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INTELLECTUAL PROPERTY PROTECTION FOR SOFTWARE

NEW TOOLS AND TECHNOLOGIES IN LEGAL PRACTICE

TRENDS IN LEGAL EDUCATION

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EDITORIAL

Dear Readers,

Here is the first issue of our Journal in 2024. Our esteemed authors covered in it some topical problems of international law as well as a number of legal issues that require the attention of lawyers at the national level.

Vlastislav Stavinoha, **Innokenty I. Karandashov**, **Alexandr S. Ignatiev**, **Sergey V. Bakhin** reflect on the prospects of implementing the right to education outside territories with a disputed regime by persons who received the education therein (for example, many young people from Transnistria, the Donetsk People's Republic and the Lugansk People's Republic graduated from high school in their homeland and later on entered Russian universities). The right to access to education is enshrined in international soft law documents and treaties and, in the authors' opinion, the refusal by a foreign state body to recognize the education received in unrecognized entities should be viewed as a form of discrimination. While there is no treaty devoted to these issues, the authors formulate a Martens clause-like norm aimed to provide the right to access to education for persons residing in territories with a disputed regime that could be introduced in an international instrument.

Dmitry V. Ivanov and **Vladislav G. Donakanian** analyze the legal concept of state aircraft and come to the conclusion that it has to be redefined. They suggest this legal category the way it is interpreted in the 1944 Chicago Convention on International Civil Aviation — all aircraft used in military, customs and police services — should be expanded, which would help to address current and potential legal problems in the sphere of international air law.

Amina A. Nagieva and **Vitaliya V. Tkacheva** examine in their article the history of the formation and development of the diplomatic asylum institution in Latin America supporting their conclusions by reference to the landmark judgments of the United Nations International Court of Justice on various aspects of granting diplomatic asylum, namely the *Asylum Case* of 1950 (Colombia v. Peru) and *Haya de la Torre Case* of 1951 (Colombia v. Peru). In the absence of universal recognition of the diplomatic asylum institution the authors propose to establish the right to grant diplomatic asylum in bilateral agreements establishing diplomatic relations between states.

Mostafa Abadikhah and **Rishat V. Nigmatullin** carefully studied 84 Bilateral Investment Treaties (BITs) of the Russian Federation and 63 BITs of Qatar. The authors arrive at the conclusion that the BITs are not well-suited to deal with the issues that arise in the field of maritime investments since they do not determine the exact scope of maritime areas, do not offer definitions/types of maritime investment or definitions of a maritime investor.

Ghulam Mujtaba (Turkey/Pakistan) and **Muhammad Zia-Ul-Haq** (Pakistan) characterize the disclosure requirements of software patents and scrutinize several models according to which the intellectual property protection of software is granted in Turkey (the disclosure requirement is limited to sharing a software algorithm only), India (generally computer programs / algorithms are not patentable, but some software inventions can still get a patent thanks to the use of alternate terminologies) and Pakistan (computer programs / software applications are protected under the copyright protection legislation).

The topic of introducing new tools and technologies in court proceedings and legal expertise attracted the attention of two groups of our authors. **Lev V. Bertovskiy**, **Genrikh S. Devyatkin**, **Alexey R. Fedorov** examine the experience of the Colombian courts who consider cases in the metaverse and reflect on technical and legal aspects of introducing virtual reality technologies that can be used by Russian courts to settle civil and criminal cases. **Elena I. Galyashina**, **Konstantin M. Bogatyrev** view the use of legal (or forensic) expertise as a tool of countering violent extremism and neutralizing the inculcation of spiritual values alien to Russian society in the Internet.

Nadezhda A. Kalmazova and **Elena G. Vyushkina** cover a number of significant aspects of teaching legal negotiations to law students in Russia, namely such of their elements as cultural patterns typical of a particular ethnic group and personal characteristics of negotiators. For understandable reasons the authors pay special attention to national characteristics of Russian negotiators (the "inflexible aggressive integrative" style) and put forward a number of valuable suggestions that should be followed in order to succeed in legal negotiations in Russia.

We hope our authors' coverage of topical issues that exist at the universal, regional and bilateral levels will bring some fresh perspectives to your general understanding of current legal problems and prospects of their solution and provide you with exciting reading before the publication of the next issue of *Kutafin Law Review*.

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THE RIGHT TO EDUCATION OUTSIDE UNRECOGNIZED ENTITIES AND OTHER CURRENT ISSUES OF INTERNATIONAL LAW

Article

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Realization of the Right to Education outside Territories with a Disputed Regime by People Who Received the Education Therein

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Abstract: Difficulties arising from the realization of the right to access to education outside a territory with a disputed regime by individuals who obtained previous qualifications in such territory have existed for a long time. The issue was exacerbated after the Ukrainian political crisis of 2014 that led to the emergence of two self-proclaimed entities — the Donetsk People's Republic and the Luhansk People's Republic — and posed the question on the further destiny of young people who finished secondary schools in these territories. Although eventually many of them were admitted to Russian universities, it did not resolve the issue fundamentally. Therefore, the authors have set themselves a goal to answer the following question: is it in compliance with international law if a state body, a state agency, or a state educational institution refuses to recognize the qualification on the sole ground that it was obtained in

a territory with a disputed regime? While the answer should be negative, it seems that most states do not share this opinion. The possible solution to this and other issues concerning the implementation of the rights of people living in such territories is to conclude the treaty that will guarantee the implementation of all basic human rights that people have under international law including the right to access to education. However, before its conclusion, it is expedient to set a Martens clause-like norm in an international instrument that may contribute to full and consistent implementation of their rights since they do require such protection today.

Keywords: territories with a disputed regime; unrecognized states; education; right to education; access to education; recognition of qualifications; discrimination

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I. Introduction

Over the past three decades, as a result of multiple political and territorial transformations, the number of unrecognized states, or, more precisely, territories with a disputed regime, significantly increased.[1]

The emergence of such entities is a consequence of the conflict between the right to self-determination (Para. 2 Art. 1 and Art. 55 of the UN Charter) and the principle of territorial integrity (Para. 4 Art. 2 of the UN Charter). The territories in question are not members of the UN, and the UN member states are unable to take a common decision on their status: the same territorial entity may be considered an occupied territory by one group of states and a sovereign state by another. However, in political and academic debates, their participants frequently forget that such territories are inhabited by the people who are victims of inter-state disputes and whose rights, consequently, require special international protection. They are born and live, they receive an education, marry, enter into transactions, etc. The recognition of facts that take place in territories with a disputed regime outside such territories and the recognition of legal documents issued by their authorities is often of particular importance to the people living there since the implementation of their rights in such territories is limited due to its weak integration into the global economy and international relations. For instance, passport holders of *de facto* states cannot travel abroad due to invalid travel documents (Ekelove-Slydal, Pashalishvili and Sangadzhiyeva, 2019). This puts constraints on their right to freedom of movement. The same is true for the right to education: for economic reasons, the quality of education in these territories may not meet the needs of their inhabitants; this makes them seek opportunities for getting higher education abroad. All of these as well as other factors

[1] Relevant statistical information varies. Caspersen and Stansfield denoted nine existing unrecognized states (Caspersen and Stansfield 2011, p. 4). In 2017, M. Dembinska and O. Campana identified eleven secessionist territorial entities fairly admitting at the same time that their counting is a contested matter (Dembinska and Campana 2017, pp. 254–255, fn. 2).

lead to the outflow of the population from the territories in search of fuller and more consistent realization of their rights.[2]

In the case of the Russian Federation (Russia), the issue of realization of the right to education by individuals who received previous education in the territories with a disputed regime is of particular importance, since graduates of schools located in such territories (e.g., Transnistria) often come to study to a Russian higher education institution. This raises the question if it is consistent with international law when a state acting through its bodies or institutions refuses to recognize the qualification on the grounds that it was obtained in such territory.[3] The outcomes of our studies on this issue are presented in this article.

II. The Concept of a Territory with a Disputed Regime

There is no universally accepted notion for entities that we call "territories with a disputed regime." For this purpose, in the doctrine, the term "unrecognized states" is used most often (Caspersen and Stansfield, 2011; Bolshakov, 2007; Dobronravin, 2013). Among less frequently-used terms one can denote those such as "unrecognized territories," "self-proclaimed states," "self-proclaimed republics" (Bolshakov, 2007, p. 84), "contested states" (Geldenhuys, 2009, p. 7), "de facto states" (Florea, 2020, p. 1005; Dembinska and Campana, 2017, p. 254), "secessionist territorial entities" (Dembinska and Campana, 2017, p. 254), "statelike entities," etc. (Geldenhuys, 2009, pp. 26–27).

However, it seems that the term "territories with a disputed regime" is more appropriate in this regard. Firstly, it is emotionally neutral as compared to the terms where the word "self-proclaimed" is

[2] For instance, the Transnistrian population was 706,300 people in 1990, while according to some estimates it was 475,665 people in October 2015, *see* Crivenco and von Löwis, 2022, pp. 51, 53.

[3] In this article, the term "qualification" is understood in the meaning it has according to Art. I of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region signed on 11 April 1997 (the Lisbon Recognition Convention), i.e., depending on the type of qualification, this may be a degree, diploma, or other certificate issued by a competent authority.

used.[4] Secondly, it does not contain the word "state," which reduces its political sensitivity. Thirdly, it generally reflects the essence of the phenomenon it denotes, i.e., the territory where the political regime, the legality of which is disputed by one or more states, operates. For all these reasons, we use this term in the present article.

III. The Right to Access to Education as an Element of the Right to Education

The right to education is one of the fundamental human rights (Gros-Espiell, 2005, p. 5; Ashenova, 2015, p. 22). It includes several elements — human rights, the realization of which leads to the implementation of the right to education, while the infringement of any of them constitutes a particular case of its violation. In this respect, the full scope of states' obligations with regard to the right to education is generally characterized by four concepts: availability, accessibility, acceptability, and adaptability (Monteiro, 2021, p. 228). In particular, the Committee on Economic, Social and Cultural Rights (the CESCR) interpreted them in its General Comment No. 13 on the right to education enshrined in Art. 13 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR).

According to the General Comment No. 13, accessibility means that educational institutions and programs have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Moreover, it has three overlapping dimensions: (1) non-discrimination which means, *inter alia*, that education must be accessible to all, in law and fact, without discrimination on any of the prohibited grounds; (2) physical accessibility which means that education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location or via modern technology (e.g., access to a "distance

[4] The fact that such terms as, for example, "self-proclaimed states" and "self-proclaimed republics" are filled with emotions was noted by A. Bolshakov (2007, p. 84).

learning" program); (3) economic accessibility, i.e., education has to be affordable to all.[5]

Access to education is considered as its element in Para. 2 Art. 1 of the Convention against Discrimination in Education (the CADE) according to which the term "education" refers to all types and levels of education and includes, *inter alia*, the access to education.[6] Since the CADE preamble refers to the right to education proclaimed in the Universal Declaration of Human Rights (the UDHR),[7] when interpreting the CADE, one should consider access to education not only as the element of education but as the subjective right and consequently as an integral part of the right to education.

Thus, from the international law perspective, the right to accessibility of education, or the right to access to education, is considered as an element of the right to education. At the same time, the right to access to education naturally includes the right to be enrolled in an educational institution, as well as the right to recognition of education when such recognition is necessary for enrollment in a state other than that where the education of the previous level was received. Without the realization of these rights, the right to access to education cannot be implemented.

IV. The Right to Access to Education as a Universally Recognized Norm of International Law

The right to access to education is enshrined in many international instruments. Para. 1 Art. 26 of the UDHR provides in particular that "*[t]echnical and professional education shall be made generally*

[5] United Nations, Office of the High Commissioner for Human Rights (1999), *CESCR General Comment No. 13: The Right to Education (Art. 13), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999*, pp. 2–3, Para. 6. Available at: http://www.refworld.org/pdfid/4538838c22.pdf [Accessed 19.09.2023].

[6] This convention counts 109 states parties, including Russia. *See* Convention against Discrimination in Education of 14 December 1960. Available at: https://en.unesco.org/about-us/legal-affairs/convention-against-discrimination-education [Accessed 30.08.2023].

[7] Universal Declaration of Human Rights of 10 December 1948. Available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/pdf/NR004388.pdf?OpenElement [Accessed 30.08.2023].

available and higher education shall be equally accessible to all on the basis of merit." It follows that any man must have the right to access to education of the mentioned types and levels. As regards higher education, the word "all" means that any person must have this right, and personal knowledge and skills may be the only criterion for such access.

Although the UDHR was adopted as a non-binding instrument, the status of norms reflected in it has been changed, and it seems that now they are a part of customary international law. Firstly, it follows from Para. 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples according to which, all States shall observe faithfully and strictly the provisions of the UDHR.[8] Secondly, according to one of the provisions set in the CADE preamble, discrimination in education is a violation of rights enunciated in the UDHR. This implies that within these two instruments, the observance of the UDHR is considered as a matter of legal obligation rather than of discretion. Thirdly, scholars also opined in favor of the customary nature of the UDHR provisions (Balanescu, 2014, pp. 7–8). Fourthly, as regards Russia's approach to the issue, the Supreme Court of the Russian Federation considers the UDHR provisions as universally recognized principles and norms of international law[9] which means, *inter alia*, that they are of customary law nature.

The provisions of the UDHR were further developed in the International Covenant on Civil and Political Rights (the ICCPR) and the ICESCR, both adopted in 1966 (the Covenants). Unlike the UDHR, the Covenants are multilateral treaties that are legally binding for states

[8] Declaration on the granting of independence to colonial countries and peoples dated 14 December 1960. Available at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/pdf/NR015288.pdf?OpenElement [Accessed 30.08.2023].

[9] *See* Plenary Session Ruling of the Supreme Court of the Russian Federation dated 31 October 1995 No. 8 (as of 03.03.2015) "On Some Issues Concerning the Application of the Constitution of the Russian Federation by Courts during the Administration of Justice," Para. 5. Available at: https://cis-legislation.com/document.fwx?rgn=17004 (AI translated version in English); https://vsrf.ru/documents/own/8342/ (In Russ.) [Accessed 30.08.2023].

parties. Currently, 173 states are parties to the ICCPR[10] and 171 states — to the ICESCR.[11] Russia is also a party to the Covenants.

As provided by Para. 2 Art. 13 of the ICESCR, States Parties thereto recognize that, with a view to achieving the full realization of the right of everyone to education: "*…secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means…*" (Subpara. "b") and "*…higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means…*" (Subpara. "c"). Consequently, the education shall be equally accessible not only to the nationals of a state party to the ICESCR but to all other persons as well. In this regard, as the CESCR concluded, the ICESCR rights apply to everyone including non-nationals regardless of legal status and documentation.[12]

In accordance with Para. "a" Art. 4 of the CADE, States Parties undertake in particular "*…to make secondary education in its different forms generally available and accessible to all*" and "*…to make higher education equally accessible to all on the basis of individual capacity.*" Largely, these norms correspond to the states' wishes expressed at the time of CADE preparation. As such, it should include an article stipulating that the "*Member States recognize in their laws and regulations and apply in their national practice the principle of equal access to education at all levels and of all types*" (Daudet and Eisemann, 2005, p. 23).

The Convention on the Rights of the Child also provides that States Parties recognize the right of the child to education and, with a view to

[10] International Covenant on Civil and Political Rights dated 16 December 1966. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en [Accessed 30.08.2023].

[11] International Covenant on Economic, Social and Cultural Rights dated 16 December 1966. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en [Accessed 30.08.2023].

[12] Committee on Economic, Social and Cultural Rights (2009), *General Comment No. 20. Non-discrimination in economic, social and cultural rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), Forty-second session, Geneva, 4–22 May 2009,* p. 9, Para. 30. Available at: http://www.refworld.org/docid/4a60961f2.html [Accessed 30.08.2023].

achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make secondary education, including general and vocational education, available and accessible to every child (Subpara. "b" Para. 1 Art. 28) and make higher education accessible to all on the basis of capacity by every appropriate means (Subpara. "c" Para. 1 Art. 28).[13]

It follows that the right to access to education is a universally recognized human rights norm and every state is obliged to ensure its implementation, including with regard to persons who received a previous education in territories with a disputed regime and wish to continue their education abroad. Consequently, a state may not refuse to recognize such education on the sole ground that the territory with a disputed regime is not recognized as a state by its government or by other states.

V. Refusal to Recognize the Education Received in Territories with a Disputed Regime as a Form of Discrimination

The non-discrimination principle is the one underpinning human rights cooperation between states. The Human Rights Committee in its General Comment No. 18 found that the term "discrimination" as used in the ICCPR "*should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*"[14]

Based on the case law under the European Convention on Human Rights, van Dijk and van Hoof concluded that "*[a] violation*

[13] To date of submitting this Article, the Convention has 196 participants, including Russia. *See* Convention on the Rights of the Child of 20 November 1989. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en [Accessed 30.08.2023].

[14] CCPR General Comment No. 18: Non-discrimination, adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, p. 2, Para. 7. Available at: http://www.refworld.org/docid/453883fa8.html [Accessed 30.08.2023].

of the principle of equality and non-discrimination arises if there is (a) differential treatment of (b) equal cases without there being (c) an objective and reasonable justification, or if (d) proportionality between the aim sought and the means employed is lacking" (van Dijk and van Hoof, 1990, p. 539). This approach to understanding discrimination is used by human rights treaty bodies.[15]

Against this legal background, the refusal to recognize an education on the ground that it was obtained in a territory with a disputed regime unambiguously constitutes discrimination. Although this reason for the discrimination is not expressly mentioned in non-discrimination provisions set forth in international legal instruments, it nevertheless falls within the scope of some of them.

For instance, Art. 26 of the ICCPR stipulates the following: "***All persons*** [emphasis added]*... are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination* ***on any ground such as*** [emphasis added] *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" Therefore, regardless of the rights affected by the discrimination, the laws of the State party to the ICCPR must prohibit discriminatory treatment as such and guarantee all persons equal and effective protection against any form of discrimination. If there are no rules in the national law providing the prohibition and guarantees mentioned in Art. 26 of the ICCPR, due to *the pacta sunt servanda* principle, domestic norms

[15] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (merits) dated 23 July 1968, Para. I(B)(10). Available at: https://hudoc.echr.coe.int/eng?i=001-57525 [Accessed 30.08.2023]; Case of Marckx v. Belgium dated 13 June 1979, Para. 33. Available at: https://hudoc.echr.coe.int/eng?i=001-57534 [Accessed 30.08.2023]; Views, Communication No. 943/2000, Human Rights Committee, Eighty-first session, 5–30 July 2004, CCPR/C/81/D/943/2000, Para. 9.5. Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvDan1pXU7dsZDBaDVpLr9rrMzSQKZXAhP%2fG8OW0PU%2btSjQ8R1xJRppbqV%2fmUxJAfWmhwFqME4Aeme5frsBE1ug3yt02AGGGe%2f%2bIexKsss3ve%2bmHN0amGdNPvgVDtp9GVfDfVRJsIeE37yLdR8%3d [Accessed 16.03.2024].

are to be applied consistently with Art. 26 in order to ensure the implementation of the latter.

As it was noted in General Comments No. 18 to the ICCPR, Art. 26 "*...prohibits discrimination in law or in fact in any field regulated and protected by public authorities*."[16] In the doctrine, it was also argued that Art. 26 is not confined either with respect to the rights or with respect to the grounds (Vierdag, 1973, p. 110). It constitutes "*...an authoritative, representative example of a non-discrimination clause of global applicability*" (Vierdag, 1973, p. 120).

Art. 2 of the UDHR provides that "*everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*." Since Art. 2 of the UDHR does not provide an exhaustive list of discrimination grounds, discrimination based on prior education received in the territory with a disputed regime is also covered by its provisions.

Consequently, a refusal to recognize an education on the ground that it was received in the territory with a disputed regime not recognized as a state by the country in which the recognition is sought would constitute a violation of Art. 2 of the UDHR by that country. In addition, if the country were a party to the ICCPR, the refusal would also be contrary to its obligations under Art. 26 of the ICCPR. In the context of Para. 1 Art. 26 of the UDHR and, as regards a state party to both the ICCPR and the ICESCR, in the context of Subparas. "b" and "c" Para. 2 Art. 13 of the latter, the refusal for the reason under consideration would mean, in fact, a denial of the right to access to the education of respective level and type on the discriminatory ground and consequently, the violation of legal obligations arising from all these rules and provisions.

[16] CCPR General Comment No. 18: Non-discrimination, adopted at the Thirty-seventh Session of the Human Rights Committee on 10 November 1989, p. 3, Para. 12. Available at: http://www.refworld.org/docid/453883fa8.html [Accessed 30.08.2023].

VI. The Issue of "Substantial Difference" between the Education Received in a Territory with a Disputed Regime and the One Received in an Internationally Recognized State

On 11 April 1997, the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (the Lisbon Recognition Convention) was signed. Now there are 56 signatories including those states that are not Council of Europe members (Australia, Canada, Israel, New Zealand).[17] This Convention does not directly address the question on the recognition of qualifications issued in the territories with a disputed regime. However, according to its Art. VI.1 "*…each Party shall recognise the higher education qualifications conferred in another Party, unless a substantial difference can be shown between the qualification for which recognition is sought and the corresponding qualification in the Party in which recognition is sought*." This norm raises the question whether the qualification issued in a territory with a disputed regime and the one issued in an internationally recognized state are "substantially different" due to the status of the territory?

In its Final report published in 2016, the Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region (the Committee) provided answers to the questions the Committee had sent to the states parties to the Lisbon Recognition Convention within the implementation monitoring procedure. It pointed out that "*[q]ualifications from non-recognised territories were also mentioned* [by states parties] *as a potential substantial difference*" and added that, "*[f]or example, the host country may not recognise qualifications from a specific territory,* e.g., *Northern Cyprus, Crimea and other territories*."[18] It is worth paying attention to

[17] *See* the list of states parties: Chart of signatures and ratifications of Treaty No. 165 (Convention on the Recognition of Qualifications concerning Higher Education in the European Region of 11 April 1997). Available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=165 [Accessed 30.08.2023].

[18] Monitoring the Implementation of the Lisbon Recognition Convention. The Committee of the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, Final report, Paris; 2016, p. 46, Para. 11. Available

the fact that it was the states parties' answer to the Committee's request to indicate "any other reason" along with substantial differences case for the refusal of recognition or for the recommendation not to recognize. As we see, the states answered in terms of the Lisbon Recognition Convention, using a slightly modified term — "potential substantial difference."[19] Although the Committee did not expressly opine on this practice, it concluded, *inter alia*, that "*[t]he competent recognition authorities should carefully weigh up their decisions and advisory statements against the purpose of the application for recognition and reflect on whether established substantial differences should on all occasions and for all purposes be considered a factor*."[20] In this context, it seems that the Committee believed that the qualification got in a non-recognized territory due to the very fact of its issuance therein does not become "substantially different."

