their subsequent submission to the court as evidence is not fully developed and not regulated.

More often, an expert is contacted on the basis of a civil contract for the provision of services provided for in Chapter 39 “Paid provision of services” of the Civil Code of the Russian Federation (Civil Code of the Russian Federation. Part Two. Federal Law No. 14-FZ dated 26 January 1996). In this case, the customer is the subject of the proceedings listed above, and the Contractor is the organization or directly the expert conducting the study.

However, it seems that conducting an expert examination, which is the subject of the contract, cannot be considered a “service.” Forensic examination is a type of activity of an expert aimed at identifying information hidden in objects using techniques and methods based on his specialized knowledge. It bears the features of scientific and, to a certain extent, creative research, but with the aim of assisting in the

implementation of proof by persons having a legal interest in the case. In this regard, it is proposed to formalize the legal relationship between the person applying to the expert (the Customer of the study) and the expert (the Executor of the study) with a "contract for conducting expert research." We believe that some provisions of Chapter 39 of the Civil Code of the Russian Federation can be extended to this type of contract.

However, in the legislative regulation of the contract in the new law on forensic activities in the Russian Federation, the following should be taken into account. According to the contract on conducting expert research, the persons participating in the case instruct the subject with specialized knowledge in a certain field — an expert, to conduct an examination of the objects available to them to obtain answers to questions relevant to the case and submit its conclusion to the court as evidence. It is important to establish that the submitted document — an expert opinion based on the results of an alternative examination is accepted into the proceedings as evidence and should be evaluated according to the rules of evaluation of the expert opinion.

The main (essential) conditions of the contract under consideration are the following:

1. The subject of the contract (intangible services). The subject should be disclosed subject to a clear definition of the type of examination and specific objects in the form of a list. The type of examination should be specified, as well as the requirements to produce research, including those concerning the use of certain methods and techniques by an expert, should be defined. It should be noted that the expert's opinion itself as a document is not the subject of the contract, but its result, along with the expert's message about the impossibility of giving an opinion under certain conditions. We believe that the questions posed to the expert are also included in the subject of the contract, but they should be listed in the application or assignment, which is an annex to the contract. The correct definition of the subject of the contract affects the quality of the result of the study — the expert's conclusion. Moreover, judicial practice has different attitudes to the unclear statement of the subject in the contract for the provision of services, but most often such a contract is recognized as not concluded, that is, the process of concluding the contract has not been legally completed.

2. The object of the contract. The objects should be listed in the text of the contract. A detailed list of objects that are submitted for research, as well as their condition, should be given in the application or assignment, which is an annex to the contract. At the same time, with respect to each object sent for research, it is necessary to designate the signs characterizing the object in such a way that their enumeration indicates only this and no other object.

3. The contractor of the contract. An expert or a commission of experts with special knowledge in the required field/areas.

4. The price of the contract. The question of determining the cost of the study may arise only in cases when a person with special knowledge is approached, the examination for which is not the main activity, or in connection with an exceptional, rare type of expertise, including a complex nature. In most cases, the appeal occurs to expert organizations that determine in advance the cost of research in a particular area of special knowledge in which they specialize. Usually, such information is provided on the official websites of expert organizations. It is not an exceptional situation when the cost of a service can be increased or decreased, but its amount in any case should be established at the conclusion of the contract and indicated in it. In addition, the contract must specify the calculation procedure, in which prepayment is not excluded.

5. The condition for the presentation of the results of the expert study. It is necessary to clearly agree on the condition concerning the presentation of the results of the examination — an examination report or expert opinion must be issued, and it is necessary to draw up an act of acceptance of the result of the study with the signatures of the customer and the contractor. After that, the transfer of the prepared expert opinion, objects and materials submitted for research should follow. In the contract, we believe, it is also necessary to prescribe a provision on the possibility of an expert, if necessary, to draw up a reasoned written message about the inability to give an opinion (Art. 16 of the Federal Law On SFEA).

6. The term of execution of the contract. An important condition of this agreement is the term of the expert study. The contract must specify the date of both the start of the study and its end. Like all the

terms of the contract, the term condition should be discussed with the direct executor — an expert who can justify the time required for a specific study.

In addition, the rule of Part 1 Art. 770 of the Civil Code of the Russian Federation on the possibility of involving third parties in the execution of a contract for the performance of works only with the consent of the customer should apply to an expert performing an alternative examination. In other words, before conducting an expert study, the contractor of the contract, whether it is an organization or an expert, should discuss the issue of a possible commission composition.

All these essential conditions, it seems, should be discussed by the parties with the participation of the expert who will conduct the study. Other conditions concerning the grounds and procedure for termination of the contract, liability of the parties, resolution or settlement of disputes, and others may be prescribed in a template. Including the condition of warning the expert about the responsibility for giving a deliberately false conclusion.

This issue arises acutely when conducting an alternative expertise. The court is more interested in it, since it is often the basis for refusing to accept the expert's opinion even as another document in the absence of an indication of the expert's warning about criminal liability under Art. 307 of the Criminal Code of the Russian Federation. Without going into a discussion about the necessity or obligation of such a warning, we note that if the contract is concluded directly with the expert, then this condition should be included in the contract for the provision of expert services in the responsibility of the parties.