In addition, the provisions of the Global Convention on the Recognition of Qualifications concerning Higher Education (the Global Convention) also confirm that the issuance of a qualification in a territory with a disputed regime does not make this qualification substantially different from that issued in a different state.[21] This is due to the fact that "substantial differences" are understood therein as "*significant differences between the foreign qualification and the qualification of the State Party which would most likely prevent the applicant from succeeding in a desired activity, such as, but not limited to, further study, research activities, or employment opportunities*" (Art. I). In addition, under Subpara. "b" Para. 2 Art. XIX of the Global

at: https://www.enic-naric.net/fileusers/Monitoring_Implementation_LRC-Final_Report.pdf [Accessed 30.08.2023].

[19] However, the Final report has left some grounds for doubt as regards the word "potential" in this phrase since it is unclear whether the states, that had answered the question, had used this word or it was the Committee that added it.

[20] Monitoring the Implementation of the Lisbon Recognition Convention. P. 88.

[21] The Global Convention entered into force on 5 March 2023. As of 22 September 2023, it had 22 states parties. The Russian Federation has not become a party thereto yet. *See,* Global Convention on the Recognition of Qualifications concerning Higher Education of 25 November 2019. Available at: https://en.unesco.org/about-us/legal-affairs/global-convention-recognition-qualifications-concerning-higher-education [Accessed 30.08.2023].

Convention the states parties thereto are obliged to take into account its provisions when interpreting and applying particularly the regional recognition conventions to which they are parties, and in this regard, the Lisbon Recognition Convention is covered by this provision.[22] Consequently, if a state party to the latter becomes a party to the Global Convention, it has to interpret the term "substantial differences" in the Lisbon Recognition Convention heeding the meaning it has in the Global Convention, i.e., *inter alia*, without regard to the status of the territory where the qualification, for which the recognition is sought, was obtained.

VII. The Issue of Recognition of the Education Received in Territories with a Disputed Regime in the Light of Sovereign Equality of States Principle

In practice, the recognition of education received in territories with a disputed regime may turn out to be more complicated. For instance, as regards Germany, the recommendation of the Central Office for Foreign Education (ZAB)[23] states that "*Diplomas, study certificates, etc. issued by the universities in the 'breakaway' republics of Abkhazia and South Ossetia — the Abkhaz State University (in Sokhumi/Sukhumi) and the South Ossetian State University 'A.A. Tibilov' (in Tskhinvali) — can be recognized if they have been previously sanctioned (confirmed) by the Georgian Ministry of Education and Science.* [...] *Diplomas and study certificates issued using official certificate forms of the Russian Federation cannot be recognized.*"[24]

[22] The Lisbon Recognition Convention is mentioned among other regional recognition conventions on the UNESCO website. *See* UNESCO, (2023). Higher education regional conventions. Available at: https://www.unesco.org/en/higher-education/conventions [Accessed 23.08.2023].

[23] For more information about ZAB, *see* Kultusministerkonferenz, "Zentralstelle für ausländisches Bildungswesen." Available at: https://www.kmk.org/zab/zentralstelle-fuer-auslaendisches-bildungswesen/ueber-die-zab.html [Accessed 23.08.2023].

[24] Anabin — Das Infoportal zu ausländischen Bildungsabschlüssen. "Häufig gestellte Fragen." Available at: https://anabin.kmk.org/filter/faq/einzelne-laender.html [Accessed 23.08.2023]. Germany and Georgia are parties to the Lisbon Recognition Convention.

From those willing to continue their education abroad, Moldova demands that their education certificates issued by the educational institutions located in eastern regions of the Republic of Moldova and the city of Bender after 1992[25] be changed for the respective education certificates drawn in due form that is recognized by Moldova.[26] German authorities are also of the opinion that degrees from Transnistria can only be evaluated if they have been previously recognized and a Moldovan diploma has been issued.[27]

On the one hand, these approaches make it difficult to realize the right to access to education in states that do not recognize respective territories as independent states. On the other hand, they do not prevent persons who received education in these territories from realizing their right, and obviously, they are based on the respect for the sovereignty of the state that claims the territory in question as part of its own territory (mother state) and the sovereign equality of states principle. Nevertheless, taking into account all the foregoing obligations of states, we are convinced that at least in the following examples, the education received in the territories with a disputed regime must be recognized by other states without the requirement of the confirmation of that education in the mother state:

(1) if a mother state conducts a non-confirmation policy in respect of the education received in the part of its territory that is under a disputed regime, or if the mother state has not adopted any procedure for this confirmation;

(2) if the people who received an education in a territory with a disputed regime cannot enter the territory of the mother state, or if the obstacles to such entrance make it actually impossible or inaccessible for the majority of the inhabitants of the territory with a disputed

[25] I.e., in Transnistria.

[26] *See* Para. 2, 4, 5, 7 of the Regulation on the legal effects of education certificates issued by the educational institutions of eastern regions of the Republic of Moldova and the city of Bender No. 20 dated 30 January 2004 (as amended on 5 November 2012). Available at: https://www.legis.md/# [Accessed 30.08.2023].

[27] Kultusministerkonferenz. Statement of Comparability for university degrees from Moldova: Checklist. P. 1. Available at: https://www.kmk.org/fileadmin/Dateien/pdf/ZAB/Zeugnisbewertungen/Einzureichende_Dokumente/Moldau_Zeugnisbewertung_Dokumente_EN.pdf [Accessed 23.08.2023].

regime, or if the entrance involves a risk of persecution on the grounds associated with the emergence of the territory (e.g., for the reason that a person belongs to its population).

As for the recognition of education in states that have recognized the territory with a disputed regime as an independent state, it does not seem necessary to seek any confirmation of the qualification from the mother state. In such a case, the recognition of the territory logically implies the recognition of the legitimacy of acts performed by its authorities, including the issuance of qualifications.

VIII. Conclusion

Based on the analysis presented above, we have come to the following conclusion. The refusal by a state, acting through its bodies or institutions, to recognize an education on the grounds that it was received in a territory with a disputed regime is not in conformity with international law, at least in cases when the applicant has to face obstacles in the confirmation process caused by the authorities or institutions of the mother state, or when the applicant is not allowed to enter the territory of the mother state, or when the entry may pose the risk of persecution on the grounds associated with the emergence of the territory with a disputed regime.

Taking into account the universal nature of the treaties and the customary nature of the UDHR provisions setting out the right of access to education and the general prohibition of discrimination existing in international law, we are convinced that our conclusions are relevant to any state and state educational institutions when they have to deal with the question of further realization of the right to education by a person who received the previous education in the territory with a disputed regime.

The complexities outlined in this article indicate that the issue of protection and realization of the right to access to education by persons living in territories with a disputed regime requires special international regulation. However, since this right is not the only internationally recognized human right the enjoyment of which is restricted as regards the persons under consideration, a treaty providing special legal

guarantees for the implementation of all those fundamental human rights that these persons have under international law should be drafted and brought to the attention of states. These guarantees would enable them to enjoy the rights, including the right to education and access thereto, outside territories with a disputed regime to the extent and in the manner in which they can be exercised abroad by nationals of any state.

Until the treaty is concluded, we invite colleagues and human rights institutions including international organizations or intergovernmental bodies to consider the adoption of instruments on the rights of people living in territories with a disputed regime that could provide, *inter alia*, a Martens clause-like norm that may have the following wording:

"Until more comprehensive provisions to safeguard the rights and legitimate interests of persons residing in territories with a disputed regime has been issued, such persons shall remain under the protection and the rule of the principles of international law, as they result from the usages established among peoples, from the laws of humanity, and the dictates of the public conscience. In particular, these persons have the right to recognition everywhere as persons before the law and the right to recognition of facts, legal status, and documents that enable them to exercise their rights. The recognition of acts performed by the authorities, which exercise *de facto* jurisdiction over the territory, related to the legal status of persons living therein shall neither affect the international legal status of the territory, nor the status of bodies and institutions acting therein, nor the sovereignty of the state which claims the territory in question as the part of its own territory."

In turn, this may encourage states to render the proposed clause a part of their laws and treaties and consequently, to create conditions for more effective realization of the rights of persons who live in territories with a disputed regime including their right to access to education.

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Legal Concept of a State Aircraft is "Up in the Air": Problems of a Definition

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Abstract: Due to the technological development the scope of State aircraft application has significantly expanded. As a result there is a need to study the current international legal approach to the definition of "State aircraft" with respect to its applicability to existing relations. Furthermore, the distinction between state and civil aviation is a critical issue in determining the scope of international air law instruments. The authors analyze different approaches to the definition of "State aircraft" at the universal, regional and bilateral level. The study has revealed that there is no holistic understanding of the concept of "state aircraft" in current international law, which has a negative impact on the international legal regulation. The authors conclude that it is advisable to revise the definition of "state aircraft" at the universal level, which should serve as an impetus for further unification of the legal regulation. The authors propose to expand this legal category beyond the provisions of the 1944 Chicago Convention. This paper argues that it would be in the interests of modern aviation and would address existing and potential legal problems.

Keywords: civil aircraft; state aircraft; Chicago Convention on International Civil Aviation; International Civil Aviation Organization (ICAO); international air law

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I. Introduction

The year 2024 will mark the 80th anniversary of the adoption of the Convention on International Civil Aviation (hereinafter — the Chicago Convention).[1] This treaty laid the foundations of modern international air law, defining the basic principles of state cooperation in the field of civil aviation. However, international relations in the use of aviation and airspace in general have undergone significant changes. The reason for these changes lies in scientific and technological progress, which has resulted not only in quantitative but also in qualitative changes in the aviation industry.

These processes have affected both civilian and State aircraft. The range of tasks performed by aircraft has significantly changed since 1944. At the same time, Art. 3(b) of the Chicago Convention has not undergone any changes. It defines state aircraft as "aircraft used in military, customs and police services." However, the scope of application of modern state aviation is not limited to these three areas.

This provision is of critical importance to the entire Chicago system because it establishes the scope of application of the Convention. A restrictive or expansive interpretation of this provision will determine which legal regime an aircraft falls under. For example, under a literal

[1] Convention on International Civil Aviation (adopted 6 December 1944, entered into force 4 April 1947) 15 U.N.T.S. 295. Available at: https://treaties.un.org/doc/publication/unts/volume%2015/volume-15-ii-102-english.pdf [Accessed 14.04.2022].

interpretation, a fire-fighting aircraft in the service of the Ministry of Emergency Situations would fall under the legal regime of civil aircraft. If the position is taken that the classification of an aircraft depends on whether it performs governmental functions, then it should be excluded from the scope of the Chicago Convention. However, the wording of Art. 3(b) does not speak in favor of one of these approaches.

Apart from the problem of defining the list of types of aircraft that belong to each category, there is also the problem of defining the criteria on the basis of which such a division can be made. The text of the Chicago Convention does not provide a direct answer to this question.

This requires a study of contemporary international law and State practice regarding the distinction between State and civil aircraft in order to determine the relevant interpretation of the Art. 3 of the Chicago Convention.

II. Historical Development of a "State Aircraft" as an International Legal Category

It was in 1910 when the first attempt to establish such a distinction was made — at the diplomatic conference in Paris, where the first draft of an international convention relating to aerial navigation was prepared. Chapter VI of the draft was devoted to the regulation of public aircraft. According to Art. 40, public aircraft are to be understood as an aircraft "employed in the service of a contracting State, and placed under the order of duly commissioned official of that State."

The Convention Relating to the Regulation of Aerial Navigation (hereinafter — the Paris Convention)[2] was adopted in 1919. It provided for the division of aircraft into two categories: private and State. Article 30 of the Paris Convention establishes that State aircraft includes military aircraft and aircraft "employed in State service, such as posts, customs, police." It is noteworthy that the above formulation, at first sight, testifies to the fact that the Paris Convention establishes an open-ended list of State aircraft. However, the same article further specifies that all

[2] Convention Relating to the Regulation of Commercial Navigation (adopted 13 October 1919, entered into force 11 July 1922), 11 L.T.N.S. 174. Available at: http://www.worldlii.org/int/other/LNTSer/1922/99.html [Accessed 02.04.2022].

State aircraft other than aircraft used in military, customs and police service should be treated as private aircraft. Consequently, the aircraft involved in mail transport had the status of State aircraft but, according to the Paris Convention, was under the private aircraft legal regime (Honig, 1956, p. 37). A similar formulation can be also found in Art. 3 of the Pan American Convention on Commercial Aviation (hereinafter — the Havana Convention).[3] But unlike the Paris Convention, the Havana Convention mentions naval aircraft along with military aircraft.

Shortly enough, a legal approach to the aircraft's distinction established by the Paris Convention was recognized to be problematic. Under the Treaty of Versailles of 1919, Germany was deprived of the right to have naval and air forces. All military aircraft and related equipment were to be confiscated. Still, Germany, on the one hand, and the members of the Supreme War Council on the other, had undertaken different approaches to the classification of such equipment. The Supreme War Council had to apply to the Aeronautic Advisory Commission, which in 1922 drafted so-called "The Nine Rules" to distinguish civil and State aircraft based on their technical characteristics (Cooper, 1946, pp. 448–449). Soon these rules absurdity made Germany protest, arguing that under "The Nine Rules" the Entente countries were using military equipment on civilian aircraft (Milde, 2008a, p. 63).

The definition of "State aircraft" in the current Convention on International Civil Aviation of 1944 is also not exhaustive. Article 3 of The Chicago Convention establishes the following,

"a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft."

[3] The Pan-American Convention on Air Navigation (adopted 20 February 1928, entered into force 13 June 1929), 129 L.N.T.S. 223.

It is necessary to point out to the unconformity between Art. 3(a) and Art. 3(c) (Abeyratne, 2010, p. 168). Article 3(a) indicates that State aircraft are not subject to the provisions of the Chicago Convention, while Art. 3(c) contains a rule that directly affects them.

Article 3 of the Chicago Convention does not define the term "State aircraft," but Art. 3(b) enshrines which aircraft is considered as State aircraft. However, State aircraft are also widely used in other spheres: to transport heads of State and government officials, to perform emergency management, to transport a required cargo to remote parts of the country, etc. The wording of Art. 3 raises several questions. First, does Art. 3(b) of the Chicago Convention contain an exhaustive list of aircraft that should be considered as State aircraft? Secondly, given the system-building role of the Chicago Convention in international air law, can we say that the legal approach stated by the Chicago Convention to the definition of State aircraft is universal? The authors of this paper will attempt to provide answers to the questions.

III. Definition of "State Aircraft" under the Chicago System

As early as 1986, at the 26th Assembly of the International Civil Aviation (hereinafter ICAO), the International Federation of Airline Pilots Associations (hereinafter IFALPA) drew attention to the fact that Art. 3(b) of the Chicago Convention did not fully reflect all areas of use of State aircraft. Moreover, it was concerned that none of the existing international treaties covered State aviation activities. As a result, State aviation, during international flights, had no legal protection under international law (Abeyratne, 2019, p. 279). IFLPA subsequently raised this issue at the 27th and 28th sessions of the ICAO Assembly, and only in 1993 the ICAO Legal Committee presented a study on this problem.[4]

The Legal Committee provided an answer to three fundamental questions. Firstly, the Legal Committee believed that all aircraft used in military, customs and police services had to be considered State aircraft without any exception. Secondly, under the Chicago Convention, "State aircraft" were defined to include only aircraft used in the military,

[4] *Secretariat Study on "Civil/State Aircrafrt,"* ICAO Doc. LC/29-WP/2-1.

customs and police services. It was pointed out that any doubts about this interpretation would be dispelled once it was understood that the status of the aircraft did not affect the scope of its immunities and privileges. Thirdly, several factors had to be considered in order to view a particular aircraft as a State aircraft, including the cargo carried nature, the aircraft ownership, the State control degree over the aircraft, the status of passengers and the persons on the aircraft, the aircraft registration, the secrecy of the flight, the nature of crew, the nature of operator, the fact of the existence of certain documentation, the area of the flight and the need of custom clearance.

In our view, ICAO's approach to the interpretation of Art. 3 of the Chicago Convention is highly controversial. Suffice it to refer to Art. 3bis, which provides that States have the right to require civil aircraft to land at a specified airport if there are reasonable grounds to believe that it is being used for any purpose inconsistent with the aims of this treaty. According to the approach adopted by ICAO, this provision can be interpreted as a right of States to interfere in the activities of the State aircraft, which, for example, is involved in the carriage of a Head of State. Moreover, the wording of this Article remains open to abuse, as the Chicago Convention does not explicitly state its purpose.

Such a restrictive interpretation is inconsistent with the Vienna Convention on the Law of Treaties,[5] which states in Art. 31 that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context." The context of the Chicago Convention indicates that the scopes of the concept of "State aircraft" and "aircraft used in the military, customs and police services" are not identical. Firstly, this can be concluded on the basis of Art. 3(a), which provides that the Chicago Convention does not apply to State aircraft, and Art. 3(b), which sets out the types of aircraft that should be regarded as State aircraft. If the drafters of the Convention had indeed intended to limit its scope of application to military, police and customs aircraft, this would have been explicitly stated in Art. 3(a), and the term "State aircraft" would not have been used at all. This is what the drafters

[5] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [Accessed 17.04.2022].

of the Convention on the International Recognition of Rights in Aircraft of 1948 did,[6] where Art. 23 states that it "shall not apply to aircraft used in military, customs or police services." A similar provision also can be found in Art. 26 of the Convention on damage caused by foreign aircraft to third parties on the surface of 1952.[7] Secondly, Art. 30 of the Paris Convention expressly stated that "all State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention," but the drafters of the Chicago Convention did not use this language. However, ICAO, in its study, countered the first argument by arguing that it was likely that the drafters of the above conventions had a similar approach to ICAO in distinguishing between State and civil aircraft, while with regard to the second argument, ICAO stated that there was no evidence that States wished to depart from the substance of the quoted provision of the Paris Convention.

All of the foregoing leads to the conclusion that the legal category of "State aircraft" should not be limited to military, customs and police aircraft. This approach to broad interpretation is supported by international legal doctrine. For example, Pablo Mendes de Leon writes that the wording of Art. 3 of the Chicago Convention "appears to make room for other aircraft than aircraft used in military, customs and polices services to be included in the same category" (de Leon, 2017, p. 14).

It could be argued that only certain types of aircraft are contained in Art. 3(b). A number of scholars point out that "the phrase 'deemed to be' in Art. 3(b) of the Chicago Convention must be interpreted as 'for the purposes of the Convention', meaning that the Chicago Convention only regards aircrafts used in military, customs, and police services as State aircraft" (Wouters and Verhoeven, 2022). On this basis, they favor a

[6] Convention on the International Recognition of Rights in Aircraft (adopted 19 June 1948, entered into force 17 September 1953) 310 UNTS 151, Art. 13. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20310/volume-310-I-4492-English.pdf [Accessed 17.04.2022].

[7] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (adopted 7 October 1952, 4 February 1958) 310 UNTS 181, Art. 26. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20310/volume-310-I-4493-English.pdf [Accessed 17.04.2022].

restrictive interpretation of the definition whereby State aircraft, within the meaning of the Chicago Convention, can only be understood as these three categories of aircraft.

This approach is best elaborated by D.P. Blake and I.S. Henderson. According to their position, there are three independent reasons why they oppose an expansive interpretation of Art. 3 (Blake and Henderson, 2011, pp. 155–159). Firstly, there is a separate legal regime for the use of State aircraft outside of the Chicago Convention. States can further agree on which other State aircraft should fall within this definition. Second, the drafters of the Chicago Convention were aware of the complexity of the issue regarding the distinction between state aircraft and, as a result, intended to establish precisely which aircraft were "deemed to be state aircraft." Third, the intention of the drafters was to ensure the safety of air navigation. From this point of view, it seems odd to add an amorphous category and exclude it from the Chicago Convention scope of regulation.

These reasons are best analysed in the reverse order. The third reason is not really an argument in favour of a restrictive interpretation, since an expansive interpretation of Art. 3 bis would not create a "legal vacuum." The second reason can only be an argument if it is supported by *travaux préparatoires*, but their analysis does not allow for such a definitive conclusion. For example, the Canadian proposal at the 1944 Chicago Conference echoed the approach reflected in the Paris Convention,[8] while the U.S. proposal defined civil aircraft as follows: "state aircraft shall mean any aircraft other than military, naval, custom and police aircraft of any State or any political subdivision thereof"[9] Subsequently, the Drafting Committee of Subcommittee 2, Committee I, proposed a consolidated draft convention containing Art. 3, which was not further amended.[10]

[8] Doc. 50 in Proceedings of the International Civil Aviation Conference: Chicago, Illinois, November 1 — December 7, 1944, U.S. Government Printing Office, 1948, p. 586, Art. 37.

[9] Doc 14 in Proceedings of the International Civil Aviation Conference… P. 555. Art. 1(2).

[10] Doc 414 in Proceedings of the International Civil Aviation Conference… P. 660.

The first reason deserves separate attention and seems to be the strongest argument of the proponents of restrictive interpretation. Thus, a similar point of view was reflected in the Digest of international law published by the U.S. Department of State. It stated that the other types of state aircraft were excluded from the scope of regulation of the Chicago Convention because its drafters could not have intended that aircraft not used in military, customs or police services would fly under a regime similar to civil aircraft (Whiteman, 1968, p. 433). In other words, this interpretation actually suggests that the Chicago Convention intended to divide aircraft into not two, but three categories: civil, state (military, customs, police), and other state aircraft outside the scope of the Chicago Convention regulation.

Still, in our opinion, the purpose of this provision is to indicate which categories of aircraft should be initially regarded as State aircraft *ipso facto*. Furthermore, according to M. Milde, Art. 3(b) of the Chicago Convention contains a rebuttable presumption (Milde, 2008b, p. 481). In other words, under certain circumstances, aircraft in these services may be qualified as civil aircraft. Among other things, it is appropriate to resort to the historical method of interpretation to determine the meaning of the provision in question. International law allows to refer to the circumstances of the treaty conclusion as an additional tool for interpretation. In 1944, the level of development of aviation in general, and the range of its possible applications was incompatibly low compared with current conditions. On this basis, we agree with the view that the incorrect wording of Art. 3 is due to the fact that at that time almost all State aircraft had the status of military aircraft (Wickramasinghe, 2016, p. 236).