Despite the existing positive aspects of the normative consolidation of alternative expertise, such as increasing the adversarial nature of the parties in the proceedings, stimulating the active participation of persons interested in the outcome of the case, saving the time of the process, and others, it is necessary to take into account the limited possibilities for conducting such examinations.

Firstly, the preparation of objects and materials for research is quite difficult. The possibilities of persons who are initiators of an alternative examination to provide objects for research (for example, those located on the opposite side) are limited. A solution to this problem

is proposed through the active use of the arsenal of rights possessed by the participants in the process. So, for example, you can apply to the court or to the investigator and use the right to familiarize yourself with the case materials and make copies and extracts from them. As for the presentation of objects that are located on the opposite side, in this situation, the appointment of an alternative expertise is possible only by agreement between the parties or by means of a forensic expertise.

Secondly, we believe that a serious limitation in the alternative expertise is the impossibility of carrying it out in relation to a living person. There is only one case when such an expertise can be carried out — when the person in respect of whom it is being carried out wishes to conduct an expertise and expresses his intention, which is not in doubt, in writing. But even in this case there is a limitation since some types of expertise in relation to living persons can only be performed by state expert institutions.

Thirdly, when conducting an alternative expertise, a financial aspect arises, which consists in the need to pay for the cost of the study, and often before it is carried out: 1) the research customer is convinced that he pays for the result, and not for the research process; 2) it is not at all necessary that the costs of the expertise in the future will be included in the court costs. The costs are not always distributed among the persons involved in the case in such a way as to fully cover all the costs of the person bearing them. The cost of alternative expertise varies depending on its type, directly depends on the fame of the expert organization, on its so-called "rating" in the "expert services market." Despite the conventionality of this concept, when choosing an expert organization, many pay attention to this aspect, only then clarifying the competence of experts, their work experience, the number of expertise performed, and so on. It is impossible to overcome these shortcomings in a short time and only by legalizing the institute of alternative expertise. In addition to proper procedural and legal regulation, it is necessary to unify the requirements for the competence of an expert, for expert organizations.

The advantages of alternative expertise include: increasing the level of competitiveness of the parties in the proceedings; stimulating the active participation of persons interested in the outcome of the

case; saving the time of the proceedings; saving money spent on the implementation of the proceedings, etc.

Courts have different approaches to accepting the conclusions of "alternative examination" as evidence: in arbitrazh proceedings, the courts accept as "other evidence," but in the civil case, the law does not provide such an opportunity. As M.V. Kamenkov correctly notes, "sometimes courts prefer not to go into the study of the legal status of the expert opinions submitted by the parties, considering them as one of the types of evidence in the case along with others available in the case" (Kamenkov, 2014, p. 154). Nevertheless, the Supreme Arbitration Court of the Russian Federation at one time took a principled position, having established in the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 23 that "the expert's opinion on the results of a forensic expertise appointed during the consideration of another court case, as well as the expert's opinion obtained from the results of an out-of-court examination, cannot be recognized as expert opinions on the business. Such a conclusion may be recognized by the court as another document admissible as evidence in accordance with Art. 89 of the Arbitration Procedural Code of the Russian Federation." Unfortunately, such an approach, against the background of the lack of legislative regulation of this issue, leads to discrepancies and problems, including actually canceling the prejudice.

There is no unambiguous judicial practice on accepting the results of "alternative" expertise as evidence. There are also mixed opinions among scientists regarding the possibility of appointing an alternative expertise and accepting its results in court proceedings. T.V. Sakhnova believes that using the results of extrajudicial expertise as written evidence is legally incorrect, but at the same time believes that "the results of non-judicia expertise cannot be equated with the conclusion of a judicial expert" (Sakhnova, 2000, p. 154). N.I. Klimenko rightly noted that "judicial and non-judicial expertise are related by the use of special knowledge, their common origin, but they differ in the grounds and procedure for their conduct," but at the same time she believed that "the source of evidence in any type of legal proceedings can only be forensic expertise" (Klimenko, 2014, p. 428). It is difficult to support these positions, since such an approach limits the possibilities

of proof in court proceedings and does not correspond to modernity. In other words, other documents and materials in the absence of clear regulations and should be evaluated based on the absence of procedural requirements imposed on them.

We believe that the expert's conclusion, including the results of an alternative examination, can in no way be attributed to either written or other documents, since the presence of single similar features of these proofs in no way negates the unique features that are inherent in the expert's conclusion.

Thus, alternative expertise is a type of use of special knowledge in legal proceedings or other jurisdictional activities, consisting in conducting research by an expert and giving an opinion on issues put to him by persons who have a legal interest in the outcome of the case, as well as their representatives, carried out on the basis of an expert research agreement.

We consider it promising to regulate in terms of determining the possibility of accepting the conclusion of an alternative expertise as an expert's conclusion — evidence — in procedural codes. There is also a need to regulate the production of alternative expertise and the directions of using its results in the new law on forensic expertise in the Russian Federation.

## V. Forms and Types of Participation of a Specialist as a Knowledgeable Person in Legal Proceedings

The forms of participation of a specialist in court proceedings can be characterized depending on the legal regulation of this form, as well as the absence of a ban on the use of the result of its implementation in court proceedings.

*1. Types of participation of a specialist within the procedural form by the degree of prevalence in all proceedings:*

*A*. Consulting activity of a specialist or participation of a specialist in procedural actions for the purpose of consultation, explanations, including giving evidence (assistance to the subjects conducting the process and other interested participants in the process in the

implementation of evidence). This type is often also called consulting or reference consulting activity of a specialist.

The purpose of the implementation: the participation of a specialist allows the persons conducting the process to receive testimony or advice from a specialist that contains information relevant to the consideration and resolution of the case — evidence, the source of which is a specialist.

Scientists rightly point out "that specialist consultation can be considered as an independent form of criminal procedure" (Rossinskaya, Galyashina and Zinin, 2022, p. 17), especially since it exists in all types of legal proceedings. It should be noted that in criminal proceedings this type is expressed in the presentation by a specialist of explanations (orally) and "conclusions" (in writing), and in civil, administrative — in the form of consultations orally or in writing. We believe it is correct to use only the term consultation in relation to a specialist.

Although N.A. Raimzhanova, for example, suggests that "the results of a specialist's written consulting activity should be called a "specialist's consultation," and his oral explanations recorded in the relevant protocols should be called the testimony of a specialist" (Raimzhanova, 2015, p. 100). However, oral explanations of a specialist are not always received during interrogation, it is also possible to receive them during the production of a procedural action in which a specialist participates, which in this situation can hardly be considered testimony.

It seems that the uniform use of this term in all types of processes, firstly, will distinguish terminologically the presentation of an expert's opinion from a specialist's consultation in writing. Secondly, it will emphasize the essence of the consulting form of the specialist's participation — the presentation of explanations, his own judgment without expert research. Such an approach, along with the regulation of the legal institute of alternative expertise (Dyakonova, 2017, p. 368), will eliminate the need to create additional artificial "entities" to ensure adversarial proceedings, which is now the conclusion of a specialist in the Russian criminal process.

A specialist's consultation, submitted in writing, is a document containing a specialist's judgments formulated on the basis of the application of special knowledge without conducting expert research in the form of his answers to the questions posed. The result of consultations

and explanations of the specialist should be made out in writing or orally with entry into the protocol of interrogation or other procedural action or court session. A specialist's consultation is evidence if it contains information about the facts by which circumstances relevant to the case are established.

It seems that the consultation of a specialist as a type of activity is the formulation of his judgment on issues raised by the person (body) conducting the process, or by persons interested in the legal outcome of the case, represented by a specialist without conducting expert research. Clarifications of a specialist are the information provided by him, bringing clarity to the essence of the questions posed to the specialist by the person (body) conducting the process and persons interested in the outcome of the case. The latter act, as a rule, as an addition to the actions performed by the specialist, performed within the framework of procedural actions or as an addition to the previously given consultation, actually form part of the consultation.

The same group can be attributed to the communication of information by a specialist in the order of interrogation, although such a consultation is formalized in the form of testimony.

Consulting activity exists both within the framework of the participation of a specialist in investigative, judicial and other procedural actions, and as an independent form, regardless of the previous one, because otherwise it would be impossible to obtain specialist advice outside of procedural actions, with the participation of which a specialist provides other than consulting assistance.

This type is characterized, first, by the result of the participation of a specialist — the appearance of evidence. Currently, these are: expert opinions (in the terminology of the Criminal Procedure Code of the Russian Federation) or written consultations, expert testimony, or other document as evidence. Giving explanations by a specialist when checking the expert's conclusion fits perfectly into this form. In practice, these explanations are issued as a "specialist's conclusion" and can also be recorded in the protocol of an interrogation of a specialist or other procedural action, during which the specialist gives explanations or advice.

Another characteristic feature is the procedure for registering the participation of a specialist: a person who meets the requirements for a specialist as a participant in legal proceedings is involved in the process in accordance with the established procedure and is given a procedural and legal status, becomes a specialist — procedural figure.

There are various ways to obtain expert advice in a procedural form. One of these methods is to get advice with the participation of a specialist in an investigative, judicial or other procedural action. The interrogation of a specialist is not actually regulated by law, with the exception of Part 4 Art. 80 of the Criminal Procedure Code of the Russian Federation, which raises a lot of questions in connection with its conduct. The procedural codes of the EAEU member states either do not provide for the interrogation of a specialist, but his testimony is listed among the evidence, or the testimony of a specialist is not provided as evidence at all. Interrogation as an investigative and judicial action in relation to each provided participant in the proceedings has its own characteristics, the regulation of which is necessary for the qualitative formation of evidence. It seems necessary to regulate the procedure of interrogation, but not only in relation to a specialist, but also in relation to an expert, since there are both common points and specifics in relation to both categories of knowledgeable persons (Dyakonova, 2021, p. 173).

The question of a specialist's help in evaluating an expert's opinion is raised by scientists quite often, especially when justifying the value of a specialist's participation in legal proceedings. Supporting this point of view, we note that some authors clarify this method of consulting activity of a specialist. E.R. Rossinskaya notes that, "consulting the court (as well as the investigator), a specialist can consider a number of important issues, from the scientific validity of the methodology used by the expert to the validity of conclusions" (Rossinskaya, 2013b, p. 25). A.R. Belkin believes it is possible to use the so-called "meta-expertise" with the involvement of an independent specialist for this (Belkin, 2017, p. 209), which resembles a specialist reviewing an expert's opinion. T.V. Averyanova wrote about "the specialist's help not in evaluating, but in verifying the expert's opinion" (Averyanova, 2004, p. 19). We believe that such a clarification is necessary if we understand the verification

of evidence not as a stage of their assessment, but as an independent action, and use the concept of "evaluation of evidence" in a narrow sense.