A noteworthy definition of State aircraft is contained in the ICAO Manual on the Regulation of International Air Transport,[11] which provides that this category includes any aircraft used in the military, customs and police services or other law enforcement service of a State. Also, the broad approach to the interpretation of Art. 3 is reflected in the ICAO Circular on Civil-Military Cooperation in Air Traffic Management

[11] The ICAO Manual on the Regulation of International Air Transport, ICAO Doc. 9626 Chapter 5.2. Available at: https://www.icao.int/Meetings/a39/Documents/Provisional_Doc_9626.pdf [Accessed 14.04.2022].

of 2011.[12] This document establishes that "State aircraft can consist of military and non-military air assets, given that it is the nature of their actual tasks that frames the character of the definition." Furthermore, the provision of Art. 3(b) does not preclude the ICAO Member States from defining what constitutes a State aircraft. The provisions of the above documents, in our view, contradict the position of ICAO specified in 1993.

In 2015, several States took the initiative to continue work on the definition of civil and State aircraft.[13] These States rightly pointed to the need for such work, as it was essential not only for the Chicago system but also for the Tokyo, Hague, Montreal and Beijing systems.[14] In the view of this group of States, significant problems arise in the classification of aircraft that are, for example, formally classified as civil but used for military purposes. This item was included in the General Work Program of the Legal Committee.[15] Still, at the next 37th session, the ICAO Legal Committee concluded no need for further work in this area. The Legal Committee took the view that the replies received to the questionnaires, which had been previously distributed to States, indicated that States "did not reveal any challenges posed to States by the current legal regime relative to civil/State aircraft that necessitate updating or otherwise altering the opinions and recommendations of the 1993 Study."[16]

However, as Ricardo de Oliveira rightly points out, an approach in which the international community does not take any actions to clarify

[12] ICAO Circular on Civil-Military Cooperation in Air Traffic Management, ICAO Cir. 330 AN/189 Chapter 5.2.1. Available at: https://www.icao.int/apac/meetings/2012_cmc/cir330_en.pdf [Accessed 14.04.2022].

[13] Poland, Bulgaria, the Czech Republic, Cyprus, Greece, Lithuania, Romania, Slovakia, Slovenia and Hungary.

[14] State/Civil aircraft definition and its impact on aviation, ICAO Doc. LC/36-WP/2-6 Para. 10.10. Available at: https://www.icao.int/Meetings/LC36/Working%20Papers/LC%2036%20-%20WP%202-6.en.pdf [Accessed 09.04.2022].

[15] Consideration of other items on General Work Programme of the ICAO Legal Committee. ICAO Doc. LC/37-WP/2. Available at: https://www.icao.int/Meetings/LC37/Documents/LC%2037-WP%202%20EN.pdf [Accessed 09.04.2022].

[16] Consideration of other items on General Work Programme of the ICAO Legal Committee.

the status of State aircraft seems to be dangerous, since the absence of practical difficulties to date does not mean that there will be no practical difficulties in the future (de Oliveira, 2016, p. 434). The theoretical issues are the following: the lack of precise indications as to whether foreign laws can be applied to State aircraft, which is operated by civilian crew; the impossibility of applying the Chicago Convention to State aircraft that are formally civil aircraft; the absence of an international legal obligation to follow international accident investigation standards if such an incident occurs with State aircraft and etc. (de Oliveira, 2019, p. 204).

Because of the foregoing, the ICAO position on the definition of "State aircraft" is ambiguous. The legal content of the term varies depending on the context. In the case of interpretation of the norms of the Chicago Convention, the term "State aircraft" is limited to the aircraft listed in Art. 3(b); in other cases (e.g., when it comes to the issue of air navigation), State aircraft mean all types of aircraft used in the exercise of governmental functions.

IV. Definition of a "State Aircraft" at the Universal Level outside the Chicago System

The wording of Art. 3(b) of the Chicago Convention is reflected in universal international treaties in the field of air law. They include the Convention on the International Recognition of Rights in Aircraft of 1948 (hereinafter "Geneva Convention"), the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952 (hereinafter "Rome Convention"), the Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 (hereinafter "Tokyo Convention"),[17] the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (hereinafter "Hague Convention"),[18] the Convention

[17] Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969), 704 UNTS 219, Art. 1. Available at: https://treaties.un.org/doc/db/terrorism/conv1-english.pdf [Accessed 15.04.2022].

[18] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971), 860 UNTS 105, Art. 3 Available at: https://treaties.un.org/doc/db/terrorism/conv2-english.pdf [Accessed 15.04.2022].

for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 (hereinafter "Montreal Convention"),[19] the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation of 2010 (hereinafter "Beijing Convention").[20] These treaties provide that they do not apply to aircraft engaged in military, customs and police services. The difference with the Chicago Convention is that these treaties do not contain a provision stating that government aircraft are excluded from their scope of application. The question arises: do these treaties apply to other State aircraft?

To answer this question, it is necessary to refer to the *travaux préparatoires* of the relevant conferences. The drafting history of the 1948 Geneva Convention is not known in detail. Still, it is common knowledge that, during discussions regarding the text of the Rome Convention of 1952, some states sought to incorporate into the text provisions that were similar to Art. 3 of the Chicago Convention (Horník, 2001, pp. 104–106). However, representatives of States decided to limit its application to aircraft used in the military, customs and police services.

This issue was extensively discussed while drafting the text of the Tokyo Convention and, as in the previous case, it was suggested to use the wording of the Chicago Convention. However, G.E. Vilkov, who represented the USSR at the conference in 1963, stated that in some States all aircraft were State property, in other words, they were State aircraft.[21] The delegations of several States supported the USSR position. For example, the Chilean representative asserted that the

[19] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted on 23 September 1971, entered into force 26 January 1973) 974 UNTS 177, Art. 4. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-english.pdf [Accessed 15.04.2022].

[20] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (10 September 2010, entered into force 1 July 2018) 50 ILM 144, Art. 5. Available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/55859/Part/I-55859-080000028055e06f.pdf [Accessed 15.04.2022].

[21] ICAO Doc 8565-LC/152-1, Vol. 1. Agenda item 11, Para. 23. The following formulation was proposed the delegation of the USSR: "This Convention shall be applicable only to civil aircraft and shall not be applicable to aircraft used for military, customs or police services."

wording proposed by the USSR was better than the corresponding provisions of the Chicago and Rome Conventions. The delegation of Canada also expressed its support, it favored the inclusion of a provision on the inapplicability of the Convention to government aircraft used for non-commercial purposes. As an example, the representative of Canada pointed to the air travel of ministers to international conferences and other flights in which there was a "public interest."[22] The representative of Ceylon said that the proposals of the USSR and Canada could be consolidated using the following wording, "This Convention shall be applicable only to civil aircraft and shall not be applicable to Government aircraft used in military, customs, police or such other non-commercial purposes." He went on to note that "in 1944, aviation had not been as advanced as at the present time and cases might arise when it would be necessary to depart from the Chicago text."[23]

However, this approach had to be rejected for some reasons. Thus, according to the *ejusdem generis*[24] *rule of interpretation, the use of government aircraft for non-commercial purposes would be limited to the use of aircraft for military, customs and police services. In addition, States expressed concern over the difficulties in defining the meaning of the phrase "non-commercial use," as government agencies may operate private aircraft that their owners have provided for profit.*

As can be seen from the travaux préparatoires, the Tokyo Conference could have been a turning point in distinguishing between State and civil aircraft. However, the diverse positions of States on this issue led to a situation where these terms are not used at all in the final text of Art. 1 of the Tokyo Convention. The definition developed at the Tokyo Conference was subsequently used in the 1970 Hague Convention and Montreal Convention of 1971, which was replaced by the Beijing Convention of 2010.

[22] ICAO Doc 8565-LC/152-1, vol. 1, Para. 28.

[23] ICAO Doc 8565-LC/152-1, vol. 1, Para. 44.

[24] According to international legal doctrine, the *ejusdem generis* doctrine is to the effect that general words when following (or sometimes preceding) special words are limited to the genus, if any, indicated by the special words (Linderfalk, 2007, p. 303).

Considering the aforementioned, it is reasonable to conclude that the scope of application of the treaties mentioned above is limited exclusively to military, police and customs aircraft. However, in the authors' opinion, this approach to regulation is not entirely justified, as for the purposes of these Conventions there is no basis to distinguish between military/customs/police aircraft and aircraft involved, for example, in emergency response. In 1970, when this issue was the subject of intense debate, the range of use of state aircraft, although different from 1944, was still not comparable to the present situation. The question remains: why did States not revise the definition during the drafting process of the Beijing Convention and bring it in line with current practice? Notwithstanding the concern expressed by one delegation that States could have different definitions of such categories as military, customs and police aircraft,[25] no work was done to clarify this provision.

The Warsaw/Montreal[26] system is an exception to the general tendency. These treaties apply to "to carriage performed by the State or by legally constituted public bodies." This wording sidesteps the issue of aircraft qualification and refers to the status of the aircraft operator. Given that these treaties are aimed to regulate only one aspect of aviation use, namely the regulation of international carriage, the developed definition seems to be the most appropriate. Also, Art. 57 of the Montreal Convention establishes the right of states to make reservations limiting its application to non-commercial air carriage for public purposes.

[25] Draft report of the work of the ICO Legal Committee during its 34th session. ICAO Doc. LC/34-WP/4-1. Available at: https://www.icao.int/secretariat/legal/LC34_Docs/LC34_wp4-1_en.pdf [Accessed 15.04.2022].

[26] The Convention for the Unification of Certain Rules Relating To International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11, 49 Stat 3000, Art. 2. Available at: https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20137/v137.pdf [Accessed 15.04.2022]. Convention for the Unification of Certain Rules for International Carriage by Air (adopted on 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309, Art. 2. Available at: https://treaties.un.org/doc/Treaties/2004/02/20040204%2010-38%20AM/Other%20Documents/COR-Reg-39917-Sr-50607.pdf [Accessed 15.04.2022].

In considering this issue, it is worth referring to the United Nations Convention on the Law of the Sea of 1982 (hereinafter — UNCLOS),[27] which repeatedly uses the concept of "aircraft." For example, Art. 236 stipulates that the provisions of the 1982 Convention regarding the protection and preservation of the marine environment do not apply to any "warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service." That is to say, in this case aircraft owned or operated by a State, beyond any doubt, implies all possible types of State aircraft. At least there is no indication to the contrary. In this regard, it is argued that from an air law perspective, the scope of application of the 1982 Convention is much broader than that of the Chicago Convention (Cluxton, 2020, p. 159). It is also noteworthy that the above provision is mainly consistent with the definition proposed by the Canadian delegation at the 1971 Tokyo Conference. It appears that in this case such an approach did not provoke any objections from the States.

The provision of Art. 39(3a) of the UNCLOS presents a particular interest to recent research. It establishes that State aircraft in transit passage "will normally comply" with the Rules of the Air established by ICAO. Professor Y.N. Maleev pointed out to the imperfection of this norm. He drew attention to the fact that ICAO cannot regulate the activities of State aircraft because State aircraft did not fall within the scope of the Chicago Convention, and, therefore, without changing the Chicago Convention, the provision of Art. 39(3a) of the UNCLOS was de facto unrealizable (Maleev, 1988, p. 190). Leaving aside the issue of the competence of ICAO to implement this provision, it should be noted that problems also arise in determining the content of this international obligation. The UNCLOS does not answer the question of what is to be understood by the phrase "will normally comply" with the rules, what are the conditions for deviation from these rules and whether notification of such deviation is necessary (Ash, 1987, p. 46).

[27] The United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, 1834 UNTS 3, 1835 UNTS 3. Available at: https://treaties.un.org/doc/Treaties/1994/11/19941116%2005-26%20AM/Ch_XXI_06p.pdf [Accessed 15.04.2022].

V. Definition of a "State Aircraft" at the Regional and Bilateral Level

Depending on the scope of use, the legal concept of "State aircraft" within the European Union may have a different meaning. For example, in 2001 Eurocontrol established,[28] concerning Art. 3 of the Chicago Convention, that for air traffic management purposes State aircraft are considered to be aircraft belonging to the military, police and customs services. It is expressly noted that civil registered aircraft used in military, police and customs services should be classified as State aircraft. If it is used for other state services, it gets the status of a civil aircraft. This approach was reflected in the Treaty relating to the establishment of the Functional Airspace Block "Europe Central" of 2010.[29] At the same time, according to Eurocontrol regulations, the term "general air traffic" means "all movements of civil aircraft, as well as all movements of State aircraft (including military, customs and police aircraft) when these movements are carried out in conformity with the procedures of the ICAO." The use of the word "including" indicates that in this case State aircraft are not restricted to military, customs and police aircraft. However, this wording is not entirely legally correct, as ICAO has no competence to regulate the activity of State aircraft.

The EU Regulation 2018/1139 regarding common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency[30] deserves special attention. Art. 3 of this regulation sets out

[28] Eurocontrol Specifications for harmonized Rules for Operational Air Traffic (OAT) under Instrument Flight Rules (IFR) inside controlled Airspace of the ECAC Area (EUROAT). Available at: https://www.eurocontrol.int/sites/default/files/2019-11/change-5-eurocontrol-specificatitions-oat-ifr-rules-version_0.pdf [Accessed 07.04.2022].

[29] Treaty relating to the establishment of the Functional Airspace Block "Europe Central" between the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Swiss Confederation (adopted 2 December 2010, entered into force 1 June 2013) 2932 UNTS 11, Art. 1. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%202932/v2932.pdf [Accessed 07.04.2022].

[30] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European

that its provisions do not apply to various "aircraft, and their engines, propellers, parts, non-installed equipment and equipment to control aircraft remotely, while carrying out military, customs, police, search and rescue, firefighting, border control, coastguard or similar activities or services under the control and responsibility of a Member State, undertaken in the public interest." The provision we have cited is not a definition of State aircraft, but we believe it allows all State aircraft in the broad sense of the term to be excluded from the scope of the Regulation.

In 2006, the European Commission for Democracy through Law (hereinafter the Venice Commission), in its opinion on the obligations of Council of Europe member states concerning secret detention facilities and interstate transport of prisoners,[31] raised the issue of the distinction between state and civil aviation. According to the Venice Commission, Art. 3 of the Chicago Convention does not contain an exhaustive list of State aircraft. In addition, it was noted that, under the Chicago Convention, State aircraft engaged, for example, in search and rescue activities could be considered as both State and civil aircraft. In the view of the Venice Commission, if there is a problem with the qualification of an aircraft, consideration should be based on the actual functions performed by such aircraft.

In 2022, a new version of the Latin American Air Code was adopted by the Latin American Air and Space Law Association.[32] The previous

Union Aviation Safety Agency, and amending Regulations (EC) No. 2111/2005, (EC) No. 1008/2008, (EU) No. 996/2010, (EU) No. 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No. 552/2004 and (EC) No. 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No. 3922/91 [2018] OJ L 212/1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018R1139 [Accessed 11.04.2022].

[31] European Commission for democracy through law. Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners, Opinion No. 363/2005, Doc. CDLAD (2006)009. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)009-e [Accessed 09.04.2022].

[32] Centésima segunda reunión del Cimité Ejecutivo de la Comision Latinoamerica de Avicaión Civil. CLAC/CE/102-NI/02, 08.12.2022. Available athttps://clac-lacac.org/wp-content/uploads/2022/12/CE102-NI02-1.pdf [Accessed 09.04.2022].

version served as a reference point for the harmonization of regulatory law for many countries in the region. Art. 49(2), which establishes the definition of State aircraft, reproduces in one paragraph the provisions of Art. 3 of the Chicago Convention and in a second paragraph establishes that "State-owned aircraft intended exclusively for non-commercial public services are also State aircraft."

An expansive approach to the definition of "State aircraft" is also followed by the State parties of the Commonwealth of Independent States (hereinafter — CIS), which in 2009 concluded an Agreement on Cooperation in the Field of Investigation of Aviation Accidents involving State Aircraft of the CIS member States.[33] According to Art. 1 of this Agreement, State aviation implies aviation used "for military, border, police, customs and other state services of the CIS member States." A similar definition is contained in the bilateral international treaties concluded by the CIS countries.[34]

There are no international treaties within the Eurasian Economic Union (hereinafter referred to as the EAEU) that contain a definition of State aircraft. Still, it can be found in the documents of the Eurasian Economic Commission. It almost literally corresponds to the above provision of the Agreement of 2009; the only exception is the additional indication that the term State aviation also includes aviation used to carry out mobilization and military-sport activities.[35]

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[33] Agreement on cooperation in the field of investigation of aviation accidents involving state aircraft of the CIS member states (adopted 20 November 2009, entered into force 9 January 2011). Available at: https://cis.minsk.by/reestrv2/doc/2754#text [Accessed 12.04.2022].

[34] See Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on Cooperation in the Field of Safety of Flight of State Aircraft (adopted on 29 November 2005, entered into force 29 November 2005), Art. 1. Available at: http://pravo.gov.ru/proxy/ips/?docbody=&link_id=3&nd=102083248&bpa=cd00000&bpas=cd00000&intelsearch=%CE+%E2%EE%E5%ED%ED%FB%F5+%F1%F3%E4%E0%F5+%D0%EE%F1%F1%E8%E9%F1%EA%EE%E9+%D4%E5%E4%E5%F0%E0%F6%E8%E8 [Accessed 14.04.2022].

[35] Protocol No. 20-48 of the videoconference meeting on finalizing the agenda of the 9th meeting of the Civil Aviation Sub-Committee of the Advisory Committee on Transport and Infrastructure of the Eurasian Economic Commission. [online], 03.03.2021. Available at: http://www.eurasiancommission.org/ru/act/energeti-kaiinfr/transport/SiteAssets/ДТИ%20воздушный%20транспорт/Протокол%20совещания%20в%20режиме%20видео.pdf (In Russ.) [Accessed 14.04.2022].

It is also worth paying attention to the legal regulation of air navigation. According to the established practice, air navigation at the regional level is subject to similar rules for both civil and State aircraft (Samorodova, 2008, p. 141; Travnikov, 2014, p. 96). This approach to the legal regulation is justified since as early as at the Chicago Conference in 1944 States were aware of the necessity to harmonize uniform flight rules for State and civil aircraft. This is explained by the fact that State and civil aircraft operate in the same airspace (Bordunov, Kotov and Maleev, 1988, p. 149). We believe that this will contribute to providing the necessary level of safety for air navigation. However, no such legally binding rules have been developed at the universal level. At the same time, according to A.A. Batalov, there is an international custom, according to which State transport aircraft must fly in international airspace following the air routes established under Annex 2 of the Chicago Convention (Batalov, 2020, p. 73).

At the bilateral level, it is quite common to conclude agreements establishing rules on the overflight of State aircraft over the territory of the contracting State, but the scope of these agreements varies considerably. A number of treaties refer to Art. 3 of the Chicago Convention in defining State aircraft,[36] while others contain provisions stipulating that such aircraft must not be armed or equipped with reconnaissance equipment during such flights.[37] Consequently, in the second case not all military aircraft can perform the overflight, but only those destined solely for transportation purposes. It is also worth mentioning the Agreement between the U.S. Government and the Republic of Kazakhstan on assessing air navigation service fees for State aircraft. Under Art. 1 of this agreement, State aircraft flight is a flight for which Diplomatic Clearance is requested by one Party and

[36] Special Agreement on the overflight of State aircraft between the Argentine Republic and the Republic of Chile (with annex) (adopted 16 December 1998, entered into force 5 January 2007) 2445 U.N.T.S. 299. Available at: https://treaties.un.org/doc/publication/UNTS/Volume%202445/v2445.pdf [Accessed 14.04.2022].

[37] Exchange of notes between the Kingdom of the Netherlands and the Bolivarian Republic of Venezuela constituting an agreement on overflight permission for state aircraft (with annexes) (done at Caracas, Venezuela, on 4 June 2012 and 4 July 2012, entered into force 4 July 2013) 2955 U.N.T.S. 187. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%202955/v2955.pdfpdf [Accessed 13.04.2022].

given by the other Party, with States undertaking not to request such authorization for flights that have a commercial purpose or another non-governmental purpose.[38]

Based on the analysis of international legal instruments on the regional and bilateral level, there is no uniform approach to the definition of "State aircraft." Nevertheless, the current prevailing approach is to include a broader list of aircraft in the definition of "State aircraft" than that enshrined in Art. 3(b) of the Chicago Convention.

VI. Immunities of State Aircraft

The issue of immunities of State aircraft is closely related to the problem of their cclassification. While ICAO in its 1993 study only mentioned that the qualification of certain types of State aircraft as civil did not affect the scope of their immunities and privileges, without disclosing their specific content, the Venice Commission explicitly pointed out that under customary international law, State aircraft enjoy immunity from the foreign jurisdiction in respect of searches and inspections. This issue deserves a separate detailed study, we will only highlight the general points.

In 1933, the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft was concluded, which stipulated in Art. 3 that "aircraft assigned exclusively to a Government service, the postal service included" shall be exempt from precautionary attachment. However, this convention has entered into force for only 5 States and only precautionary attachment is affected by the quoted provision. Thus, this convention does not allow a conclusion to be drawn on the scope of immunities of State aircrafts.[39]

[38] Agreement between the Government of The United States of America and The Government of The Republic of Kazakhstan on assessing air navigation service fees for state aircraft (adopted 12 January 2018, entered into force 21 May 2018). Available at: https://www.state.gov/wp-content/uploads/2019/02/18-521.1-Kazakhstan-Defense.pdf [Accessed 14.04.2022].

[39] Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (adopted 29 May 1993, entered into force 19 November 1938) LNNTS 192, p. 289. Available at: https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20192/v192.pdf [Accessed 13.07.2023].