As already noted above when considering the issue of "reviewing" an expert's opinion, the result of such an action can only relate to the forms of participation of a specialist in one case. A specialist can express his opinion on the expert study conducted, having studied the expert's opinion, can help with identifying errors, incompleteness of the expert opinion, but in this case the result of the specialist's activity should be issued as a consultation, including in writing. That is, a specialist can conduct a scientific and methodological review of the expert's conclusion.

In the case when a specialist is presented with objects in respect of which an expertise was previously conducted, and a "review" is required, and in fact, a repeated expert study, the result of such activity should be formalized as an expert opinion. At the same time, it should be taken into account that the procedural status of such a specialist will change and, as a result, such activity will not be considered as a type of specialist participation.

Thus, the questions posed to the specialist during the verification and evaluation of the expert's opinion have a fairly wide range, however, answering the question should not require the specialist to conduct a study, otherwise, the specialist should inform about such a need and recommend an expertise.

*B*. Scientific and technical activity of a specialist or participation of a specialist in procedural actions for the purpose of providing scientific and technical assistance to the person (body) conducting the process (investigator, inquirer, judge, court).

The purpose of the implementation: the participation of a specialist is designed to ensure that the procedural action is carried out properly, taking into account the use of scientific and technical means and for the proper registration by the person (body) conducting the process, the protocol of the procedural action — the evidence obtained as a result of the action. This provision confirms the comprehensive nature of assistance (technical and consulting) with the participation of a specialist in investigative, judicial and other procedural actions.

A specialist can use his knowledge to assist in the formation of evidence (in the detection, fixing and seizure of objects, documents, and other objects), photographing, etc. An example is the provisions of several procedural codes, which indicate the possibility of attracting a specialist to assist in the examination or examination of certain evidence.

The difference between this form and the subsequent one lies in a set of actions united by common tasks: the participation of a specialist in an investigative or other procedural action with current (during the action) or subsequent (immediately after the action) explanations. And, most importantly, taking into account the purpose of the specialist's activity in this form, the determining factor in it is participation in the conduct of procedural (including investigative, judicial) actions and obtaining information recorded in the protocol. In this case, the specialist does not act as a source of the received evidence (protocol), but only provides assistance to the person conducting the process.

The same form should include the provision of assistance by a specialist in the selection of samples for comparative research. In many cases, only a specialist can provide their search, correct withdrawal, and fixation. He can also give explanations within the framework of the ongoing action about what type of expertise should be commissioned, what questions can be put to the expert to obtain maximum information from the detected objects. This provision also confirms the comprehensive nature of assistance (technical and consulting) with the participation of a specialist in investigative, judicial, and other procedural actions.

Some scientists have proposed to fix certain grounds for mandatory involvement of a specialist to participate in investigative, judicial, and other procedural actions. We believe that listing all the mandatory grounds for the participation of a specialist to participate in investigative, judicial, and other procedural actions will be superfluous. The solution of this issue should be left to the discretion of the person leading the process, since the establishment of such a list will in any case be incomplete, and the absence of any significant condition will become a formal basis for refusing to involve a specialist. But in all cases when there is a need for the application and use of special knowledge and there is no, at least at first glance, the need for expert research, it is necessary to involve a specialist in the case.

*2. Types of specialist participation in the framework of a non-procedural form.*

These types are distinguished due to the lack of legislative regulation in general or in cases where the law does not attach the same importance to the results of their use as the results of the application of procedural forms. E.A. Zaitseva, highlighting as a basis "the presence or absence of regulatory regulation," writes about several non-procedural forms of specialist participation: "a) conducting preliminary (pre-expert) research; b) forensic medical expertise; c) conducting documentary tax audits; d) appointment and production of audits; e) conducting audits; f) carrying out inventories" (Zaitseva, 2008, p. 204). As for the first form, it remains to be hoped that over time the so-called "preliminary studies" with the registration of "specialist certificates" will be canceled.

It is proposed to consider the following types of participation of a specialist in the framework of a non-procedural form: medical and psychiatric expertise; audits, inventories, tax and audit inspections; consulting activities of a specialist in a non-procedural form. A specialist's consultation received in a non-procedural form is not used as evidence but has an important orienting and auxiliary value.

This type requires clarification to distinguish it from consulting activities that have a procedural form. This form includes consultations that a specialist gives to a defender or a victim in criminal proceedings, to persons participating in the case — in civil, arbitration, administrative proceedings without applying to the person conducting the process, as well as in cases before the initiation of proceedings.

Non-procedural forms are of particular interest in the sense that their results can later become evidence. That is, information received as part of a consultation from a specialist by the parties can be issued in the form of a specialist's opinion, for example, subject to the requirements of Part 3 Art. 80 of the Code of Criminal Procedure of the Russian Federation, and attached to the case materials, sometimes as other documents (Part 1 Art. 74 of the Code of Criminal Procedure of the Russian Federation). In civil law processes, such consultations are usually made out in the form of written or other documents.

In addition, this type is also characterized by the lack of procedural status of the specialist to whom the party to the proceedings refers,

since such an appeal is often not formalized procedurally, the specialist is not involved in the process.