The problem of determining the immunities of State aircraft and, accordingly, the precise distinction between State and civil aircraft was most acute during the drafting of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[40]

Thus, Special Rapporteur Motoo Ogiso presented his interpretation of Art. 3 of the Chicago Convention in terms of jurisdictional immunity. After quoting the provision, he stated the following,

"An aircraft is not to be considered a State aircraft merely by reason of its ownership or operation by the State. It is therefore justifiable to draw the conclusion that State immunity cannot be invoked in proceedings relating to State-owned or State-operated aircraft, except for aircraft used in military, customs and police service," in other words, an aircraft owned or operated by a foreign State is assimilated to a privately owned and operated aircraft (civil aircraft) and is subject to the jurisdiction of the territorial State based on its territorial sovereignty."[41]

Thus, the Special Rapporteur favors a restrictive interpretation. At the same time, it is not entirely clear under which category an aircraft carrying a Head of State falls. According to this formal logic, full immunity would be available to, for example, an aircraft employed in the customs service, but not to an aircraft carrying a Head of State. However, he noted that "there is not a uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft."[42]

It was subsequently concluded that the issue of immunities of State aircraft, including presidential aircraft, and their international legal status was unclear and that the international law commission would

[40] The United Nations Convention on Jurisdictional Immunities of States and Their Property. G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) Available at: https://treaties.un.org/doc/Treaties/2004/12/20041202%2003-50%20PM/CH_III_13p.pdf [Accessed 16.04.2022].

[41] Second report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur. A/CN.4/422 & Corr.1 and Add.1 & Corr.1. Para. 29.

[42] Second report on jurisdictional immunities of States and their property. Para. 31.

need considerable time to study the issue. In the end, Art. 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property established that "the present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State." Thus, it was decided to leave the issue aside, but it can be seen as an indirect confirmation of the existence of such immunities, although the question of their scope is still unresolved.

It is worth noting that State practice does not support the assertion of absolute immunity for State aircraft. In 2013, for example, Spain, Italy, France and Portugal withdrew permission to use their airspace, forcing a plane carrying Bolivian President Eva Morales from Moscow to La Paz to make an emergency landing in Vienna. The reason for this decision was the concern that the plane was carrying Edward Snowden. The Austrian security service searched the plane at Vienna airport. But the suspicion was not confirmed. Subsequently, the Venezuelan authorities accused the European countries of a violation of international law (Abeyratne, 2013, pp. 648–649).

VII. Definition of a "State Aircraft" at the National Level

Although there is no unified approach to the definition of a State aircraft in international law, it should be noted that there is a uniformity of national approaches to this definition. This issue may be of academic interest for comparative legal research, however, within the framework of this study, the examination of a number of national laws of several states from different parts of the world (Russia,[43] Spain,[44]

[43] Russian Federation Air Code, Art. 22. Available at: https://www.consultant.ru/document/cons_doc_LAW_13744/7f3c996cc4d09b8c93f4ea54468d2531f95e6b7d/?ysclid=ll7vdmbuec580745614 (In Russ.) [Accessed 27.06.2023].

[44] Ley 48/1960, de 21 de julio, sobre Navegación Aérea, Artículo 14. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-1960-10905 (In Spain.) [Accessed 27.06.2023].

Canada,[45] USA,[46] Mexico,[47] Argentina,[48] Kenya[49]) allows us to draw an intermediate conclusion that most states consider as state aircraft not only military, customs and police aircraft, but also any other aircraft that are involved in the performance of state functions.

In this context, it is worth mentioning the recent attempt by a court in France to reconcile the provisions of the Chicago Convention with French national law, which also enshrines an open list of State aircraft. In 2020, an aircraft carrying the President of the Congo was arrested at the request of creditors. The Congolese party went to court to challenge the decision and invoked the absolute jurisdictional immunity of the State aircraft.

Before turning to the question of immunity, the court had to determine whether the aircraft was a State aircraft. The Court turned to the provisions of the Chicago Convention and briefly outlined the difficulties that arise with provision 3 of the Chicago Convention. It then quoted French law and concluded that in International Law State aircraft included not only military, customs and police vessels but also other types of State aircraft. However, while in the first case the aircraft reflected in Art. 3 of the Chicago Convention are recognized as State aircraft ipso facto, with regard to the other aircraft it is not sufficient that they perform State functions.

The Court found that two criteria were necessary for other State aircraft to be recognized as such. The first criterion is the recognition of such status by the State that uses this aircraft. Such recognition takes the form of a request for permission for the flight of a State aircraft to another State. The second criterion is the recognition of a particular

[45] Air Services Charges Regulations. 2(1). Available at: https://laws-lois.justice.gc.ca/eng/regulations/sor-85-414/index.html [Accessed 27.06.2023].

[46] 49 U.S. Code § 40102, 41. Available at: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title49-section40102&num=0&edition=prelim [Accessed 27.06.2023].

[47] Ley de Aviacón Civil, Artículo 5. Available at: https://www.profeco.gob.mx/politicasaviacion/pdf/LAC.pdf (In Spain.) [Accessed 27.06.2023].

[48] Codigo Aeronautico, Artículo 37. Available at: https://www.profeco.gob.mx/politicasaviacion/pdf/LAC.pdf (In Spain.) [Accessed 27.06.2023].

[49] The Civil Aviation Act, Art. 2. Available at: https://www.kcaa.or.ke/sites/default/files/act/CIVIL%20AVIATION%20ACT%2C%202013.pdf [Accessed 27.06.2023].

foreign aircraft as State aircraft by the State within whose airspace such a flight takes place. This criterion is fulfilled if the State issues a permit for such a flight. The court concluded in the end that the Congolese President's aircraft was a state aircraft. However, due to the lack of diplomatic immunity and previous court decisions where Congo waived its immunity, the arrest was found to be lawful.[50]

VIII. The Problem of Aircraft Identification

In addition to the need for a definition of State aircraft, international law should also establish criteria that distinguish between State and civil aviation. As M. Milde rightly points out, such distinction under the Chicago Convention should be guided by a functional approach. This follows directly from the wording of Art. 3(b), which uses expressions such as "used" and "in service" (Milde, 2008a, p. 71). In other words, only the tasks performed by a particular aircraft are important.

Such an approach is intended to solve the problem of misuse of aircraft. According to it, a civil aircraft used for military or customs purposes should be classified as a State aircraft. The situation is similar for State aircraft that are used for civilian purposes. At the same time, it should be noted that the functional approach is an ambiguous phenomenon. On the one hand, it makes legal regulation flexible, and on the other hand, it implies that the legal regime to which a particular aircraft will be subjected will depend on the decision-maker's subjective perceptions, although possibly based on the objective factors identified in the 1993 ICAO study. It is unclear how disputes will be resolved if the use of the different criteria outlined in the ICAO Study would lead to different results and how the actual status of the aircraft or the validity of assumptions regarding its status would be assessed.

Furthermore, the functional criterion in the light of the provisions of Art. 3 of the Chicago Convention and the subsequent interpretation of this provision by ICAO may lead to perplexing results. If one considers,

[50] Tribual Judiciare de Paris, N° RG 20/80785 — N° Portalis 352J-W-B7E-CSG3Q. Congo vs Commisimpex. Available at: https://jusmundi.com/en/document/decision/fr-commisimpex-s-a-v-republic-of-the-congo-and-caisse-congolaise-damortissement-jugement-du-tribunal-judiciaire-de-paris-monday-29th-june-2020#decision_11679 [Accessed 23.07.2023].

for example, the humanitarian cargo delivery on a military transport aircraft, then the question becomes: is this a State aircraft? Based on the ICAO recommendations discussed above, it must be concluded that it is a military aircraft and therefore, it is outside the scope of the Chicago Convention. Meanwhile, if an aircraft of the same type, which is operated by a national emergency service with a crew whose members have the Status of civil servants, is used for a similar delivery, can it be defined as a State aircraft? Despite the fact that among the criteria proposed by ICAO, there are such ones as ownership and the degree of State control over the flight, authors believe the answer will be negative. After all, formally, the ICAO criteria are not designed to distinguish between State and civil aircraft, but between aircraft engaged in the military, customs and police services and any other aircraft which, according to the ICAO position, fall under the scope of the Chicago Convention. On this basis, emergency service aircraft should be treated as civil aircraft.

In the authors' opinion, it is not acceptable that identical aircraft performing similar functions and being under State control have different status. The authors of the present article proceed from the assumption that this approach is not justified.

The functional approach is of particular importance in armed conflicts, where lives depend on how accurately a target is defined. However, this area of legal regulation is outside the regulation of international air law and falls under international humanitarian law. This is indicated by Art. 89 of the Chicago Convention, which provides that "in case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals." So, for the purpose of qualifying military and non-military State aircraft, it is necessary to rely on Art. 52(2) of Additional Protocol I to the 1949 Geneva Conventions, which provides that "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[51]

[51] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 7 December 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 52. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf [Accessed 14.04.2022].

IX. Conclusion

The authors of the article assume that there is an urgent need for the development of norms of international law that will regulate State aircraft activities. But before, the international community needs to develop a unified approach to the definition of "State aircraft." It is obvious that the approach contained in the Chicago Convention does not meet the needs of modern aviation and in many respects contradicts the established practice. Given the contradictory practice of international organizations, it is difficult to apply unambiguously in respect of Art. 3 the concept of a treaty as a "living instrument" that has changed its legal content. It can be clearly concluded that Art. 3bis of the Chicago Convention should be amended to include all types of aircraft used for public purposes.

The authors share the view of those scholars who point to the advisability of drafting and adopting a new multilateral treaty on air law at the universal level, which would resolve not only this problem, but also a number of other conflicts and gaps in the Chicago Convention (Samorodova, 2008, p. 171). Addressing these problems through a number of amendments to the Chicago Convention is unlikely, as, given their number, the elaboration of a new international treaty seems a more rational solution. It is particularly noteworthy that, unlike the Chicago Convention, the provisions of the future treaty would have to regulate not only civil aviation, but also State aviation.

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The History of the Formation and Development of the Institution of Diplomatic Asylum in Latin America

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Abstract: The institution of diplomatic asylum occupies a special place in the system of international law due to the ambiguity of its legal regulation. As it is known, this institution was not recognized by the Vienna Convention on Diplomatic Relations of 1961 and subsequent universal legal documents. However, most Latin American countries widely apply the right to grant asylum in the premises of diplomatic missions and not only on the basis of the provisions of numerous regional agreements, which directly provide rules of granting diplomatic asylum. The dual approach to the issue of diplomatic asylum that has developed in international practice creates a lot of disputes between states, due to the divergence of their positions on this issue. The article examines the history of the formation and development of the institution of diplomatic asylum, its legal regulation in Latin America and briefly reveals the contribution of judicial practice to the development of the institution. The main purpose of this study is to identify existing contradictions in the international legal regulation of the institution of diplomatic asylum and to analyze acceptable ways to eliminate such discrepancies.

Keywords: diplomatic law; diplomatic mission; premises of a diplomatic mission; diplomatic asylum; Latin America

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I. Introduction

For centuries international law has known the institution of diplomatic asylum, which nowadays is understood as a right to grant a person persecuted on political grounds protection in the premises of diplomatic missions, consular offices, on warships, aircraft, in military bases and camps and other objects exempted from the jurisdiction of the receiving State (Greenburgh, 1995, p. 103).

The first origin of diplomatic asylum stems from the establishment of permanent diplomatic missions provided with inviolability.[1] Soviet scientist D.B. Levin attributes the appearance of the first embassies in the Italian republics to the middle of the 15th century (Levin, 1949, p. 40). Prior to this, diplomatic missions were temporary in nature, which entailed, as a consequence, the absence of immunities and privileges of embassy buildings (Blishchenko, 1990, p. 5). Phillipson concluded that during the era of temporary (quasi-permanent) embassies the use of ambassadors' premises for the purpose of protecting criminals was impossible due to the lack of its' immunity (Phillipson, 1911, p. 337). It can be argued that the end of the process of transformation of temporary diplomatic missions into permanent ones was sanctioned by the Congress of Westphalia in 1648.[2]

[1] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 2. Available at: https://www.unhcr.org/protection/historical/3ae68bf10/question-diplomatic-asylum-report-secretary-general.html?__cf_chl_tk=llrNyxVihX.XJkBiEX9Iztq73737drbWu8_m_AGkxrA-1672926591-0-gaNycGzNGeU#_ftn8 [Accessed 25.02.2022].

[2] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 2.

With the aim to ensure the efficient performance of the functions of diplomatic missions in Europe "franchise du quartier" (freedom of the quarter) immunity was declared which rendered the entire quarter immune to domestic jurisdiction, with the result that the practice of granting diplomatic asylum became widespread (Satow, 1961, p. 215). The inviolability of embassy premises was a legitimate reason for providing shelter to persons persecuted by local authorities, including criminal offenders. The inadmissibility of entry into the territory of legations of the agents of the receiving State without the consent of its head made it impossible to detain these persons. As a result, the quarters turned into the haunt of criminals thus posing a threat to public safety and sovereignty of the State (Iskevich and Podolskii, 2014, p. 6).

The institution of diplomatic asylum was also recognized by the Venetian Statute published in 1554. It stipulated that a person accused of a common crime was not subject to prosecution on the premises of the embassy. This provision, however, did not apply to political criminals who were required to be extradited. Such a tendency to exclude this category of criminals from diplomatic asylum prevailed until the 19th century (Prakash, 1971, p. 21).

The practice gained further acknowledgement due to an arbitration award granted in 1601 by Pope Clement VIII in connection with the dispute between France and Spain. The latter violated the inviolability of the premises of the French diplomatic mission in Madrid by a forcible detainer of the perpetrators of the murder of several Spanish soldiers (Hughes-Gerber, 2021, p. 35).

Since the 19th century, granting diplomatic asylum has been regarded by the international community as an abuse of diplomatic immunity and interference in the internal affairs of States. This does not mean, however, that the practice has ceased to exist. On the contrary, it has undergone changes, as a result of which diplomatic asylum has been granted exclusively during periods of political unrest and only in relation to political offenders, thus excluding the commission of an ordinary crime from the grounds for granting protection in the premises of a diplomatic mission. This approach to diplomatic asylum has been preserved to this day, particularly in Latin America (Galenskaya, 1968, pp. 98, 103).

II. Formation and Development of the Institute of Diplomatic Asylum in Latin America

The institution of religious asylum, introduced in the New World during the colonization period in the 16th century, was a prerequisite for the development of diplomatic asylum institution in Latin America. As initially recognized in Spain, the practice provided fugitives who had committed civil offences with the opportunity to seek protection and assistance in certain monasteries and churches (Gil-Bazo, 2015, p. 15). The legitimacy of its granting resulted from the sanctity of these places (Ronning, 1965, p. 24).

The popularity of the institution of religious asylum was due to the constant intense struggle between secular and ecclesiastical powers, which partly explained the fact that the right of religious asylum defended the longest in Spain and Latin America unlike other European countries.

Abuses of the practice of religious asylum posed a threat to State sovereignty, and as a result, a number of attempts were made through royal decrees and papal bulls to restrict the practice of asylum by limiting the offences for which asylum could be granted and places it could be granted in as well. It appears that particular attention of royal authorities was paid to attempts to apprehend military delinquents.

In 1681, for example, Philip III of Spain issued a decree prohibiting the granting of ecclesiastical asylum to persons who were not entitled to it, according to the laws of the Kingdom of Castile. In addition, the requirement to facilitate the granting of asylum for a shorter period of time was enshrined.[3] A royal decree of 1787 allowed the extradition of war criminals from sacred places in order to ascertain whether or not the offence was one that permitted asylum (Ronning, 1965, p. 25). Finally, in 1800, a decree was passed that almost completely abolished the practice of ecclesiastical asylum in Spain (Cavalario, 1848, p. 418).

In addition to the above-mentioned documents, which applied to the Spanish colonies, in 1680 the monarchs adopted a Code of Laws for

[3] Recopilación de leyes de los reynos de las Indias, Madrid, 1791, Libro I, Titulo V, Ley II, p. 35. Available at: https://www.boe.es/biblioteca_juridica/abrir_pdf.php?id=PUB-LH-1998-62_1 [Accessed 25.11.2022].

the administration of their possessions in the Indies.[4] However, unlike Spain, in Latin America the Church was under direct and immediate control of the Crown making asylum less of a threat to secular power and continuing to be popular in the first third of the 18th century. As the Church became more involved in factional political struggles, this favorable position weakened.

With the gradual establishment of independence and the appearance of permanent diplomatic missions of foreign states on the territory of Latin America in the middle of the 19th century, the practice of granting diplomatic asylum began to gain popularity (Pastorino and Ippoliti, 2019, p. 10). For example, in 1850, the former President of the Republic of Ecuador resorted to the Colombian consulate in Quito, Ecuador, for protection.[5]

In the context of the 20th century, the practice of granting diplomatic asylum played an important role as a mechanism for protecting human life during the Spanish Civil War (Grugel and Quijada, 1990, pp. 357–358). Between 1936 and 1939, more than 10,000 people were granted diplomatic protection in 19 diplomatic missions in Latin America, Europe and Asia. However, this move led by Latin American embassies was criticized by the Spanish government, which considered such a use of the inviolability of premises for the purposes of diplomatic asylum to be abusive (Hughes-Gerber, 2021, p. 45).

The crisis faced by the Peruvian Embassy in Havana in 1980 also should be mentioned. More than 10,000 Cuban citizens forced their way into the embassy building to seek protection. Refusal of Peru to extradite them prompted Fidel Castro to stop providing security for the Peruvian diplomatic mission. Subsequently, however, the President of the Republic of Cuba was forced to make concessions and publicly announced the launching of the Mariel Boatlift allowing Cubans to emigrate to the United States (Larzelere, 1988, p. 26). In addition, in 1973, after Pinochet's coup, hundreds of supporters of Chilean President

[4] Recopilación de leyes de los reynos de las Indias, Madrid, 1791, Libro I, Titulo VI, Ley I, p. 36.

[5] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 12.

Salvador Allende sought asylum at the embassies of Mexico, Panama and Venezuela (Behrens, 2017, p. 183).

State practice nowadays continues to expand with new cases of granting diplomatic asylum to individuals. Among the most prominent are the sheltering of the ousted Honduran President Manuel Zelaya, first in the Brazilian Embassy in Honduras, and then in Mexico in 2010, as well as the granting of diplomatic asylum in the Ecuadorian Embassy in London to Julian Assange, an Australian national, the founder of a website WikiLeaks, in 2012 (Heijer, 2013, p. 404).

Assange gained international recognition in 2010 after the mass disclosure of classified documents detailing American military and foreign affairs activities including thousands of State Department cables, military reports related to the Iraq and Afghanistan wars, and Guantanamo Bay detainee assessments information (Abashidze and Chernykh, 2016, p. 77). In 2012, while being released on bail as he awaited the ruling of the Supreme Court of the United Kingdom, he sought asylum at the Ecuadorian embassy in London to avoid extradition to Sweden where a European arrest warrant for sexual assault charges was issued (Arredondo, 2017, p. 132). Although the investigation into the sexual misconduct allegation was dropped in 2019 as a result of the expiration of the relevant statutory time limitations, Assange continued to reside in the embassy for seven years, until diplomatic protection was revoked in 2019 due to a violation of the embassy's terms of tenure (Vázquez, 2017, p. 215).

He was subsequently detained by the British Metropolitan police invited by the Ecuadorian ambassador for breaching his bail conditions and transported to a police station, where Assange was further arrested on behalf of the U.S. subject to a U.S. extradition warrant. A previously sealed 2018 U.S. indictment against Assange for charges of conspiracy to commit cyber hacking related to his involvement with Chelsea Manning, former U.S. army intelligence analyst, and WikiLeaks was also published. Lastly, the United Kingdom maintains physical custody of Assange as he awaits the continuance of his extradition hearing. After losing latest legal appeal the prospect of Assange being handed over to the U.S. authorities remains a distinct possibility, despite a Magistrate's

Court's recent denial of the United States' extradition request due to grave concerns as to Assange's mental health (Restrepo, 2021, p. 144).

The historical precedent discussed above has become the subject of controversy over the legitimacy of the practice of granting diplomatic asylum as it reflected the inherent legal uncertainty in the diplomatic asylum institute regarding the correlation between territorial sovereignty and diplomatic inviolability. While the receiving state is eligible to prevent a fugitive from leaving its territory, the sending State is entitled to withstand the physical recovery of the fugitive (Värk, 2012, p. 254).

Since the United Kingdom disputed Assange's political asylum, it pointed that it may terminate it referring to the 1987 Diplomatic and Consular Premises Act, which specifies that in case of a misuse of diplomatic premises the inviolability of the embassy could be revoked, thus allowing the authorities to enter its territory in order to search it.

Nevertheless, Art. 22(1) of the 1961 Vienna Convention on Diplomatic Relations (VCDR) establishes the inviolability of diplomatic premises. It implies that an embassy and its territory are exempted from the jurisdiction of the host State and cannot be subject to coercive measures without the consent of its head. The Assange case depicts a use of the diplomatic premises incompatible with the recognized diplomatic functions provided for in Art. 3(1) of the VCDR. Such a use is prohibited by Art. 41(3) of the VCDR. However, failure to comply with Art. 41(3) does not provide that inviolability is lost as a consequence of such an abuse (Denza, 2016, pp. 384–385). In this regard, the attempt to arrest Assange inside the Ecuadorian embassy without the consent of its head constituted a violation of the diplomatic inviolability principle.

In those cases where disputes arise between receiving and sending States over the provision of protection to an asylum seeker, whether for reasons of political expediency or humanitarian concerns, the most desirable course of action to prevent or resolve them would be to resort to diplomatic means, such as entering into negotiations with a view to satisfying both human rights and demands of the receiving State (Heijer, 2013, p. 424).

III. Codification of the Institution of Diplomatic Asylum in Latin America

The widespread practice of granting diplomatic asylum is continuously replenished with numerous cases of abuse of this right that indicates the need for a legal settlement of the issue under consideration.

In 1865, due to the negative consequences of providing refuge to the Peruvian General Canseco in the U.S. diplomatic mission in Peru, the Lima Rules were developed. Pedro Canseco was charged with conspiracy against the Government and maintained constant contact with accomplices while enjoying asylum in the U.S. embassy for 4 months. Shortly after he was exiled to Chile, the general invaded Lima at the head of a group of supporters and played an important role in overthrowing the existing government (Gilbert, 1901, p. 120). Serious difficulties followed, prompting the diplomatic corps to define principles governing diplomatic asylum in a treaty-like form.

The political nature of a would-be asylee's act, the exceptional character of the case and the limited period of time necessary to ensure fugitives safety constituted the key requirements of granting asylum according to the Rules what, to a large extent, reflected some features of the modern regional treaty law regime.[6] Nevertheless, the Peruvian government failed to enact this document.

In December 1865, the French Legation in Lima became a safe haven for three Peruvian citizens accused of peculation, treason and conspiracy. However, the French chargé d'affaires ad interim refused to allow the Peruvian officials to arrest them, and as a result in 1867, the Foreign Minister of Peru convened a conference of diplomatic representatives with the aim of developing a uniform approach to the issue of granting diplomatic asylum (Nolan, 1934, p. 176). The representatives of the United States and Peru were bent upon abandoning the practice completely, but despite the lack of a legal basis, the other participants of the conference were looking for a way to continue to grant diplomatic asylum in any form without creating a legal obligation to recognize this institution (Nolan, 1934, p. 177).

[6] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 27.

In 1898, the heads of diplomatic missions of Brazil, the United States of America and France in Bolivia managed to draw up agreement hereinafter referred to as the Rules of La Paz. This set of rules established detailed stipulations governing conditions for granting protection and asylees obligations (Hughes-Gerber, 2021, p. 104).

For example, refugees reception procedure required that the would-be asylee be received in the outer or in a waiting room of diplomatic premises and the information concerning his personal data including reasons for demanding refuge be requested.

In case a person was found eligible for protection, it was required to immediately notify the authorities of the State of his nationality of his place of asylum. In addition, a person granted diplomatic asylum was prohibited from maintaining contacts with the outside world, receiving guests, or leaving the diplomatic mission, except with the permission of its head (Moor, 1906, pp. 783–784). Whereas such limitations to the practice are inconsistent with the current state of affairs depicted by the Assange case who was accused of receiving guests and interfering in other states' affairs while enjoying asylum.

In 1922, the diplomatic corps of Argentina, Bolivia, Brazil, Cuba, France, Germany, Peru, Spain, Great Britain, the United States and Uruguay to Paraguay introduced the Rules of Asunción.[7] Notwithstanding a certain degree of correspondence of some of its provisions with those of the La Paz, the former reflect the intention of the parties to set severe limitations on the refugees' ability to contact with the outside world and engage in any political activity.[8] They also provide for penalties in case of violation of the asylees' obligation not to leave the territory of a diplomatic mission without proper authorization (Hughes-Gerber, 2021, p. 106).

Moreover, the persistence of the practice of giving asylum exclusively to political offenders entitles the head of the diplomatic mission acting as the sending State's representative to qualify the character of an alleged offence. Still, the uniform approach to the institution at issue

[7] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 30.

[8] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 31.

incorporated within the analyzed sets of Rules drastically differs from the modern-day concept of diplomatic asylum.

In the context of Latin American regional law, there is a large number of treaties related to the issue of diplomatic asylum, namely the Treaty on International Penal Law of 1889, the Treaty of Peace and Friendship of 1907, the Bolivarian Agreement on Extradition of 1911, and the Treaty on Political Asylum and Refuge of 1939. In addition to the above-mentioned documents, the legal basis for the practice was provided by the Havana Convention on Asylum of 1928, the Montevideo Convention on Political Asylum of 1933, and the Caracas Convention on Diplomatic Asylum of 1954. Their importance for the development of the institution in question was confirmed by ratifications by all Latin American States.

The Havana Convention on Asylum of 1928 extensively interprets the diplomatic asylum concept, meaning by this term the grant of asylum in warships, military aircraft and military camps, in addition to legations. The stipulations of the Convention reflect the previously developed principles of the institution introducing the term "urgent cases" and in view of the grant of asylum only for the period necessary to ensure the safety of an asylum seeker, as well as the need to notify the authorities of his location (Hughes-Gerber, 2021, p. 110).

The Convention also stresses that granting asylum to persons accused or condemned for common crimes is not permissible, which correlates with the Latin American practice of providing political offenders with diplomatic protection in the buildings of mission.[9] However, it is important to note that the Convention does not define any of these categories of offences, nor does it accord the unilateral right to qualify the offence to any State. In line with these principles, Art. 2 of the Convention introduces new requirements. Thus, persons enjoying asylum were prohibited from performing acts contrary to the public order and being landed in any point of the national territory nor in any place too close to it.[10]

[9] Convention on Asylum, Havana, 1928. Available at: https://www.refworld.org/pdfid/3ae6b37923.pdf [Accessed 28.12.2022].

[10] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 50.

This article also deals with the concept of "humanitarian tolerance" which entails the respect for the practice of providing a would-be asylee with diplomatic asylum, to the extent it is allowed, by the states even if they do not formally recognize the institution itself (Dyemin, 1992, pp. 95–96).

The Montevideo Convention on Political Asylum, signed at the seventh International Conference of American States on 26 December 1933[11], specifies and eliminates inaccuracies in the provisions of the Havana Convention of 1928.

Thus, Art. 1 mostly replaced provisions of its predecessor, however, providing further specifications. Thus, in line with the previous founding principles the broad meaning of asylum is retained and the right to enjoy asylum is provided exclusively for political offenders. Along with criminals charged with common crimes, deserters from the armed forces of the land and sea are subject to extradition at the request of local authorities. Article 2 reaffirms that the State offering protection in its diplomatic premises has a discretionary right to categorize the alleged offence as political or non-political and determine the degree of urgency of a particular case, therefore putting sending State at risk of abusing its practice. The Convention also establishes the principle of non-discrimination, according to which asylum seekers shall not be discriminated against on the basis of their nationality or on the basis of the national State's domestic law. Article 3 of the Montevideo Convention affirms the humanitarian foundation of the institution. Since the principle of reciprocity is not applicable, any person may resort to protection despite the non-recognition of the institution by his national State. Moreover, states that recognize only a limited right to diplomatic asylum may grant such a right only to the extent is recognized by the receiving State.

On March 28, 1954, at the tenth Inter-American Conference the Caracas Convention on Diplomatic Asylum was signed by 14 states. Its development took into account the experience of Latin America in the

[11] Convention on Political Asylum, Montevideo, 1933 Available at: https://www.oas.org/en/sla/dil/inter_american_treaties_A-37_political_asylum.asp [Accessed 28.12.2022].

proceedings of the International Court of Justice in the *Haya de la Torre* case.

In general, the Caracas Convention systematizes and clarifies previously adopted agreements, exclusively regulates the practice of granting asylum and enjoys broader recognition than the Montevideo Convention of 1933. Article 1 specifies locations that may constitute the places of asylum. Thus, protection can be provided in war vessels, military camps, aircraft and legations, meaning by the latter not only premises of regular diplomatic missions, but also residences of their heads. The Convention went further in imposing an obligation on the receiving state to provide the sending State with additional facilities in cases when there are too many asylum seekers to be housed in legations. Article 2 reaffirms that the granting of diplomatic asylum is a right and not an obligation of states, thus underlying that the provision of asylum is to be exercised at the discretion of a sovereign State, as with the right to unilateral qualification of the offence.

In line with the previous founding principles and instruments the Caracas Convention of 1954[12] enshrines the concept of urgency, the non-reciprocal character of the institution, the principle of non-discrimination and the requirement to grant asylum to persons persecuted for political reasons, exempting deserters of armed forces from being eligible, sets the limit on time permissible for the use of asylum, regulates the obligation of notification and prevention of the asylee from acts disturbing public order.

Articles 13–17 define the end to which the safe-conduct is supposed to be granted, having at their core the goal to ensure the protection of asylee's life, liberty or personal integrity. Of particular note is the notion of the last resort that represents the attempts of Latin American states to restrict the practice of granting asylum to eliminate threats to the host State's sovereignty by providing protection unless it is absolutely necessary. According to the Art. 19 of the Caracas Convention, rupture of diplomatic relations and recall of a diplomatic mission are not grounds for the termination of a diplomatic asylum already granted. At the same

[12] Convention on Diplomatic Asylum, Caracas, 1954. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201438/volume-1438-I-24377-English.pdf [Accessed 28.12.2022].

time, the staff of the diplomatic mission must abandon the territory of receiving State together with the asylees, or, if this is not possible, surrender them to a third State that is ready to provide them with its protection. Thus, all of these aforementioned principles have by now become key features of the right to diplomatic asylum.

Latin American countries have repeatedly taken the initiative to elaborate a universal legal framework for the institution of diplomatic asylum. However, consideration of the issue by the International Law Commission of the United Nations was rejected.[13]

IV. Case Law of the International Court of Justice on Diplomatic Asylum

The legality of granting diplomatic asylum was justified in rulings of the International Court of Justice on the three-stage Colombian-Peruvian dispute. The controversy was caused by the asylum offered in the Colombian Embassy in Lima on 3 January, 1949, to Victor Raul Haya de la Torre, a Peruvian politician charged with involvement in a military rebellion.

Colombian Ambassador's request of a safe-conduct to the political refugee to secure his safe passage from the embassy gave rise to the controversy and was subsequently rejected by the Peruvian Government on the grounds that Haya de la Torre's acts constituted a common offence, thus depriving him of benefits of asylum. Unable to find a negotiated solution the parties to a dispute submitted the questions to the International Court of Justice that formed a subject matter of the *Asylum* Case.[14]

As a result of the Colombian-Peruvian dispute, the controversial provisions of the 1928 Havana Convention were construed and new rules for granting asylum in Latin America were created (Evans, 1952, p. 144).

[13] UN General Assembly, Question of Diplomatic Asylum, Report of the Secretary-General, 2 September 1975, A/10150 (Part II), Para. 168.

[14] Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266. Available at: https://www.icj-cij.org/public/files/case-related/7/007-19501120-JUD-01-00-EN.pdf [Accessed 05.01.2023].

First, the International Court of Justice distinguished "territorial" asylum from "diplomatic" asylum, which were often used interchangeably, especially in case of extradition, under the regional multilateral conventions in force at the time of the proceedings. The latter was understood as a shelter provided by a sending State outside its territory, most often in its legations.[15] Second, while being exempted from the jurisdiction of the receiving State, the refugee remains within its territory, which was considered by the Court as a violation of the receiving State sovereignty and an interference in its internal affairs. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case. Third, the International Court of Justice has identified gaps in regional legislation concerning the right to unilaterally qualify an offence for the purpose of granting asylum. In its application, Colombia invoked provisions of the Bolivarian Agreement of 1911 on Extradition, the Havana Convention of 1928 on Asylum, the Montevideo Convention of 1933 on Political Asylum as the entitlement to qualify the nature of the offence. Although Art. 18 of the Bolivarian Agreement stipulates the recognition of the institution of asylum by the signatory states, however, this does not imply unilateral competence of the country granting asylum to qualify the nature of the offence. With regard to the Havana Convention of 1928, in the Court's view, the right of qualification of refugees act cannot be deduced from its provisions. The Montevideo Convention of 1933 was also recognized by the Court as inapplicable to this dispute due to the fact that it was not ratified by Peru. Fourth, on the subject of the existence of a constant and uniform usage of unilateral qualification as a right of the State of asylum the Court held that proofs provided by the Colombian government were insufficient to constitute a practice peculiar to Latin American region accepted as law. In light of all of the above the Court declared that Colombia, as the State of refuge, was incompetent to unilaterally categorize the offence as political in its character in the form of a definitive decision binding on Peru. Finally, the International Court of Justice clarified the concept of urgency set out in Art. 2 of the 1928 Havana Convention, according to which the granting of asylum is

[15] Colombian-Peruvian Asylum Case (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 266.

subject to the condition of an imminent and persistent danger to the asylum seeker and is limited to the period of time necessary to ensure the safety of the individual.

The Court concluded that asylum could not be justified by the requirement of urgency as long as three months had passed since the military rebellion that allegedly constituted a danger to Haya de la Torre when he was given asylum in Colombian embassy. Consequently, the Court stated in its judgement that the provision of asylum failed to comply with Art. 2, Para. 2, of the 1928 Havana Convention. Following the Court's rejection of the Colombian request for an interpretation of the judgement on the *Asylum* case[16], Colombia initiated new proceedings with Cuba as an intervening Party asking the Court to determine the manner of execution of the Judgement of 20 November 1950 and state whether asylum should be terminated by extraditing the refugee. In its judgment in the *Haya de la Torre* case[17], the Court ruled that asylum must be ceased as soon as possible, while mentioning that the question of choosing the means of its termination was beyond the Court's jurisdiction. However, the Havana Convention of 1928 was silent on the matter at issue, which implied the discretionary right of the parties to decide the manner in which the right to asylum must be ceased based on considerations of convenience or simple political expediency. Therefore, Colombia was not obliged to fulfill its obligation by surrendering a refugee, since extradition was not the only form of termination of asylum. However, the choice of a specific method of termination of the obligation was not within the competence of the Court, and therefore the parties themselves, based on considerations of courtesy and good-neighborliness, would be able to come to a practical and satisfactory solution.[18]

[16] Request of Interpretation of the Judgement of 20 November 1950 in the Asylum case, Judgement of 27 November 1950, ICJ Reports 1950, pp. 395–404. Available at: https://www.icj-cij.org/public/files/case-related/13/1935.pdf [Accessed 03.01.2023].

[17] Haya de la Torre Case (Colombia v. Peru), Judgement of 13 June 1951, ICJ Reports 1951, pp. 71–84. Available at: https://www.icj-cij.org/public/files/case-related/14/014-19510613-JUD-01-00-EN.pdf [Accessed 05.01.2023].

[18] Haya de la Torre Case (Colombia v. Peru), Judgment of 13 June 1951, ICJ Reports 1951. Available at: https://www.icj-cij.org/public/files/case-related/14/1939.pdf [Accessed 05.01.2023].

This case had a significant impact on the institution of diplomatic asylum and its legal regulation, as it revealed the lack of necessary mechanisms in the then existing asylum regulations. The *Asylum* case prompted Latin American States to adopt a new convention, which was expected to identify issues that had not been regulated by the legal instruments in force at that time. In 1954, three years after the last judgment of the International Court of Justice on the *Asylum* case, the Convention on Diplomatic Asylum was adopted in Caracas, which, *inter alia*, established the right of the State granting asylum to unilaterally qualify the nature of refugee's offence, non-proliferation of the reciprocity principle in the relations between countries regarding the granting of diplomatic asylum and a number of rules aimed at improving the practice of granting diplomatic asylum.

V. Conclusion

The institute of diplomatic asylum has an ancient history of formation and development, dating back to the appearance of the first permanent embassies. However, this institution has not received universal international legal recognition and has been established only in the practice of Latin American countries. The practice of granting diplomatic asylum by countries in the Latin American region is developing towards a wider application, including granting asylum not only in the premises of diplomatic missions and consular offices, but also on the territory of military bases, military camps, on board of military ships and military aircrafts.

Based on the results of the study, the following conclusions can be drawn:

1) in view of the existing divergences in the law enforcement practice of States on issues of diplomatic asylum, it is necessary to improve the contractual framework applicable to the institution in question;

2) Latin American experience in the formation of a regional contractual framework provides a fundamental legal basis for further codification of the issue of diplomatic asylum at the universal level;

3) in order to avoid a conflict of interests between States on matters of diplomatic asylum, it is necessary to establish the right to

grant diplomatic asylum in bilateral agreements establishing diplomatic relations or other agreements applicable to issues of diplomatic asylum;

4) the lack of universal recognition of the institution of diplomatic asylum leads in practice to frequent situations where diplomatic asylum is granted by a State that recognizes this right in the premises of diplomatic missions located on the territory of States that do not recognize this institution, which, in fact, is a potential subject of an international dispute.

Thus, general international law does not recognize the institution of diplomatic asylum and considers the granting of refuge in the premises of diplomatic missions and other organs for international relations as the use of these premises for purposes incompatible with the main goals and objectives of these bodies. The institution is neither prohibited nor recognized in general international law, which makes it necessary to further regulate it in order to create a single legal framework applicable to issues of diplomatic asylum, develop a single legal mechanism and principles that are mandatory for States to comply with when exercising their right to grant diplomatic asylum.

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Article

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Bilateral Investment Treaties in the Russian Federation and the State of Qatar in the wake of Maritime Investment. Part 1: Gaps in Regulation

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Abstract: Today one of the most useful and significant means in supporting and maintaining the foreign investment process is Bilateral Investment Treaties (BIT). The Russian Federation (Russia) and Qatar have actively concluded 84 and 63 BITs, respectively. Unfortunately, the existing BITs do not provide a comprehensive legal framework making it possible to deal with the maritime investments. Hence, the basic question raised in the article is whether the current BITs are a suitable legal framework to protect maritime investments? Having conducted a qualitative and quantitative analysis of all the BITs that Russia and Qatar are parties to, the authors come to the conclusion that the existing BITs are not suitable due to the lack of attention to the necessary issues related to maritime investment. These issues include: (1) the exact scope of maritime areas, (2) definition and types of maritime investment, (3) definition of maritime investor.

Keywords: BIT; maritime investment; Qatar; Russian Federation

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I. Introduction

Today, the seas are one of the rich and important resources of living and non-living minerals and non-minerals, as well as non-renewable and renewable energies (Petterson, 2020, pp. 5–10). As Brown believes, the sea and ocean are significant areas to invest in their resources and opportunities (Brown, 2013, p. 719). This idea has resulted in many states focusing on investment at sea in current years. For instance, states invest in renewable energy, including solar, waves and wind energies, which have attracted more attention in recent years. In addition, due to the boom in the use of wind energy, research on investment in this type of energy generation has increased over the years (Murgas, Henao and Guzman, 2021, p. 4).

There is no doubt that any investment, whether on land or at sea, needs special protection to encourage the investors. BITs are main means

to protect and maintain the investment that raise specific protecting arrangements for investment and investors. According to the *Qatar — Togo BIT* (2018) "the Contracting states will make favorable and proper circumstances and environment for the foreign investors within their territories" (Qatar — Togo BIT, 2018, Art. 3). Currently, BITs[1] can be elucidated as a structure to tackle the challenging problems among the host states and investors like a path to create give-and-take interests (Aaken, 2008, p. 1). Hence, 2,830 BITs have been concluded so far and this number is increasing every year (UNCTAD, 2024).[2]

The Russian Federation (Russia) and Qatar having 37,653 and 560 Km of coastline respectively are among the maritime states in which investing in maritime zones is particularly important. In accordance with the statistics released by the United Nations,[3] the maritime states like Russia and Qatar have more inclined to conclude BITs (UNCTAD, 2024).[4] Russia and Qatar have concluded 84 and 63 treaties, respectively, which amount to 6 % of the total BITs. These states pay attention to this kind of treaties because they can protect their investors in other countries, as well as attract foreign investments to their territories by such awareness. The preamble to *the Russian Federation — Cambodia BIT* mentions that "The states, considering to

[1] BITs are one of the types of international investment agreements (IIAs). As UNCTAD has stated, international investment agreements include both of the bilateral investment treaties (BITs) and the Treaties with Investment Provisions (TIPs). A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory. The great majority of IIAs are BITs. TIPs bring together various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished: 1. Broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter); 2. Treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds); and 3. Treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues. UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, Terminology. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy [Accessed 02.11.2023].

[2] UNCTAD, Investment policy Hub. Available at: https://investmentpolicy.unctad.org [Accessed 16.02.2024].

[3] *See* The United Nations Conference on Trade and Development (UNCTAD).

[4] For more information *see*, UNCTAD, Investment policy Hub.

make beneficial terms and environment for investments, realizing that the boosting and mutual maintenance of investments under the current BIT will induce the attracting investment process and participate in the growth of the jointly advantageous economic and commerce; have declared their consent on the BIT" (Cambodia — Russia BIT, 2015).

Freeman states that BITs are considered as great support for investors because their articles and chapters, like parts related to definition of major terms, or standards of treatment and settlement mechanisms, include protecting measures (Freeman and Bartels, 2004, p. 213). ICSID believes that "today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce."[5] Although it is true that the current BITs are suitable tools for investment and investor protection, the main point here is that these treaties will face challenges in the wake of maritime investment. In fact, the current BITs are a tool to protect investment on land and they do not pay attention to the dimensions of investment at sea that can be considered as gaps under these treaties. Investment dimensions in the sea fall into two significant parts. The first part is in connection with the relevant concepts which includes the types and definitions of the maritime investment and investor. The second part contains territorial nexus that describes the nexus between maritime zones and investment (Clare, 2018, p. 112).

According to the investment dimensions in the sea under the current BITs, there are two hypotheses in this paper. First, the current Russian and Qatari BITs contain some gaps in dealing with maritime investments. Second, there are several basic dimensions related to maritime investment including: (1) the exact scope of maritime zones, (2) the definition of maritime investor, (3) definition and types of maritime investments.

Considering the hypotheses, the current paper uses quantitative and qualitative methods. Quantitatively, all the Russian and Qatari BITs are explored in detail. Thus, the present paper examines 147 treaties

[5] ICSID Case No. ARB/04/14, Para. 180.

based on the latest UNCTAD statistics.[6] In line with the qualitative method, one of the important methods of data collection is textual analysis (Gill et al., 2008, p. 291). Thus, the current study shows what gaps within the current BITs there are by analyzing each one. The current study includes three parts. Part one focuses on the difference between maritime investment and onshore investment that covers the dimensions of maritime investment and the provisions governing the investment protection at sea. Part two analyzes the issues as to investment at sea that do not exist in the current Russia and Qatari BITs. Finally, Part three concludes the present study.

II. The Difference between Maritime and Onshore Investments

Many experts may believe that the difference in the geographical realm of investment, whether it is sea or land, does not cause a difference in the essence of the matter. But such mindset is inaccurate. Since the dimensions including "issues related to maritime realm" and "governing rules" are different in these areas, it is necessary to identify them in order to reduce future challenges between host states, third states, investors and public interests. In this article, based on our consideration of the BITs texts we divide these dimensions into two different parts: (1) related issues; (2) governing system.

II.1. Related Issues as Criteria of Difference

By examining all of the Russian and Qatari BITs,[7] we discovered three main issues that the present BITs do not pay attention to when dealing with investments at sea. The issues include: (1) the exact scope of maritime areas, (2) the definition and types of maritime investment, (3) the definition of maritime investor.

[6] The Russian and Qatari BITs are subject to the analysis presented in this paper as these countries are advanced in concluding the Investment Agreements and are maritime states.

[7] Russia has concluded 84 BITs since 1989. Qatar has concluded 63 BITs since 1996. UNCTAD statistics. Available at: https://investmentpolicy.unctad.org [Accessed 02.12.2023].

The main structure of BITs is based on two foundations. The first one is related to the main concepts and definitions, and the second one is in connection with the responsibilities, duties and rights of the parties in the investment process and the provisions, principles, and regulation that should be considered by them. The Russian and Qatari BITs show that Art. 1 of the treaty is basically devoted to the clarification of terms. Article 1 of *the State of Palestine — Russian Federation BIT* covers the definitions of investor, investment, income, territory of a contracting party and the law of the relevant state (Palestine — Russia, 2016). Also, Art. 1 of *the Paraguay — Qatar BIT* explains such concepts as investment, investor, returns, freely usable currency, output of investment and territory (Paraguay — Qatar, 2018). It is obvious, there is nothing of the "related issues" in these articles.