Types of specialist participation depending on the nature of the specialist's special knowledge. These types are characterized by the possibility of implementation in both procedural and non-procedural form. For example, the participation of a teacher in a procedural form is possible after the investigator or the court adopts an act on the basis of which this person becomes a full participant in the proceedings. However, the law does not prohibit a party to the process from contacting a specialist — a teacher — for advice outside of court proceedings, but in a case that is being considered.

Among the forms of participation of a specialist regulated by law, the following are distinguished:

— participation of an interpreter (sign language interpreter) in legal proceedings. The essence of the activities of both specialists is identical, which means that the regulation of the procedural and legal status of the translator and sign language interpreter should be unified, but this is not specified in the procedural codes. At the same time, the translator's activity also refers to the scientific and technical activity of a specialist;

— participation of a teacher, psychologist. Most procedural codes define educators and psychologists as professional participants. Some researchers propose to single out specialists at the legislative level who perform certain functions (Bychkov, 2007, p. 5). But, we believe, this is not necessary, since the procedural and legal status of such specialists should be regulated uniformly. The regulation in the procedural codes of the specifics of the participation of a teacher and a psychologist is caused only by the specifics of the participation in the process of the subject in respect of or about which the proceedings are being conducted, for example, a person, a minor or an elderly person with a mental disorder, etc.;

— participation of knowledgeable witnesses. The allocation of this procedural form is possible conditionally, since the legislator does not define a knowledgeable witness as an independent participant, unlike a witness in the general sense. However, no law prohibits the interrogation of a person who has both special knowledge and information relevant

to the circumstances of the case. At the same time, the preponderance of the reliability, quality and value of the testimony of a knowledgeable witness in comparison with a witness who does not have special knowledge and is unable to assess the circumstances is obvious;

— participation of a specialist who conducts the mediation procedure — a mediator. Based on the essence of mediation as a form of alternative dispute resolution, the direct activity of a mediator specialist is beyond the scope of the jurisdictional process. The mediator's function in general is to organize a negotiation procedure for the settlement of disputes, this is a kind of mediation between the parties to the conflict, which is organized by an independent and neutral mediator — mediator, to achieve a mutually beneficial solution, performed voluntarily. The Russian Federal Law No. 193-FZ dated 27 July 2010 "On Alternative Dispute Settlement Procedure with the Participation of an Intermediary (Mediation Procedure)" defines that this procedure applies to disputes arising from civil, administrative and other public legal relations, including in connection with the implementation of entrepreneurial and other economic activities, as well as disputes arising from labor relations and family relations. At the same time, a ban on the use of mediation in criminal proceedings has actually been established, but this does not stop the discussion on this issue. Nevertheless, it has become most widespread in the arbitration process, in which it is possible for the parties to appeal to the mediator at any stage of the process (Para. 2 Part 1 Art. 135 of the APC of the Russian Federation), which entails the postponement of the trial.

The analysis of the essence of the mediation procedure allows us to conclude that there is no need for regulatory regulation of the procedure itself, since the implementation of all actions within the procedure is entrusted to the manifestation of the joint goodwill of the mediator and the parties to the conflict and are partially regulated by the Law on Mediation. The issues of choosing a mediator, concluding an agreement on conducting the procedure, and others remain outside the scope of legal proceedings. But this does not negate the need to regulate some procedural aspects, since the result of the mediator's activity is often an agreement concluded by the parties to the conflict, which is approved

by the court as a settlement agreement, with the consequences resulting from this in the form of voluntary fulfillment of the agreements reached.

On the one hand, the mediator cannot act as a full participant in the proceedings, due to the goals of his activity, but on the other hand, legislative regulation of some aspects of the procedure for the participants of the proceedings to the mediator as a specialist is required. Such treatment can manifest itself in two ways: 1) for the purpose of conducting a mediation procedure; 2) for the purpose of consultation, explanations, without conducting a mediation procedure. In the latter case, this form of using special knowledge merges with a non-procedural form of consultation and does not require a separate regulatory consolidation (for example, the mediator clarifies the parties to the process about the possibilities of the mediation procedure).

It seems correct in procedural legislation to determine that the mediator belongs to such a group of subjects of the process as a specialist, is not a witness, which is justified by his functions and the availability of special knowledge. But the procedural and legal status of the mediator should still be regulated considering the specifics of alternative dispute resolution (Dyakonova, 2021, p. 178).

It should be noted that the participation of a specialist in legal proceedings, regardless of its form, is difficult to overestimate. To improve the implementation of the forms of participation of a specialist and eliminate contradictions, we consider it necessary to adopt resolutions at the level of the supreme courts of the EAEU member states containing explanations on the participation of a specialist in various types of legal proceedings, on the forms and types of his participation, the goals of his activities, differentiation with other forms and types of use of special knowledge, and the use of their results.

## VI. Conclusion

The provisions given in the paper concerning the classification of the types of the use of specialized knowledge according to the criterion "depending on the subject entrusting the forensic examination and the result obtained, as well as the scope of its application," the classification of the types of use of specialized knowledge associated

with the participation of a specialist, will allow to streamline the use of specialized knowledge in proceedings. It is necessary to harmonize and make consistent the system of types of the use of specialized knowledge, with clearly defined features of each form and each type of use of specialized knowledge. This will strengthen the initiative of the parties in the activity of proving facts significant to the case, but at the same time observe the procedural form of legal proceedings. Otherwise, the practice will follow a simplified path of creating surrogate uses of specialized knowledge that will not be regulated, which already creates problems in using their results in court proceedings, and this situation will only worsen. Therefore, it is proposed to consider modern developments in the field of forensic expertology to improve legislative regulation of the use of specialized knowledge in legal proceedings.

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# ACADEMIC OPINION

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# Sustainability as a Foundation for the Philosophy of International Law — Reopening Relations among Peoples

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The sources for my talk are twofold. I wrote a paper for the first issue (2007) of the *European Journal of Legal Studies* (a student journal based at the EUI Florence — open access) called: The Yearning for Unity and the Eternal Return of the Tower of Babel (Carty, 2007). More recently I read very closely a work by a French psycho-analyst and political philosopher, Cynthia Fleury "Ci-git l'amer", published with Gallimard in 2020. This work has an English translation, as "Here Lies Bitterness, Healing from Resentment", published by Stockwell, 2023 (Fleury, 2020).

"Sustainability" is a concept usually employed in the contexts of either environmental protection or the closely linked issue of economic and social development. In other words, it attached to types of activity and how they can be continued without leading to the exhaustion of the activity. Renewability is the key driving idea. Maybe it represents a desire for infinity and eternity. At the same time activity presupposes

actors. In the international community the primary actors are states, upon whose effective dynamism all activity depends. Individuals and companies are, of course, also significant actors. However, they are still so linked to individual states that the fruitfulness of their activities is bound up with the health of their states. The sustainability of the world community depends, therefore, vitally, upon the capacity of states to generate sustainable relations with one another. It has to be the task of the international lawyer, as an analyst of the legal well-being of the international community, to understand the dynamics of relations among states — in order to differentiate those dynamics which are positive and favor sustainability, and those which are negative and discourage sustainability.

Cynthia Fleury writes (Fleury, 2020, pp. 66–67) that energy directed to improper objects consumes and puts in peril the ecological system of resilience — talking of individuals and communities. One has not an unlimited psychic energy and to invest it in the world outside oneself, it is essential to avoid the gradual death of the libido, which will follow from negative emotions, which she sees as most easily summed up with the idea or concept of resentment. She is writing primarily in the context of colonialism — as a French person — and draws very heavily on the writings and professional medical practice of Franz Fanon, a fellow political philosopher and practicing psycho-analyst active in the 1950s as France's Empire was imploding in great bitterness. Another equally important strand and source of her reflections is the fascism which gripped Europe in the early middle years of the 20th century, its origins and its lasting effects on late modern and late capitalist society as analyzed in the Frankfurt school of Horkheimer and Adorno. The collective psychological distortions caused by fascism world-wide, but especially in the West, is the second major theme of her reflections. Together these two elements, post fascism and post colonialism, are simply exhausting the possibilities of creative psychological energy in moods of depression, resentment and, above all, collective paranoia in international relations. They threaten the possibility of collective economic and social, as well as physical environmental growth. Fanon and Fleury, who may be described as a disciple of the former, offer a way out into the open air, the open skies, and above all, the open seas.

The title of her book is a play on the French language Amer (bitterness) and Mer (the sea). The cover of the French edition is a painting of Gustav Klimt "La Mort et La Vie." The English language edition has a photograph of quite a stormy sea, covered over with menacing clouds.

The really difficult and lifelong task of myself as an international lawyer has been to provide for an intellectual framework in which the international lawyer is permitted, or indeed able, to intervene professionally in the dramatic world of Fleury, Fanon, Horkheimer and Adorno. This is where I revert to "The Yearning for Unity and the Eternal Return of the Tower of Babel." The image of international law which is virtually absolutely dominant is pure and formal — following in the footsteps of the Vienna School of international Law, of Hans Kelsen and Josef Kunz. The world is made up of States as corporations. That is, an international legal order grants the competence to act, very much as companies in commercial transactions, to entities which have certain objective characteristics, territory, population and government. The legal order recognizes such entities as having the capacity to bind themselves legally to one another by means of treaties or general customary law — a somehow collective binding acquiescence in particular patterns of behavior. The lawyer, as a purely technical formalist only comes into action as the person who identifies if and when particular states have registered their consent to additional legal obligations.

Rules apply equally and impersonally, to all states which have accepted them. The UN Charter may serve as a fundamental basis for the building of further binding rules. It assumes that all of the entities which are members of the UN enjoy the guarantees of Art. 1 and 2 of the Charter, impersonally and equally. Effectively, this means international lawyers work with signed and authenticated documents. They analyze the meaning of what has been agreed. Beyond this they have no function. Above all, they cannot really give a professional judgement as to whether any particular legal document furthers or does not further sustainability. That would have to be a task assigned to other professionals. Whether an economic or social or energy driven environmental activity is sustainable, only the relevant experts can assess. The lawyers are allowed to affirm the extent of what commitments have been undertaken. They must additionally affirm that the entities making these commitments have

acted within the authority of the entities/states. It might be unkindly remarked that all of these lawyerly activities will soon be within the remit or competence of artificial intelligence.