The exact realm of the maritime investment should be specified in line with the definition of territory in Art. 1, which is the matter under the Law of the Sea.[8] The BITs should also address the definition of maritime investment and investor under the related paragraphs.[9] The relevant articles are among the most significant ones, which are generally placed at the first chapter of the BITs due to the importance of identifying the relevant terms. Undoubtedly, it is important to recognize the nature for the purposes of analyzing the related details. It is clear that without identifying the terms on the subject of maritime investment, the investment parties will face problems and they will often raise cases before the investment tribunals like ICSID.[10]

[8] United Nation Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[9] Lack of attention to the relevant concepts can be seen in all the Russian and Qatari BITs. In this regard, because of the huge number of the BITs, it is important to mention some of them, for example Morocco — Russian Federation BIT (2016), Iran — Russian Federation BIT (2015), Cambodia — Russian Federation BIT (2015), Azerbaijan — Russian Federation BIT (2014), Kazakhstan — Qatar BIT (2022), Qatar — Rwanda BIT (2018), Qatar — Togo BIT (2018), Ethiopia — Qatar BIT (2017), Singapore — Qatar BIT (2017), Serbia — Qatar BIT (2016). For more information *see* https://investmentpolicy.unctad.org [Accessed 02.12.2023].

[10] In this regard you can see some cases about the exact realm investment that is one of the challenging issues related to the maritime investments. *See* Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic (PCA Case No. 2014-03), Fraport AG Frankfurt Airport Services Worldwide

II.1.1. Governing System as a Difference Criterion

The governing system means the legal system governing the investment protection at sea. The system is different from onshore based on the mutual rights and obligations of investors, third and host states at sea. The mutual rights and obligations are also considered in the existing Russian and Qatari BITs. In accordance with *the Morocco — Russian Federation BIT* "the contracting states will attract the investors and investments in a proper and beneficial way in their territories and accept them based on the regulation and laws of host state" (Morocco — Russia BIT, 2016, Art. 2). But the point is that these rights and duties are different in the face of maritime investments and require more attention. On the one hand, the main different rules in maritime investment are the provisions related to the UNCLOS and other related conventions of law of the sea.[11] On the other hand, the legal system governing the investment protection at sea protects two different areas: (1) protection of the investor and investment, (2) protection of the public interests of the seas and marine environment. If these realms are not covered simultaneously, they will cause future tensions and create unstable environment for the investments.

III. An Analysis of Issues related to Maritime Realm in the Current Russian and Qatari BITs in the Existing Russian and Qatari BITs

In this part, we specify three important issues, which include: (1) the exact scope of maritime areas, (2) definition and types of maritime investment, (3) definition of maritime investor. These issues are generally stated in the Russian and Qatari BITs, but in the wake of marine investment, they need to be stated in accordance with maritime investment.

v. The Republic of the Philippines, (ICSID Case No. ARB/03/25), InterTrade Holding GmbH v. The Czech Republic, UNCITRAL (PCA Case No. 2009-12).

[11] Conventions managed by the International Maritime Organization (IMO), like International Convention for the Safety of Life at Sea (SOLAS), 1974: 1997/1998 amendments.

III.1. Exact Realm of Maritime Investment

Although the Russian and Qatari BITs try to specify the scope of the territory, the exact maritime realm has been remained unclear. First of all, we need to refer to the preamble of these BITs. The *Russia — Bahrain BIT* notes that the states would like to make proper environment and terms for encouraging and attracting investments "within their territories" (Bahrain — Russia BIT, 2014, Preamble).[12] According to *the Qatar — Singapore BIT* "the parties want to create conditions favorable for fostering greater investment by investors of one Contracting Party 'in the territory of the other Contracting Party' based on the mutual benefit" (Singapore — Qatar BIT, 2017, preamble).[13] These preambles show that the relevant states' territories are the place of investment. In fact, to protect the investments under the BITs, the contracting parties need the territorial nexus (Clare, 2018, p. 112). The territorial nexus means the territorial connection between the host state's territory and investments. The point here is that this territorial realm must be specified.

There is no challenge regarding onshore investment because the borders of a state are the territorial realm of that state. But regarding maritime investment, the issue is complicated because we are dealing with maritime zones. A BIT to deal with maritime investment is needed to fully address maritime zones based on the UNCLOS. The Russian and Qatari BITs have basically chosen two approaches regarding maritime zones, firstly, those that have not considered maritime zones, and secondly, those that have mentioned maritime zones. The UNCLOS have categorized the maritime areas into 8 zones including: Internal Waters, Archipelagic Waters,[14] Territorial Sea,[15] Contiguous Zone, Exclusive Economic Zone (EEZ), Continental Shelf, High Sea, and Seabed (Ravin, 2005, p. 5).

[12] The same refers to the Iran — Russian Federation BIT (2015), Morocco — Russian Federation BIT (2016), Guatemala — Russian Federation BIT (2013), Russian Federation — Uzbekistan BIT (2013), Nicaragua — Russian Federation BIT (2012).

[13] *See also* Qatar — Somalia BIT (2018), Qatar — Rwanda BIT (2018), Qatar — Togo BIT (2018), Ukraine — Qatar BIT (2018).

[14] Since archipelagic waters possess special nature, we have discussed this realm in another paper published in Atlantic law journal, *see* Abadikhah, Nigmatullin and Latypova, 2023.

[15] Sometimes different words may be used. In *The Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, the Tribunal stated that "the Ministry's instruction that prevents the ship from leaving the 'territorial waters' of

III.1.1. BITs that have not Considered Maritime Zones

In examining the concept of territory, some Russian and Qatari BITs do not pay attention to the concept of territory, like *Japan — Russian Federation BIT,*[16] *Kazakhstan — Russian Federation BIT*[17] and also, *the Qatar — Senegal BIT*.[18] Some BITs provide a vague definition, such as *Iran — Russian Federation BIT,* which states that "the term 'territory of a Contracting Party' refers to the territory of the Russian Federation or the territory of Iran" (Russia — Iran, 2015, Art. 1).[19] Others simply declare that the territory of investment includes maritime areas, but they do not specify the maritime areas; in accordance with *the Qatar — Switzerland BIT* "the term 'territory' means the territory of the Contracting Parties, including the maritime areas over which the State concerned may exercise, sovereign rights or jurisdiction" (Qatar — Switzerland BIT, 2001, Art. 1).[20] *The Russia — China BIT* states that "the territory means the territory of the maritime area of each Contracting Party over which it exercises sovereign rights or jurisdiction" (Russia — China BIT, 2006, Art. 1.5).[21]

Ukraine was an arbitrary measure that impeded the management, maintenance, use or enjoyment of Claimants' investment and, therefore, was a breach of Art. 2(3) of the BIT." *See* Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine (ICSID Case No. ARB/08/8) Excerpts of Award dated March 1, 2012 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, Para. 282.

[16] Signed 13 November 1998, entered into force 27 May 2000.

[17] Signed 6 July 1998, entered into force 11 February 2000.

[18] Signed 10 June 1998, not in force yet. Also, the same refers to the Albania — Russian Federation BIT (1995), Russian Federation — Viet Nam BIT (1994), Poland — Russian Federation BIT (1992), Russian Federation — United States of America BIT (1992), Finland — Russian Federation BIT (1989).

[19] Date of signature: 23.12.2015, date of entry into force: 06.04.2017. The same refers to the State of Palestine — Russian Federation BIT (2016), the Azerbaijan — Russian Federation BIT (2014) and the Russian Federation — Turkmenistan BIT (2009).

[20] The Qatar — Switzerland BIT, signed 12 November 2001, entered into force 15 July 2004.

[21] The Art. 1(4) of Germany — Qatar BIT (1996), Art. 1 of the Qatar — Tunisia BIT (1996), Art. 1 of the Lao People's Democratic Republic — Russian Federation BIT (1996), Art. 1 of the Ecuador — Russian Federation BIT (1996) and the Art. 1(4) of the Italy — Russian Federation BIT (1996).

III.1.2. BITs that have Considered Maritime Zones

Some treaties have specified maritime areas. *The Qatar — Togo BIT* reads the territory as follows: "For the State of Qatar: land, inland waters and territorial of the State of Qatar and their bed and subsoil, and air space above them, and the economic zone and continental shelf, which is exercised by the State of Qatar's sovereign rights and jurisdiction; for the Republic of Togo: the territory of Togo, including the territorial sea, air space and any other maritime area of the Republic of Togo which had been or could be designated following the legislation in force in its territory as an area over which the Republic of Togo may exercise its jurisdiction" (Qatar — Togo BIT, 2018, Art. 1.5).[22] In several BITs, Qatar has precisely specified its maritime zones, but the contracting state has provided a vague definition. Based on *the Qatar — Argentina BIT*, the "Territory" implies (a) for the Argentine Republic: the territory subjected to the sovereignty of the Argentine Republic in accordance with its constitutional; (b) for the State of Qatar: land, inland and territorial waters and their bed and subsoil, and the economic zone and continental shelf, which is exercised by the State of Qatar's sovereign rights and jurisdiction" (Qatar — Argentina BIT, 2016, Art. 1.5).[23]

The interesting thing about some Russian BITs is that the treaty not only mentions maritime zones, but also indicates UNCLOS as the main document regarding maritime zones. Thus, the Art. 1(4) of *the Morocco — Russian Federation BIT* states that "with respect to the Russia: the territory of the Russia including Continental Shelf and Exclusive Economic Zone that were defined based on the UNCLOS"

[22] The same refers to Art. 1(5) of the Ukraine — Qatar BIT (2018), Art. 1(4) of the Singapore — Qatar BIT (2017), Art. 1(5) of the Kenya — Qatar BIT (2014), Art. 1(5) of the Moldova, Republic of — Qatar BIT (2012), Art. 1(5) of the Albania — Qatar BIT (2011), Art. 1(4) of the Macedonia, The former of the Yugoslav Republic — Qatar BIT (2011), Art. 1(4) of the Panama — Qatar BIT (2010), Art. 1(4) of the Costa Rica — Qatar BIT (2010).

[23] The same refers to the Art. 1(5) of the Serbia — Qatar BIT (2016), Art. 1(6) of the Paraguay — Qatar BIT (2018), Art. 1(13) of the Ethiopia — Qatar BIT (2017), Art. 1(5) of the Kyrgyzstan — Qatar BIT (2014), Art. 1(4) of the Jordan, Art. 1(4) of the Mongolia — Qatar BIT (2007).

(Morocco — Russia BIT, 2016).[24] Another type of Russian BITs are treaties that only name two maritime zones. As the Art. 1(4) of *the Russia — Cyprus BIT* notes that "the Term 'territory' shall mean the territory of Russia or the territory of Cyprus, and shall include their respective exclusive economic zone and continental shelf" (Russia — Cyprus BIT, 1997).[25]

III.1.3. Comparison

The present article analyzes the Russian and Qatari BITs, except for those treaties whose text has not been made available to the public, such as *Kazakhstan — Qatar BIT* (2022).[26] Hence, Russia has concluded 84 BITs (including signed, expired and in force) but only 82 out of them can be accessed.[27] Qatar has concluded 64 BITs, but only 50 treaties can be accessed. The BITs have mentioned the territory in general but some of them indicate maritime zones and the others do not. It is obvious that the international investment needs BITs that will pay attention to all maritime zones in order to protect investment. Besides, this can be considered as a matter of transparency.

[24] Also, the Art. 1(4) of the Russia — Cambodia BIT (2015), Art. 1(d) of the Bahrain — Russian Federation BIT (2014), Art. 1(4) of the Russia — Guatemala BIT (2013), Art. 1 of the Uzbekistan — Russia BIT (2013), Art. 1(5) of the Zimbabwe — Russia BIT (2012), Art. 1(d) of the Nicaragua — Russian Federation BIT (2012), Art. 1(d) of the Equatorial Guinea — Russian Federation BIT (2011), Art. 1(5) of the Russian Federation — Singapore BIT (2010), Art. 1(4) of the Namibia — Russian Federation BIT (2009).

[25] The same refers to the Art. 1(4) of the Lebanon — Russian Federation BIT (1997), Art. 1 of the Korea, Dem. People's Rep. of — Russian Federation BIT (1996), Art. 1(4) of the Croatia — Russian Federation BIT (1996), Art. 1 of the Mongolia — Russian Federation BIT (1995), Art. 1(4) of the Russian Federation — Yugoslavia (former) BIT (1995).

[26] Date of signature: 12.10.2022, not in force yet. The same refers to the Qatar — Rwanda BIT (2018), Qatar — Timor-Leste BIT (2012), Lebanon — Qatar BIT (2010), Qatar — United Kingdom BIT (2009), Qatar — Tajikistan BIT (2007), Libya — Qatar BIT (2004), Mauritania — Qatar BIT (2003), Qatar — Syrian Arab Republic BIT (2003), Eritrea — Qatar BIT (2000), Qatar — Yemen BIT (2000), Chad — Qatar BIT (1999), Pakistan — Qatar BIT (1999) and Qatar — Sudan BIT (1998).

[27] Two of them expired and there is no access to their texts: Denmark — Russian Federation BIT (1990) and China — Russian Federation BIT (1990).

One of the challenges of the investment in current international society is the lack of transparency, which resulted in the recent amendments to the Convention of ICSID as to transparency (ICSID rules, 2022). The lack of transparency creates challenges for both investment parties and investment courts. As in the "*Peteris and SIA North Star v. Kingdom of Norway*" case,[28] the transparent approach of the BITs regarding the dimensions of the territory helped the investor's argument. The state of Norway breached Art. 3 of the *Latvia — Norway BIT*[29] and prevented the continuation of investment. The state mentioned that the allocated authorization to the investor was not for investment within the Internal Waters, Territorial Sea, and Continental Shelf. In accordance with the BIT, the investor clarified the realm of the maritime investment and argued that the investment had been located at the maritime areas of the Norway.[30] Therefore, such problems may happen to the investments in future, and a transparent and complete BITs regarding the maritime zones can help the investors.

III.2. Defining Maritime Investment

The increase in treaties on investment has expanded the definition and explanation of investment per se (Vandevelde, 2009, p. 261). The major goal is to make sure that such treaty protection can be applied to a wide range of activities related to foreign investment. However, there is no univalent definition of foreign investment. Kahn believes that the shortage and absence of a common definition in the legal field is due to the fact that the meaning of the investment as a term differs in accordance with the goal of the numerous investment tools and instruments that include it (Kahn, 2007, pp. 17–19). All Russian and Qatari BITs have provided similar definitions regarding investment. In all these BITs, the link between the territory of the other contracting party and foreign investment is considered. As the *Russia — Nicaragua BIT* mentions "'investments' are all kinds of property assets invested by

[28] ICSID Case No. ARB/20/11, 11 March 2021.

[29] The investment protection rule. Latvia — Norway BIT (1992), signed 16 June 1992, entered into force 1 December 1992.

[30] *See* subsection 5 of the Section III, p. 33.

investors of the State of one Contracting Party 'in the territory of the State of the other Contracting Party' in accordance with the legislation of the State of the latter Contracting Party" (Russia — Nicaragua BIT, 2012, Art. 2). *The Togo — Qatar BIT* states that "the term 'Investment' means any kind of asset invested by an investor of one Contracting Party 'in the territory of the other Contracting Party' in accordance with the laws and regulations of the latter Contracting Party" (Qatar — Togo BIT, 2018, Art. 1).

The same criteria that were considered in the *Salini v. Kingdom of Morocco* case[31] to identify investment can also be seen in the Russian and Qatari BITs, including: (1) a contribution, (2) a certain duration, (3) a risk, (4) the participation to the economic growth of the host State.[32] In this paper, we do not intend to explain "the Salini criteria" because these criteria have been explained by many experts, rather, we want to mention a new criterion related to the territory of investment with reference to a determined kind of the maritime investment, relying on the approach of *Phoenix action v. Czech*, which actually added a criterion to the Salini criteria. It means that as in *Phoenix action v. Czech* case, the Tribunal added new criteria — in which the assets should be employed by the investors based on the regulation of the host State and bona fide. The criteria addition may also happen in future cases with reference to the kinds of maritime investment.[33]

According to maritime investment, it is better to pay attention to two points. First, a new criterion should be added to the definition part according to the territorial framework. Second, the definition in the above-mentioned BITs has two parts: the first one is a general definition and the second one mentions some properties specifically. In the second part, it is better to mention the types of maritime investment since sometimes a new criterion may be related to a specific type of maritime investment and can help the investor's argument in a dispute in the future.

[31] ICSID Case No. ARB/00/4, 31.07.2001.

[32] These criteria are precisely stated under the definition of investment in Art. 25(1) of the ICSID Convention.

[33] ICSID Case No. ARB/06/5.

III.3. Types of Maritime Investment

Based on the types of maritime investment examined in various books, articles and treatises, it is possible to conclude that the most important kinds of investment at sea are six cases. However, since these cases are not exclusive, other cases can be discovered in the future.

First, investment in non-renewable energies. Oil and gas reservoirs are among the most important resources under the states' jurisdiction. Today, finding and exploiting oil and gas fields is costly and time-consuming. Therefore, countries with oil and gas resources use large investors to exploit these resources.[34] Apart from the resources under the jurisdiction of governments, the global increase in the need for energy, has put the oceans as a potential source of energy high on the agenda (Nengye, 2015, p. 190). However, one of the unique features of offshore energy projects is the obvious risks with extensive social, economic and environmental consequences that such offshore activities create in the event of major problems (Treves and Trevisanut, 2015, p. 247). At the level of international law, the regulations of maritime energy investment projects are not strictly included in a global regime. Many legal regimes overlap in this regard, which can mainly be mentioned as part of the international environmental law, international energy law, investment law and law of the sea.

Second, investment in renewable energies. The amount of energy production and consumption from fossil fuels are also key factors in the aggravation of pollution and climate change. It gives rise to the exploitation growth of renewable energies at sea, such as offshore wind and solar energy (Neves, 2021, p. 206). Nowadays, because of the ongoing investments in the field of renewable energy, several areas of law will certainly be taken into consideration. First, international investment law, second, international environmental law, and third, a set of special rules related to renewable energies. Since our topic is maritime investment, international law of the sea should also be taken into consideration. Therefore, we are currently faced with four sets of legal rules. Thus, the presence of investors in this area requires a precise

[34] As such, Qatar and China agreed to a $ 60 billion, twenty-seven-year deal for liquefied natural gas (LNG). *See more* Dargin, 2022.

legal framework, but currently this integrity does not exist in the form of a set and may cause problems for investors.

Third, investment in marine living resources. Most of the living organisms caught in the oceans are harvested for human consumption. However, marine food chains and networks are complex and fragile, and excessive fishing and water pollution can disrupt these food chains and, as a result, reduce ocean fish stocks. In this regard, investors must be supported and secured by investment law. Also, the realm of this investment is the sea, which makes the Law of the Sea play a major role. In addition, sometimes the excessive catches attract the attention of environmental law to this field. Therefore, investment in the field of marine living resources involves laws in various fields of international law.[35]

Fourth, investment in seabed mining. Today, commercial investments by private investors in the field of seabed mining are increasing (Shukman, 2013). Mining activities can cause the production of sound, vibration and light pollution in an area that is normally quiet, motionless and dark, and based on the kinds of mining that takes place, it can also lead to the leakage of chemicals. It is clear, once a mining company decides to invest in this field, it must pay attention to several legal fields. First, international investment law that actually protects investment. Second, the Law of the Sea because the realm of investment is the seabed. Third, international environmental law, because this field of law always requires investors not to harm the environment.

Fifth, investment in submarine pipelines and cables. In the last 25 years, submarine cables have become a dominant element in the world economy. The Internet is an essential tool for almost all forms of international business. Therefore, more capital and assets has been invested in submarine cables in recent years (Kidney, 2018). Submarine pipelines are also used to transport the three main materials of gas, oil and water. Submarine transportation pipelines are mainly used for transportation of gas (Smcock, 2017, p. 285). The regulation with reference to the submarine pipelines and cables should also be appeared

[35] Namely, Investment Law, Environmental Law, and Law of the Sea.

within the various branches of law, including the Environmental law, Energy law, Investment law and Law of the Sea.

Sixth, investment in the construction of artificial islands. The global warming and population increase are two main matters that make other issues like sea level increase and land shortage. One of the solutions proposed by experts to improve the situation is the construction of artificial islands. Of course, the construction of such structures, along with creating new opportunities and solving some previous problems, also created environmental concerns (Hotwani, 2021, p. 1). Due to the advantages of artificial islands, many countries with advanced technologies are looking to build them. Also, developing countries that do not benefit from such technologies are certainly seeking to attract investment companies in this regard. In addition, the investment in this sector involves different branches of law, like International Investment Law, International Law of the Sea, International Environmental Law.

It is clear that some branches of International Law, like the Investment law, Environmental law, and Law of the Sea are involved in all types of maritime investment. The point here is that these rules are scattered and may present challenges to investors.

III.4. The Global Nature as a New Criterion

The investments, which placed within the maritime zones of states, are protected by the Qatari and Russian BITs (Trevisanut and Giannopoulos, 2018, p. 800). Hence, applying the BITs protection on the far side of the states' maritime areas is facing a challenge. However, such challenges can be solved according to the nature of maritime investment. One of the kinds of investments that are of a global nature and can earn the treaty protection is submarine cables and pipelines. Sometimes, in a conflict, the host state may claim that submarine pipelines or cables lie in the territory that is on the further side of the jurisdiction of the same state and are not protected by the related BIT. Therefore, the relevant court does not have appropriate jurisdiction. This argument is not true as to submarine cables and pipelines since they are of a global nature and the global nature helps to protect the investment under the BIT. Based on the research of the authors, no dispute has been raised

regarding the nature of cables and pipelines. However, the global nature was raised by Claimant in *Deutsche bank v. Sri Lanka* case, and this argument can also be used regarding investment in maritime territory.