What will now be attempted is a revolutionary rethinking of the intellectual tasks of international lawyers, largely through a historical exploration of the doctrinal roots of our intellectual tools. The issue of formalism is tied to the idea of international legal order as a rules-based order. States make agreements with one another designated by their law creating wills coming together. All legislation has its roots in the form of contractual agreement. This is actually a way of thinking which goes back to the idea of the original social contract of the Englishmen Thomas Hobbes and John Locke. What is now long forgotten is that such an idea of law replaced the classical Greek (Plato and Aristotle) and Christian concept that Law represented good relations among morally just and fair people. Both Francisco Vitoria and Hugo Grotius still held to the belief that a good society depended upon the just behavior of "well-ordered and reasonable people." The Prologue to Grotius's foundational text for International Law, "The Law of War and Peace," was a debate between Socrates and the Cynics about whether society was possible because of the reasonable nature of people, or whether people were "wolves" to one another and could not live in a harmonious social world.

The social contract, the foundation of what became the liberal, democratic idea of law is based upon the idea that human beings moved or transformed from a wild state of nature to a civil society based upon Law by virtue of an enforceable original contract, which grounds a rule making institution that makes rules for the future, which are binding on all members of the said constituted civil society. What this essentially mythological theory of the origin of Law leaves ambiguous is whether and how far institutions exist which actually rest upon the consent of people, and, indeed, whether people have ever constituted one or more institutions at an international level which encompass the whole of international society.

It has been left to an Anglo-Irish moral theologian, Oliver O'Donovan, one time professor in Christ Church Oxford — the very heart of the Anglo-American world — to expose the nihilistic roots of the liberal-democratic idea of a rules-based world order — nihilistic because it has

neglected to integrate any idea of concrete, historical identity of peoples into its idea of Law. Societies are made up of people, living in particular historical contexts, with, above all, a sense of meaning, purpose and goal to their lives, which is the basis of the possibility of their cooperation with one another. People can live together if they have a common sense of the purposes of their community together. Most important of all, points out O'Donovan, the world does not consist of one people, but of very many different peoples. Each people has a separate historical identity, meaning an experience over time of their living together in particular communities achieving more or less completely the aims that the communities evolve for themselves. International law is therefore, above all, a matter of mutual recognition of relationships among the different peoples. So international law consists of interlocking patterns of mutual recognition among a variety of peoples who succeed — more or less — to achieve convergences among their very varied senses of the meaning, purpose and goals of their individual societies.

O'Donovan draws a very radical conclusion from his perspective that the liberal democratic view of world legal order is built in the absence of any recognition of the differing identities of a variety of peoples. This part of his theory may well appear far fetched and speculative. It is perhaps a matter of reasoning back from a reality observed during the Cold War — before 1989 — that the absence of a capacity to see the necessity of a Law based upon relationships rooted in diversity leads inexorably to a violent, hegemonic drive to compel the whole of world society into a single, homogenous model of society, which is actually a projection of the actual historical circumstances out of which they — original Anglo-American societies — have themselves come — an historical origin of which they are themselves unconscious. It is the lack of self-awareness which permeates these societies — not merely Anglo-American but also other liberal democratic societies which imitate and follow them — that transforms their consciousness of the resistance of other societies to themselves into a paranoia. They then engage in foreign interventions to assure the expansion of their own model of society at a global level. O'Donovan concludes his argument with the assertion that any model of world order rooted in the liberal democratic

model will be hegemonic, violent and provoke great frustration on the part of other peoples.

At the start of the cold war in 1952 another religious thinker, Martin Buber, gave a compatible, if not identical, interpretation of the pathology of the Cold War, in more psychological terms, which provide a more accessible bridge between the thinking of O'Donovan and Fleury. In a short lecture which he gave in New York in 1952, called "The Existential Mistrust between Man and Man", Buber describes how the world is divided into two camps (or Lager) in which each sees the other as bodyful (leibhafte) false and itself as bodyful true. Men no longer content themselves, as in earlier historical periods, with holding their own views for the lonely truth and the other's views for false. He goes further and is convinced that on his side there is the justly right and on the other side there is the unjustly wrong, that it is he who can see and realize what it is right to do, and the other side masks his greedy self-interest in what he says is right. In other words, he sees his own thinking as true ideas and the thinking of the other as ideology.

The other side will explain how he has come to know something, but our side will not take him seriously. We will always read into the other side, an unconscious motive which is driving him to say what he says, in other words a complex. I do not now ask myself about the truth of what the other says, but I ask what is the interest of the group out of which the other person comes, to what group he belongs. However objectively his view may appear to be expressed, his idea can only appear as ideology. Therefore, the main task which I have in relation to these other people is to use individual psychology or social psychology to expose and see through him. These campaigns of exposure, of "seeing through the other" are now the principal Sport of relations among human being, where those practicing this "Sport" have no idea where it is leading them. That from one camp to the other no real conversation can be had, is the strongest symptom of the sickness of men today. This existential mistrust is this sickness.

Fleury applies her own mixture of psychoanalysis and political philosophy primarily in the context of the origins of fascism and colonialism. However, it has to be stressed that her main concern is with the possibility of a failed reaction to these very negative experiences,

which thereby prolong the agony. As she says at the beginning her concern is that her "patient" should avoid a response to fascism or colonialism, which only sets up a chain reaction, in which the patient/victim continues to be trapped in the same circles of negativity. This is precisely where it can be said that she is concerned with resilience, that is with the reestablishment of sustainable persons, the agents which are necessary if one is to have sustainable actions.