In the case, Sri Lanka believes that there is no link between the territory of Sri Lanka and investment as the financial transactions were concluded through Deutsche Bank London, not through Deutsche Bank located in Sri Lanka. Therefore, since the investment did not take place in the Sri Lankan territory, then there is no jurisdiction for court under the relevant BIT.[36] In fact, this argument of the Sri Lankan state may also be considered regarding cables and pipelines as the global nature of this kind of investment makes some projects connect several countries from several continents and cables and pipelines pass through maritime zones under the jurisdiction of states and beyond the jurisdiction such as oceans.[37] The claimant mentions the banking operations and its global nature and notes that the operations carried out by each branch of Deutsche Bank are global in nature. It means that it is correct that the operation was fulfilled by the London branch, but the London branch and the Sri Lankan branch operate under the same title of Deutsche Bank. Therefore, the operation carried out by Deutsche Bank is global. Therefore, when it is taken into consideration to be worldwide in nature, it indicates that wherever useful and favorable operations have been done for the interests of the investment, it must be taken into account as part of the investment and be protected by the BIT. This issue can be seen precisely in the case of cables and pipelines, because although the cables and pipelines have crossed the oceans, due to the global nature of this kind of investment, the part of the investment that is in the oceans should also be protected by the BIT and undoubtedly, there is a territorial nexus here. So, as it is clear, the nature of cables and pipelines is related to two factors: first, the maritime realm as a whole and second, the investment operation as a whole.

The necessity of explaining the types of maritime investment and also the global nature as a new criterion is that the Russian and Qatari states must include the types of maritime investment in their BITs: first, because there may be new criteria in future investments according

[36] Case No. ARB/09/02, Paras 222–229.

[37] Like SEA-ME-WE 3 and SEA-ME-WE 4 projects.

to the type the maritime investments. Second, they should add the criterion of global nature to their BITs as a new criterion and solution to protect investments that are global in nature and are on the far side of the states' jurisdiction. New criteria may be added to the Investment definition in future disputes such as what happened in the *Phoenix Action v. Czech* case.

III.5. Defining Maritime Investors

The investor's definition in global and regional approaches is relatively broad; for instance, in the European Union (EU) approach, within some cases, it is limited to companies that have significant trade activities.[38] However, in EU bilateral or multilateral trade agreements, it isn't obvious what is meant by "significant trade activities." Therefore, deciding whether the activities of a company in a particular country are sufficient to convert the same company into a foreign investor is left to the investment tribunals (Krajewski, 2016, p. 12). Also, *the Qatar — Romania BIT* states that "the concept 'investor' indicates with reference to either Contracting state to Legal entities and Natural persons, containing business associations, corporations and other Organizations, that possess their seats, together with 'Real Economic Activities' in the contracting States' territory" (Qatar — Romania BIT, 1996, Art. 1.1). Therefore, the approach of Russia and Qatar can be challenging. Basically, BITs, in the explanation of terms, dedicate an article to the investor's definition from the way of thinking of the same BIT. It is clear that Russia and Qatar have adopted two approaches regarding the criteria related to the investors' definition. These two approaches are clearly revealed as to maritime investment. Here, the maritime realm plays the role of a main criterion. Further we are going to consider the following two main criteria: (1) paying attention to the criterion of the territory under the investor's definition, (2) failure to take into account the criterion of territory under the investor's definition.

[38] As in the investment agreement between the European Union and Singapore, in the definition of investor, such a thing is considered in Art. 1(2). *See* EU — Singapore Investment Protection Agreement, Art. 1.2, 15.10.2018. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018-- [Accessed 16.02.2024].

III.5.1. Paying Attention to the Criterion of the Territory

Some Russian and Qatari BITs consider the matter of territory. According to *Russia — Morocco BIT*, "investor" means… 1) any Natural person… who invests *"within the other Contracting state's territory*"; 2) any Legal Person which makes investments "*in the other contracting state's territory*" (Morocco — Russia BIT, 2016, Art. 1.2). *The Qatar — Croatia BIT* mentions that "The term 'investor' means in respect of either Contracting Party: a) natural person, a national of a Contracting Party who makes an investment '*in the territory of the other Contracting Party'*; b) a legal person incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat and performing real business activity in the territory of the same Contracting Party and making an investment *'in the territory of the other Contracting Party'"* (Croatia — Qatar BIT, 2001, Art. 1.2).[39] "The criterion of territory" means that the BIT mentions that the investor is the one who invests in the territory of the other contracting party. These are two articles that refer to the criterion of the territory. It is not enough to mention only the criterion of territory, but the BIT should precisely mention the maritime zones under the definition of the investor in accordance with the UNCLOS.

III.5.2. Failure to Pay Attention to the Criterion of the Territory Definition

Many BITs, especially the treaties of Qatar, do not pay attention to the criterion of the territory under the definition of the investor. As such, *Cambodia — Russian Federation BIT* states that the "term 'investor' (with regard to each Contracting Party) shall mean: a) any natural person who is a citizen of the State of that Contracting Party; b) any legal person established or constituted under the legislation of that Contracting Party" (Cambodia — Russian Federation BIT, 2015, Art. 1.1). The same refers to *the Cyprus — Qatar BIT* as it states

[39] The same refers to the Korea — Qatar BIT, as it states that "investors" means any natural or legal persons of one Contracting Party who invest in the territory of the other Contracting Party.

that "'Investor' means Natural persons having the citizenship and corporations, companies, firms or business associations or participation incorporated or constituted under the law in force under the contracting parties" (Cyprus — Qatar BIT, 2008, Art. 1.1). Obviously, these articles not only fail to consider the maritime areas, but also do not take into account the territory in general.

III.5.3. Comparison

According to the two approaches, three criteria are taken into consideration to define the investor. First, the investor must be a natural or legal person who has the citizenship of one of the Contracting states or whose headquarters is in the country of relevant states, respectively. Second, in some BITs, real and significant economic activity in the investment host country is considered. Third, it must be a person who invests within the other contracting state's territory. The first and second criteria are not the subject of this paper. In fact, the basic challenge in facing maritime investment appears to be the third criterion.

Qatar's approach in its BITs tends to ignore the third criterion. In only two treaties — *the Croatia — Qatar BIT* (2001) and *the Qatar — Korea BIT* (1999) — Qatar pays attention to the criterion of territory under the definition of the investor. But in the other 48 BITs, Qatar does not pay attention to the criterion of territory.[40] Russia's approach is similar to Qatar's one and does not tend to the third criterion. Only in 11 treaties, the criterion of territory has been noted under the investor's definition.[41] Therefore, in this regard, the approach of Russia and Qatar is not acceptable. Basically, investment treaties support and maintain

[40] For more information on BITs of Qatar, *see* UNCTAD, investment policy Hub. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/171/qatar [Accessed 16.02.2024].

[41] Namibia — Russian Federation BIT (2009), Russian Federation — Venezuela, Bolivarian Republic of BIT (2008), Libya — Russian Federation BIT (2008), Lithuania — Russian Federation BIT (1999), Russian Federation — Ukraine BIT (1998), Russian Federation — Turkey BIT (1997), Egypt — Russian Federation BIT (1997), Cyprus — Russian Federation BIT (1997), Lebanon — Russian Federation BIT (1997), Netherlands — Russian Federation BIT (1989), Finland — Russian Federation BIT (1989).

the investors who invest within the other contracting state's territory. It is a very challenging issue not to consider the territorial criterion under the "investor's definition part" of the treaties in which they do not define the territory at all in any part. For example, a Russian investor invests in Iran's territorial sea, and after a while, the Iranian government does not consider the investment within its territory.[42] Now, the Russian investor refers to the RF — Iran BIT (2015) in order to prove that the investment is located in Iran's maritime realm. They realize that the territory is not defined.[43] Then, they refer to the investor's definition paragraph and see that only the territory is mentioned, but the sea areas are not specified.[44] In this case, the natural or legal person may be known as an investor based on the other criteria, but through the relevant BIT, they are not taken into account as an investor who invested in the proper territory and, hence, subject to the same BIT protection and governance. In addition, according to the BIT, there is no jurisdiction for the investment court in this regard.[45] Therefore, to avoid such challenges in the future, it is better to mention maritime areas precisely when defining the "investor." Therefore, there are two solutions for Qatari and Russian BITs. First, it is better that all treaties

[42] What happened exactly in the *Peteris and SIA North Star v. Kingdom of Norway* case. *See* Section III.1.3.

[43] Art. 1(1) of the BIT states, "The term 'territory of a Contracting Party' refers to the territory of the Russian Federation or the territory of the Iran, as the case may be."

[44] Art. 1(2) of the BIT states, "The term 'investor' in respect of either Contracting Party refers to: (a) natural persons who according to the laws and regulations of that Contracting Party are nationals of its State and do not have the nationality of the State of the Contracting Party in the territory of which the investments have been made; (b) legal persons which are established under the laws and regulations of that Contracting Party and have their seats in the territory of that Contracting Party."

[45] As in the case of *Hussein Nuaman Soufraki v. The United Arab Emirates*, the claim was related to port concessions in Dubai. Mr. Soufraki had a dual Italian and Canadian citizenship and used the Italy-UAE BIT to raise a lawsuit before the court based on his Italian nationality. The court examined his claim of Italian citizenship. But the Court found out that Mr. Soufraki's effective nationality is Canadian, and in other words, by acquiring Canadian nationality, he lost his Italian nationality. Therefore, he does not have the right to bring a case based on the BIT. This case shows that if the criteria of the treaty are not met, the treaty does not protect the investor. *See,* Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Award, 7 July 2004, Paras 63 and 83.

pay attention to the definition of maritime zones in accordance with the UNCLOS. Second, the treaties that did not address the definition of the territory should consider the criterion of the maritime areas in accordance with the definition of the "Investor." The current study proposes the following definition of an offshore investor as follows:

"Maritime investor" means a Natural or Legal person of one of the Contracting states within the Maritime areas under the Sovereignty and jurisdiction of the other state, including Internal Waters, Archipelagic Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone, Seabed, Sub Seabed and The Continental Shelf or maritime areas outside the jurisdiction of states, such as the high sea, invests based on the permission of the UNCLOS in the framework of various types of marine investment.

IV. Conclusion

The differences between land and maritime investments can be analyzed as the main issues in maritime investment which lack attention, which can lead to some challenges as to maritime investors. The differences can fall into two groups. The first one is some concepts related to marine investment such as the definitions of marine investor and investment, as well as types of marine investment. This group of issues appears only in connection with the investment agreements. The second group is the system governing the maritime investment protection, which, on the one hand, protects the maritime investor and, on the other hand, maintains the public interests, the interests of the coastal and third states in the maritime zones. The second group is the field which implies some other branches of international law like environmental law, law of the sea and energy law. It is obvious that the first group must be considered as a main protective tool for foreign investment, namely investment treaties, to cover the challenges and fill the gaps as to maritime investments.

Based on the purpose of the current paper, which focuses on the gaps in BITs, we here analyze the first group of differences and conclude that the current treaties are not enough to form a comprehensive legal framework to protect maritime investments. The present paper reviewed

and analyzed 147 Russian and Qatari BITs, which revealed that there are some deficiencies related to maritime investments. Some significant issues relating to maritime investment, which make the differences between the maritime and land investment, have not been explained in details. These relevant issues contain:

First, the exact realm of maritime zones. The UNCLOS has defines and categorizes the Maritime zones. These zones include Internal Waters, Archipelagic Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone, Continental Shelf, High Sea, and Seabed. A BIT to deal with maritime investment is needed to fully address maritime zones based on the UNCLOS.

Second, the definition of maritime investors with respect to maritime zones. Russia and Qatar have adopted two approaches regarding the criteria related to the investors' definition. The maritime realm does play big role in these two approaches: (1) paying attention to the criterion of the territory according to the investor's definition, (2) failure to take into account the criterion of territory according to the investor's definition.

Third, the definition of maritime investment in connection with the marine zones and types of maritime investment. According to maritime investment, it is better to pay attention to two points. First, a new criterion should be added to the definition part according to the territorial framework. Second, the definition in the BITs has two parts: the first one is a general definition and the second one mentions some properties specifically. In the second part, it is better to mention the types of maritime investment since sometimes a new criterion may be related to a specific type of maritime investment and can help the investor's argument in a dispute in the future.

Ultimately, it is significant that 17 agreements out of the Qatari BITs and 11 agreements out of the Russian BITs did not pay attention to maritime zones. Definitely, lack of attention to the relevant issues can make some challenges in the way of maritime investment in future.

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INTELLECTUAL PROPERTY PROTECTION FOR SOFTWARE

Article

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The Disclosure Requirements of Software Patents: Suggestions for Developing Countries

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Abstract: This is a research study of available options of Intellectual Property (IP) protections for software in the present IP systems, in most of the countries including copyright and patent protection. Each type of IP protection has its own advantages and limitations like enablement of subject matter for registration requirements, scope of rights conferred and period of protection etc. The trends and demands of software industry for the grant of patents protection for Computer Implemented Inventions (CIIs) were also discussed. The present research paper discusses a best mode of technical disclosure, more than an algorithm, of software patents and additional recommendations are also given as a solution to the technical problem of a suitable IP protection for software. A *sui generis* IP protection was suggested as a best option for a composite IP protection covering all aspects of advanced software inventions.

Keywords: software patent; disclosure requirement; sufficiency of disclosure; computer implemented inventions; CIIs; computer program; global trends

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I. Introduction

Intellectual Property (IP) rights protection has been recognized as an assurance to the capital investment on Research and Development of technology. IP rights are exclusive rights granted by the State over intellectual creations including technological inventions, in almost all fields of arts and science. The software industry is also ranked as one of the major players in the advanced and rapidly developing technologies in the world. This industry has a key influential economic impact due to a notable share in market investments and profits.

The available IP protections for software in the present IP systems of most of the countries are copyright and patent. Patent right is considered as the strongest protection among all types of IP protection; however, it has a limitation of period of protection as compared to term of copyright. Each type of IP protection has its own advantages and limitations like enablement of subject matter for registration requirements, scope of rights conferred and period of protection etc. The significant role and contribution of software industry, in national economy of the developed countries, has enabled patent protection for computer program or software in a direct or indirect way by introducing new terminologies. However, the software industry of the developing countries is still facing challenges to get patent protection. The most of IP offices of these countries are reluctant to accept software as patentable subject matter for certain legal restrictions. The standard patentability requirements of an invention include novelty, inventive step, industrial application (Utility), subject matter enablement and technical disclosure of the invention. One of the main reasons for rejection of software patents given by IP offices, is insufficient disclosure of novel technical contribution.

This research is focused on the minimum level of disclosure of newly developed software, considered as an invention. The enablement of software patenting with clear patentability criteria will be a contribution to the economy of developing countries. Canfield (2006, p. 1) discussed two approaches including “Do existing disclosure requirements require applicants to disclose their code? If not, should

the disclosure of code be required under a new disclosure requirement? Kenneth Canfield discussed with respect to United States of America's polices and decisions by the United States Patent and Trademark Office (USPTO) and U.S. courts known as the Federal Circuits and the Supreme Court. The present research paper covers a study about the best mode technical disclosure for software patents in international prospectus and additionally recommendations are given as solutions to the technical problem of a suitable IP protection for software.

A more comprehensive study of patent disclosure requirements with respect to software engineering requirements is suggested here with a newly identified techno-legal approach. The adopted methodology of this qualitative research study is based on international IP laws, case laws, court decisions and recent research studies including research articles, blogs, books, and online web resources on the subject. The research objective is to identify the minimum technical characteristics of a software to be disclosed in the patent application to satisfy the discourse requirement of the Patent Laws which will enable a person skilled in the art to re-engineer the software from the disclosure given in the patent specification. The discussion on available IP rights protection for software in the existing IP systems is given in Part II and international approaches for software protection is given in Part III of this research paper. Part IV substantiates that technical disclosure is the objective concept of grant of patent, Part V encamps the general requirements for software re-engineering with respect to a variety of software technologies and a debate on software in Part VI and disclosure requirements in IP context is made in Part VII. The Limitation for software patents is discussed in Part VIII and the conclusion is made in Part IX by identification of the minimum standard disclosure requirements for software patent protection satisfying the software re-engineering requirements.

II. Intellectual Property Protection for Software

International intellectual property treaties like the Paris Convention for the Protection of Industrial Property,[1] 1883; the Berne Convention for the Protection of Literary and Artistic Works,[2] 1886; and the Trade-Related Aspects of Intellectual Property Rights (TRIPS),[3] 1995 recognize the ownership rights of intellectual creators. Article 27 of the TRIPS Agreement enables patent protection for inventions of all fields of technologies without discrimination subject to fulfillment of patentability requirements. However, Art. 10 of TRIPS provides copyright protection for computer programs. Software engineering also involves a notable investment of resources in terms of capital, time and effort of the skill set like cost incurred on innovation of other technological disciplines e.g., medicines, biotechnology, engineering, or robotics.

Keeping in view the significant role and contribution of software industry in the country's economy, the developed countries has enabled patent protection for computer programs or software in an indirect way by using terminologies like *computer related inventions*, *computer implemented inventions (CIIs)* and *system* etc. However, the software industry of the developing countries is still facing challenges to get patent protection. The indigenous software industry of the developing economies must be supported by a suitable IP protection like strong patent protection instead of copyright and by its effective enforcement. The enablement of software patenting regime will be a value addition to the economy of developing countries' economy like Pakistan, Malaysia, and Turkey.

Technical disclosure of an invention, applied for patent, is a mandatory requirement in addition to basic patentability criteria

[1] Paris Convention for the Protection of Industrial Property. Available at: https://www.wipo.int/treaties/en/ip/paris/ [Accessed 11.02.2024].

[2] Berne Convention for the Protection of Literary and Artistic Works. Available at: https://www.wipo.int/treaties/en/preparatory-documents.html#accordion__collapse__03_a [Accessed 11.02.2024].

[3] Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an agreement by Members of World Trade Organization (WTO) in 1995. Available at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf [Accessed 11.02.2024].

i.e., novelty, inventive step, and industrial application. The main reasons for rejection of software are insufficient technical disclosure and lack of industrial applicability in most cases. The required level of technical disclosure of a software invention is satisfied with the disclosure of source code. The objective of the research is to identify the minimum characteristics features of a software to be disclosed to satisfy the discourse requirement of the patent laws of a state. The extent of technical disclosure means sufficient description of technical characteristics features provided in the patent specification that enables an ordinary person skilled in the art to develop or re-engineer the patented software.

II.1. Software Technology

A computer program or software is a written set of instructions commonly known as *source code*, to perform a specific operation by controlling computer hardware. This *source code* comprises of written commands in specific format which are translated into *object code* to be read by a computer machine hardware. Software is commonly divided into three categories including *system software*, *programming software* and *application software*. The Graphical User Interface (GUI) or front-end view is result of execution of software's source code at backend. The concepts of "*software as such*," "computer implemented inventions" (CIIs), "*computer related inventions*" and "business method" are used for IP protection. The source code or executable code or application software is regarded as "*software as such*." The term of CIIs is defined in European Patent Office (EPO) Guidelines for Examination, as one which involves the use of a computer, computer network or other programmable apparatus, where one or more features are realized wholly or partly by means of a computer program[4] (EPO, 1978). The inventions, combination of software and hardware, are known as "computer related inventions." The concept of software is further discussed in Part V of this research study.

[4] EPO examination guidelines. Available at: https://www.epo.org/law-practice/legal-texts/html/guidelines/e/j.htm [Accessed 11.02.2024].

II.2. Copyrights for Software

Copyright protection is given for original works of authorship to authors for creativity of artistic work, literary work, audio-video performances like music or movies or dramas, and certain other creative works. The copyright holder has exclusive rights over his work to exclude others from making copies, reproduction, distribution and making derivative work like performing work in public without his/her authorization.

Software in the form of source code, object code or application software are considered literary work. Software codes are like statistical formulas or mathematical equations like algebraic expressions written in books or articles. The computer program was considered a literary work and was covered under copyright protection under the Bern Convention and under Art. 10 of the TRIPS Agreement.[3]

Copyright registration is voluntary and provides a relatively longer term of protection, which is valid up to the author's life plus 50 years thereafter and in some regions, it is up to 70 years after the author's life. The copyright only protects the expression of an idea but not the technical concept or transformation of an idea. Copyright does not protect technical innovative aspects or ideas underlying the software. The duplication of copyrighted ideas by different implementation methods is legally allowed. The concept of copyright infringement for software is weak for example, if graphical user interface, the front end, is changed and the rest of source code is same, it does not amount to a copyright infringement.

The rapid development of technology, especially in the massive use of software applications in all fields of life like home appliance, communication technology and industrial automation, has raised challenges for copyright protection for software. A literary work like a book only comprises printed pages without any extended function of implementation like a software which produces an extended different display or outputs on the execution of code based on runtime data inputs. There is a hot debate nowadays that copyright is not sufficient and does not fit IP protection for advanced technological inventions of software. Copyright protection for "software *as such*" is a widely

accepted approach. However, a demand for stronger IP protection, by the time, has been increased by the industry for complex software application, for example robotics, applications of artificial intelligence, CIIs and computer related inventions.

Copyright protection has a limitation of authorship of creation. The natural person can be an owner of copyright work and term of protection is related to the author's life. Another aspect is related to the rights of the owner due to his/her copyright work. Open-source software, software created by cloud computing and intellectual creations as a result of software, are facing a challenge of clear ownership. The issues of determination of terms of protection and related rights, due to unclear authorship, are obstacles for the grant, to claim and enforcement of copyrights.

II.3. Why is Software not Patented?

Patent right is considered as the strongest protection among all types of IP protections. It provides exclusive rights or monopoly rights over an invention with a limited protection period of twenty years. Article 27 of the TRIPS Agreement, enables patent protection and states that patents shall be available for any inventions, whether products or processes, in all fields of technology, if they are new, involve an inventive step and are capable of industrial application. Although software engineering is a well-recognized discipline of engineering, the developed software is not covered globally under patent protection. A software is the transcription of a mathematical function and math is not patentable. Hence the software is not patentable. Software triggers patent thickets enhancing, difficulty of innovation, complicated cross-licensing relations among stakeholders, and discouraging newcomers in the software industry. Further copyright already provides sufficient protection to keep running the innovation cycle, so software has not been considered for patent protection till now. Patents are exclusive rights granted by the state for inventions subject to its technical disclosure. Software "*as such*" is not considered as a patentable invention and is disqualified for award of a patent mainly for the reason of insufficient disclosure as developed source code is not shared in patent specification.

II.4. Why is Source Code not Disclosed?

Despite complete technical disclosure, the reproduction of a patented technology product is not so simple. In addition to technical disclosure for technology products other than software, a lot of resources including infrastructure, raw materials, skilled labor, and administrative approval are mandatory requirements that cost a notable financial investment. In the case of software invention, where source code is disclosed, only execution by software developer is required, saving all other reproduction costs. Therefore, software industry or developers are reluctant to share source code or object code of their software, contrary to patent holders of other technologies. On the other hand, the software industry demands protection of a technical idea of their software as an invention. The influential giant software industries succeeded in patent protection in some countries even without source code disclosure. Software "*as such*" is excluded from patent protection almost all over the world. However, software under the cover of such terminology as "CIIs" are used in Europe, "computer-related inventions" — in Japan and "systems" term — in some other countries. U.S. has a more relaxed approach toward award of software patent and grant for business methods patents started after the 1998 case of *State Street Bank & Trust Co. v. Signal Financial Group, Inc.* (Keeley-Domokos, 1999).