Here Fleury connects with one of the fundamental alternatives to liberal democratic, universalist rules-based order, which arose in Europe after the French Revolution and the forceful spread of the French version if the liberal contract (from Jean Jacques Rousseau) into central and eastern Europe. Through Herder and more especially Hegel, the concept of collective, as well as individual identity, was rediscovered in terms of the struggle for recognition, the struggle of one person or group to have his historically distinctive identity respected by the other. This is in fact simply the origin of modern nationalism in its response to the hegemonic ambitions of French universalism. The battle is to compel a respect which will not, in Hegel's paradigm, be accorded in the absence of a will to fight to the death.

These struggles are certainly not always successfully concluded and here is where Fleury understands a form of fascism to arise. It is based upon a sense of resentment at a believed continued oppression which the oppressed feel they can only overcome through revenge, through inflicting the same suffering on the supposed oppressor. Here is where Fleury and Buber come close together. Her anxiety is that judgement about the nature of the oppression can be purely subjective, constructive and therefore not objectively capable of resolution. She sees the origin of fascism in the collective desire to inflict revenge on a person or group who sometimes is, but often is not, the originator of the oppression.

This paradigm transfers easily to the post-colonial dilemmas of former imperial possessions. And here is where Fleury draws heavily on Franz Fanon, so famous for his fierce tract "The Wretched of the Earth" (1961). Fanon applied his responses in his therapeutic work with individual patients. One fundamental principle which he applied was that, contrary to the abstract principle of the rule of law applying equally to everyone, in fact every patient is different and one has to

find a way through its own particular struggle for recognition. One of the many difficulties of the rules-based concept of the international order is that its concept of the state is abstract. Especially since World War II, mainstream international lawyers in the West at least, are not prepared to find any place for the concept of the nation within the state. The former concept is regarded as volatile and ephemeral and so to be avoided by lawyers who should concern themselves only with what has been agreed among states. This immediately and completely disqualifies them from attending to the very tensions among states which are the threat to world peace. Of course, it also disempowers them from reflecting professionally on any issue connected with the self-determination of peoples or the rights of minorities within states. Fanon realizes, as does Fleury, that every conflict giving rise to a desire for revenge, is very concrete and particular. No two cases of conflict are the same. The way to healing, resilience and sustainability will always be different for different individuals and peoples.

So, what are their ways, of Fanon and Fleury, to resilience? The medical approach is not the juridical. They do not deny that injustice and oppression can sometimes only be overcome with a forceful response. However, resilience or sustainability depends upon the creation of alternative agendas. Fleury uses three French words which sound almost the same but have radically different meanings, as metaphors and psychological images which are intended to aid in psychological healing. These are again Amer (bitterness) Mere (mother) and Mer (the sea). These are supposed to designate three images. The first is one of fixation on injury. It is not disputed that the injury is real, but Fleury suggests that the route to recovery from it is separation. This is where the place of the mother appears. The work of separation — she calls individuation — is always primarily the work of the individual herself, however much helped by the doctor. Similarly, every community ravaged by colonialism or other oppression has to find its own way to recover its wholeness. Anyway, the idea of uncoupling from the object of oppression — rather than returning to it in order to annihilate it — is central. The final stage is the most metaphysical. It calls for a complete transcendence from the previous negative experience. The metaphor of the Sea symbolizes the infinity of the wider world, of all the possibilities

of being which are to be found — if one returns again to O'Donovan — in recovering the past of one's own collective identity and reliving it in the context of the present and its "becoming" Future. The movement, the flow the boundlessness of the Sea expresses the potential for discovering of new goals and meanings, liberated from an alien intrusion which is distorting these goals. Essentially this means an at least temporary uncoupling from the liberal democratic rules based international order.

Of course, the medical approach does resemble a fundamental feature of the UN Charter, in so far as the primary emphasis is on a peaceful resolution of conflict, except in so far as self-defense is absolutely unavoidable as an option. However, the medical approach applies not only to the victims of colonialism and imperialism but also to the perpetrators, those least likely to feel the need for assistance. There has to be healing on both sides if there is to be a global recoupling. This is a very large subject, but two points which are related can be mentioned. It is noticed, also by Fleury — it concerns her extensive review of Horkheimer and Adorno — that the radical individualism provoked by late capitalism, in the cultural Marxist view of the Frankfurt school has fragmented so-called liberal democratic societies into a role of narcissist consumerism, which makes them incessant rivals of one another, and very little able to form any community of purpose. In other words, to borrow the sociological terminology of the late 19th century Germany, Gesellshaft has completely absorbed Gemeinshaft. Fleury herself draws on another French thinker, Rene Girard, for the warning that this mimic rivalry is inevitably violent in its final outcome. Horkheimer and Adorno do not offer a solution in their portrayal of the cultural hegemony of capitalism. However, Fleury — and here she draws also on Fanon and post-colonial cultural theory — does recommend as urgent and central to her project, the weaning away of the "addicted consumer" from the homogenizing effects of late capitalist cultural imperialism, through an essential therapeutic exercise in the recovery of individualism, a true individualism of personal freedom. That would be a first stage towards the recreation of Gemeinshaft among Western nations.

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