II.5. Software as Trade Secret

The undisclosed information of commercial value are protected under the legal cover of trade secret laws. Article 39 of the TRIPS Agreement provides protection of undisclosed information against unfair completion subject to three conditions including (1) the undisclosed information has a commercial value and (2) is not readily accessible or open to persons of relevant circle and (3) reasonable measures have been taken by the lawful owner to keep the information secret. However, the main challenge is the secrecy of undisclosed information while launching the product in the market and the control of secret information among employees during production. The lawful owner is responsible for maintaing the secrecy of such information under the law. If information is revealed by an employee or by a third party due

to efficient reverse engineering techniques, this IP protection is ended automatically. The lawful owner of a trade secret can claim penalty or damages from his employee as a breach of contract if the employee is under the "Non-Disclosure Agreement (NDA)," but the owner cannot claim any compensation from a third party at the disclosure of secret information. However, the trade secret is over.

The undisclosed information of commercial value like a technical formula, design of product, business practice, technical process, legal instrument, pattern, customer list, business method and compilation of information can be protected as a Trade secret to get competitive advantage over business competitors (Lin, 2012, p. 940). Trade secret protection, subject to availability, can be adopted as an option for software IP protection. Software itself qualifies for trade secret protection as it is a compilation of information whether is a method of doing business or process of technical operation. Trade secret law is enforced in many jurisdictions including American States and Europe. However, limitations of trade secret are applicable on software and strong measures against decoding or reverse engineering techniques should be adopted with due care.

III. International Practices for Software IP Protection

All the member states of the TRIPS Agreement are obliged under Art. 10 to protect computer programs (software) under copyright protection by grading the source code or object code as a literary work. Despite signatories to the TRIPS Agreement, customized approaches of software protection were observed by the Members States. A most suitable and friendly approach for their national economic growth was adopted for protection of software in order. The objective was to support their software and computer-related industry. Accordingly, the national IP laws were amended by introducing enabling provisions for software protection as the results of industry demand, government policy directives and decision by the courts of law. The practices of some countries, the adoption with respect to software protection and its impact, are discussed here. The countries are categorized here as Developed IP economies and Developing IP economies for the sake of comparative analysis.

III.1. Developed IP Economies

The countries with a higher share of intellectual economy have scored a remarkable positive impact in their national economy with extended IP protection for software. The relevant amendments in national IP laws, national IP office practice, decisions of the courts of laws, application filing trends and overall impact are discussed here. The trend of filing patent applications is increasing rapidly worldwide. The application filed for patent in computer technology and IT method for management collectively reached from 123,283 to 144,053 to 229,277 during the year 2005, 2010, and 2015, respectively (WIPO, 2017, p. 64).[5]

United States of America. Software *as such* is recognized as a "literary work" and is protected under copyright protection under Copyright Law of the United States and Related Laws of the United States Code of the Copyright Act, 1976 (U.S.C. Copyright law).[6] U.S. Copyright protection is meant only for software code and protects against exactly coded software. Internationally copyrights are automatically created over original intellectual creations, for whoever created it, even without registration. However, under the U.S. practice, registration is required to enforce copyright work against piracy or violations. The software industry of U.S. is very strong and has an influential impact on the national economy. In terms of most revenue earning ranking, several world top revenue earning information technology firms, belongs to the U.S. including Apple Inc., Alphabet Inc., Amazon, Microsoft, IBM, Intel, and Dell Technologies.[7] The significant economic impact of this industry leads the software to a stronger IP protection in the U.S. According to another view, it can be said that the policy of relatively stronger IP protection for Information and Communication Technology (ICT) products played a key role in flourishing of the U.S. based IT firms.

[5] World Intellectual Property Indicators. (2017). Fig. A32. P. 64. Available at: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2017.pdf [Accessed 11.02.2024].

[6] Copyright Law of the United States and Related Laws of the United States Code. Available at: https://www.copyright.gov/title17/title17.pdf [Accessed 11.02.2024].

[7] Wikipedia. List of largest technology companies by revenue. Available at: https://en.wikipedia.org/wiki/List_of_largest_technology_companies_by_revenue [Accessed 11.02.2024].

The ICT sector has a major impact on the U.S. economy. The ICT sector provided jobs for up to 4.2 million workers in 2002 and contributed a share of $ 1 trillion to the national GDP, i.e., 7.4 % of GDP (CEO Council, 2014). Software is also recognized as an invention and is eligible for patent protection under the U.S. law. Patentability of an invention is stated under 35 U.S.C. § 101 of U.S. Patent Act[8] where a patentable invention includes any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, subject to the conditions and requirements of the title (U.S. Patent Act). Patentability of software inventions are judged on two parameters, i.e., physicality or utility, under the Manual for Patent Examination Procedures (MPEP) guidelines of USPTO and in the light of U.S. Federal Circuit decisions. "Physicality" aspect of a software invention covers disclosed software, which results in a physical transformation outside the computer while "utility" aspect of a software invention itself relating to a practical application software as a new process invention. However, disclosure requirement for a person skilled in the art (PSA) is relaxed as either disclosed in the specification or would have been known to a skilled artisan as referred in USPTO Manual of Patent Examining Procedure[9] (MPEP). In software patents, the algorithm of software application is described in the specification as disclosure especially for the software with "utility" aspect, which is supported by the decision of U.S. Court (Trs. of Bos. Univ. v. Everlight Elecs. Co., LTD., 896 F.3d 1357, 1364 (Fed. Cir. 2018)[10] and the Section Guidance 112 (USPTO MPEP). An algorithm is a step-by-step procedure for solving a given type of technical or mathematical problem. The disclosure of software source code is not required according to the USPTO examination practice and U.S. Federal Circuit's patent law interpretation (Canfield, 2006, p. 7). A dramatic increase was observed in patent filing in the U.S. after the

[8] Available at: https://www.bitlaw.com/source/35usc/101.html [Accessed 11.02.2024].

[9] Manual of Patent Examining Procedure § 2106, United States Patent Office, Ed. 9, Rev. Available at: https://www.uspto.gov/web/offices/pac/mpep/index.html [Accessed 11.02.2024].

[10] Available at: https://casetext.com/case/trs-of-bos-univ-v-everlight-elecs-co-27 [Accessed on 11.02.2024].

court's decisions for the grant of patent protection to software (Hunt, 2001, p. 8) and business methods.[11]

Europe. The term "program code" or program listing is alternatively used for software "*as such*" in practice at the European Patent Office (EPO). Program codes are protected under copyright protection, which covers only the expression and implementation of a particular program code but not the idea or a business method behind it. Optional protection of copyright like international practice is also available in the European region. Computer programs are not graded as inventions under Art. 52(2) c of European Patent Convention (EPC).[12] However, under the EPO practice, a new solution which solves a technical problem qualifies as a patentable invention. Software inventions are granted patent protection by measuring at abovementioned criteria of a problem solution approach. Software inventions are patented in most of the EU countries by using the terminology of Computer-Implanted Inventions (CIIs). CIIs are classified into three categories in the EU practice. First, the software which controls the devices by microprocessor like pure machine software, e.g., Programmable Logic Controller (PLC), embedded software; the second type is software-controlled processes like software controlling industrial automation by using computer or microprocessor; the third type is software "*as such*," if has any technical effect that goes beyond normal interaction of software and computer hardware (Frietsch et al., 2015, p. 5). The application filing of CIIs has been increased at the EPO from mid-1990s and in 2002, CIIs filing reached more than 35 % of all filings at the EPO in 2011[13]. However, the shares of CIIs based application filed U.S. and Canada were higher than the EPC Member States in total applications (Frietsch et al., 2015, p. 19). This positive impact of increased filing of CIIs indicates its significance in economic growth. The CIIs related industry has created a notable share in jobs creation in Europe.

[11] Available at: https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/business-review/2001/q1/brq101bh.pdf [Accessed 11.02.2024].

[12] Convention on the Grant of European Patents (European Patent Convention). 1973, Rev. 2000, Available at: https://www.epo.org/en/legal/epc/2020/a52.html [Accessed 11.02.2024].

[13] https://www.4ipcouncil.com/application/files/1314/5277/3742/Economic_impact_of_CII_at_EPO.pdf [Accessed 11.02.2024].

China. The current Patent Law of China does not clearly recognize computer programs as a patentable invention. However, computer-related inventions are not excluded from patent protection under this law. As per SIPO practice of patent examination guidelines, computer-related inventions are judged to grant a patent, where combination of software and hardware collectively creates a technical effect (Zhou, 2006, pp. 135–136). Copyright "*as such*" or a mere program code is excluded from patentability and protected under copyright in China.

Japan. Japan Patent Law, after amendments in 2002, clearly enables patent protection for computer-related inventions as a computer product. The one of the basic criteria for patentability of a software invention is determined whether a creation of technical ideas utilizing a law of nature. Japan Patent Office (JPO) has issued special guidelines for examination of computer software-related inventions.[14] Japanese patent law divides software into three categories, including software in combination with hardware; software on computer-readable storage medium and explicit software as patentable inventions if the information processed by software is concretely realized by using hardware resources. However, disclosure of computer program code is not required for computer-related inventions.

III.2. Developing IP Economies

The countries with developing intellectual economies shy away from granting patent protection to software. Despite this a notable litigation is going on in these countries, but the matter of granting patent to a computer program remained a challenge. Three case countries studies are listed here to assess the situation on the subject issue.

Turkey. Computer programs or software "*as such*" in accordance with Art. 55 and 82 of Law No. 6769 on Industrial Property Code,[15] are excluded from patent protection in Turkey. A similar approach to EPO,

[14] Computer software-related invention. Available at: https://www.jpo.go.jp/e/system/laws/rule/guideline/patent/handbook_shinsa/document/index/app_b1_e.pdf [Accessed 11.02.2024].

[15] Available at: https://www.turkpatent.gov.tr/en/laws-and-regulations [Accessed 11.02.2024].

towards granting patent protection for software, has been adopted by the Turk Patent and Trade Office. A software-related invention can be patented in Turkey like in the EU, if it is related to a machine or process and qualify for other patentability requirements. However, disclosure requirement is limited to sharing a software algorithm only. There is a need for clear definition of software as a patentable invention in IP code with more precise disclosure requirements.

India. The Indian Patents Act, 1970, amended in 2002,[16] excludes software from patent eligibility. Section 3(k) of the Patents Act states that inventions in the form of a mathematical or business method or a computer program per se or algorithms are not patent eligible. This legal statement means a computer program "*as such*" and even described in the manner of a software algorithm cannot be patented. However, as per practice of the patent system of EPO, US, and Japan, computer programs are patented, and software algorithms are given in description as a technical disclosure. An effort was made in 2005, for amendment to enable patent protection for *computer program with technical application to industry*, was turned down by the Indian parliament (Eberhardt et al., 2016). Despite this, a computer program per se or algorithms are excluded from patentable subject matter, still several patents for software inventions are filed every year in India and several software inventions succeed to get a patent because they are cleverly drafted by using alternate terminologies. Software in the combination with hardware is considered as patentable in India also. Contrary to developed IP economies, this exclusion of a stronger IP right for a computer program adversely affects national software industry.

Pakistan. Computer programs as such or software applications are protected under copyright protection in Pakistan. Pakistan's IP laws were revised in 2000, in compliance with the TRIPS Agreement. Accordingly, computer programs were kept under copyright protection. Section 7(2) of the Patents Ordinance (2000)[17] excludes mathematical methods,

[16] The Indian Patents Act, 1970, amended 2002. Rev. Available at: https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_113_1_The_Patents_Act_1970_-_Updated_till_23_June_2017.pdf [Accessed 11.02.2024].

[17] Available at: https://ipo.gov.pk/system/files/%28112%29PatentsOrdinance2000_Amendmentsfinal_0.pdf [Accessed 11.02.2024].

literary work, business methods and presentation of information from the definition of an invention. As per present practice at IPO Pakistan, the Patent office rejects software inventions by giving equivalence to one of above-mentioned excluded categories from the patentable subject matter. However, under IPO Pakistan's practice, software in the combination with hardware like machine software are granted patent protection. This non-supportive policy towards software patenting is one of the reasons for a very low number of applications filing for software inventions in Pakistan. However, national software industry demands are increasing for patent protection for their investments in this technological field of inventions.

IV. Patents as Monopoly Rights

A patent is sort of a mutual agreement between a sovereign State or government and the inventor or legal assignee of an invention. The State, under this agreement, grants exclusive rights to the inventor over its invention for a limited period in exchange for detailed public disclosure of his/her invention. In legal terms, a new or improved solution to a specific technological problem, whether a product or a process, is defined as an invention (WIPO, 2008).[18] The core aim of patent protection is to promote scientific research and development in all fields of technology for the betterment of mankind. A balance is maintained by granting exclusive rights to investor or investor over their novel product or process, to ensure their investment on research, in exchange of public disclosure of their invention. The detailed public disclosure enables the researchers of the field to continue further research on the invention which saves the cost resources on re-inventing the wheel. This patent system attracted the intellectuals to share their knowledge of highly valuable research results and tangible achievements. The patent is also commonly regarded as monopoly rights. However, this concept is not true in totality, for the reasons several constraints are still applicable

[18] WIPO Intellectual Property Handbook: Policy, Law and Use. (2008). Chapter 2: Fields of Intellectual Property Protection Archived 2013-05-20 at the Wayback Machine. Available at: https://bae2008.files.wordpress.com/2015/02/wipo_pub_489.pdf [Accessed 11.02.2024].

despite grant of patent. For example, these constraints include: patent is only granted for a limited period of time, i.e., for 20 years, patent is enforceable only within the jurisdiction of a State where it was granted, filing an application before public disclosure is mandatory, patent cannot be granted without fair disclosure, exploitation of patented, 100 % market monopoly does not allow other laws to be applicable, and a State can use invention without the consent of a patentee by issuing compulsory license in special conditions, e.g., emergency health situations, etc. TRIPS Agreement allows the Member States to include several exceptions to grant of patent which are in their national interest with certain limitations.

IV.1. Non-Patentable Subject Matter and Non-Inventions

Patents are granted for the inventions and most countries of the world including EPC excluded the following intellectual creations from the definition of a patentable invention in national patent legislation. These non-inventions are non-patentable subject matter and include a discovery, a scientific theory, a mathematical method, purely aesthetic work like creative or artistic work, a scheme, playing a game or doing business, a rule or a method for performing a mental act, the presentation of information; a computer program or a code *as such* and simple isolation of substances that exist in nature.

IV.2. Exceptions to Patent Protection

Several inventions which even qualify for patentability criteria are still barred for patent protection under the pre-defined exceptions in the patent laws of the respective jurisdiction. For example, some inventions are excluded from patent protection such as inventions against public order or morality or prejudice to health of living organisms or the environment; inventions of new plants and animals other than micro-organisms; inventions for essential biological processes for the production of plants or animals other than non-biological and microbiological processes; inventions for therapeutic, diagnostic, and surgical methods for the treatment of humans or animals; a subsequent use of a known

process or product; and for a mere change in physical appearance of a chemical product. In general practice, software, computer program, computer listing, software codes, source codes, application software and "software *as such*" are considered as non-invention subject matter and excluded from patent protection.

IV.3. Technical Disclosure as mandatory "Patent Requirement"

According to Art. 29 of the TRIPS, *"Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date."* This means that an invention applied for a grant of patent must be disclosed with detailed technical details in the description, up to such a level that a person skilled in this relevant field of technology can understand it and reproduce the patented invention whether product or process. According to Section 112 of the U.S. Patent Act, the patentee is required to clearly explain their claimed invention and the procedure how to make and use the invention, in the written description (U.S. Patent Act). Article 83 of the European Patent Convention (EPC) states that a European patent application must disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. However, the level of expertise of a person skilled in the relevant field of technology varies from one field of technology to other field of technology and sometimes from jurisdiction to jurisdiction. The patent disclosure is published by the national IP office for public information before the grant of the right. In this way the technical knowledge is disseminated in public and enters public domain after expiry of patent rights, if granted. The detailed disclosure of patented invention for public information is binding to enjoy benefits of exclusive rights.

V. Software Engineering

Software engineering is a common term for the design and development of software applications in a systematic manner. According to the definition by the Bureau of Labor Statistics, software engineering is a *"systematic application of scientific and technological knowledge, methods, and experience to the design, implementation, testing, and documentation of software…"* (ISO/IEC/IEEE, 2010).[19]

V.1. General Requirements in Respect of Software Engineering

Several development models, approaches, designing tools and platforms are available for designing and development a software application. The most appropriate or suitable model, design tool and platform are selected by the developers because of system requirement analysis. This selection depends mainly on technical, functional software requirements, required time of development, development and maintenance cost, customer, or end user needs, and availably of skill set in the market, etc. These requirements are recorded in the System requirements specification (SRS) as functional and non-functional requirements. A standard software development requires at least, an algorithm, a text editor for coding, a programming tool, Flowchart, database structure, database modeling tool, ERD, and networking protocols services etc. Computer programs can be divided into three main categories, i.e., application software, programing software and system software. A programming tool or language is *programming software* is a coding tool for developers to write source code e.g., C#, Java, JavaScript, Scala, HTML, XML, PHP, SQL, Oracle, Ruby, Swift, CSS, Kotlin, Rust, etc. are few examples of commonly known programming languages. *System software* are coded in machine languages and includes device driver, operating system (OS), compiler, disk formatter and simple text editor etc. System software serves as a base for application software as middleware between application

[19] Definition of Software engineering. Systems and software engineering — Vocabulary, ISO/IEC/IEEE std 24765:2010(E), 2010.

and computer machine. *Application software* is high level computer applications designed to perform certain tasks for non-technical end users like database systems, gaming applications, office suites, business software and educational software, etc. Some application software can be platform dependent and platform independent. An operation of computer software is a composite result of execution of *application software* written in a *programming language* and based on *system software*.

During the designing phase of Software Development Life Cycle (SDLC), specific programming software, database structures, inter-operability tools, protocols, application server, and modeling language are selected. Specialized tools have been designed for each type of application software, for examples PHP,.Net, or AJAX are commonly used for the development of a website of browser base applications. The right selection of tools increases operational efficiency and performance of software. Open-source programing software is very popular among developers. However, full-sized firms prefer to use licensed software applications due to the advantage of backup support.

The software design process includes designing algorithms, UML, flow charts, database design and connectivity. The transformation of an algorithm or a flow chart, with all constraint, is done by a coding process and its connectivity to designed database. Coding is not a simple process; it requires multiple times improved coding and regressive testing. Like introduction of Object-Oriented Programming technique, reusability of code, brought revolutionary increase in software coding techniques and application efficiency, in the past. Ideally, for re-engineering software, the sharing of programing logic, language, tools, database structure and technical user documentation makes the programmer's life easier. However, sharing a software source code only requires execution of the code at proper platform.

V.2. Software Engineering vs Other Engineering Disciplines

Patents are available for all types of technology; therefore, software engineering must qualify to be an engineering discipline to be eligible for a patent. Many experts consider that software engineering is not

a real engineering discipline like other real engineering disciplines of civil, mechanical, electrical, electronic, or industrial engineering, etc. This school thoughts supportive to the above approach argues that other engineering disciplines produce some tangible and durable results, based on laws of nature, in the form of products. Most other engineering disciplines involve cross-disciplined works. However, software engineering is performed in a totally artificial environment without involvement of cross-disciplinary tangible components. According to the second approach software engineering is considered as "a systematic approach to the analysis, design, assessment, implementation, test, maintenance and reengineering of software, that is, the application of engineering to software" (Phillip, 2007, p. 1). Disclosure requirements of an invention for grant of a patent varies from discipline to discipline. For example, some additional requirements are required in following types of invention listed below:

1. drawings in device and mechanical inventions,
2. block diagrams or process flow diagrams in process or procedural invention,
3. structural formulas in chemical products,
4. DNA sequences or genes listings in most of Bio-tech inventions,
5. efficacy data in case of subsequent use of pharmaceutical invention.

V.3. Determination of an Inventive Step for Re-engineered Software

A patent is granted for an invention if the claimed invention qualifies for the legal requirement of novelty and inventive step over prior art and is capable of industrial application or utility. An invention has an inventive step if it was non-obvious to a person skilled in the art (PSA) before or at the time of filing of the patent application for this invention. Mostly new inventions are granted patents based on an inventive step. However, there is not any standard scale of qualification of inventive step. It depends upon the examiner approach for the level expertise of PSA. The knowledge level of PSA varies from technology to technology. In the case of software re-engineering, the judgement of an inventive

step over existing software would not be simple. Software engineering encamps a wide range of tools and technologies. The software invention can be a collective result of multiple experts of various tools, used in single software application. Therefore, multiple PSA will be considered to judge each technological aspect of software application. The level of expertise and understanding for each programming tool is different even within the same software engineering discipline as the concept of an "informed user" varies from market to market in Trademark cases. For the improvement of efficiency of software invention only minor code level changes are made. Whether this minor change in code will qualify for an inventive step or not? However, inventions qualify for inventive steps in case of improved efficacy in medicines or pharmaceutical inventions.

VI. Role of Software Applications

The application of software has become a significant component of all technological products. A huge investment is being made in research to offer competitive and efficient products. The software development in each sector requires different levels of expertise, varieties of tools used, and a focused approach with a specific research direction. Few examples are discussed below.

E-Commerce: software application designed using high level programming language to deploy business methods and schemes with additional information security measures like using network protocols and encryption techniques. This development enabled online banking and online sale of goods.

Machine Software: system software is coded to control hardware operations and performance which include computer parts drivers, industrial automation software, PLC, applications for automotive industry etc.

Telecommunication Industry: the development of mobile phone applications is hot cake due to recent trends of increased use of mobile phones. These mobile applications involve Artificial Intelligence (AI) software for ease of use and their use has become an integral part of daily life. These software apps are considered as "an edge" for sale

of mobile phones. Software applications enabled efficient, fast, and economical voice and video call options.

Communication Technology: system software is used as networking and communication protocols for efficient, fast, and secure connectivity. The security levels are achieved by using encryption and decryption techniques and VPN, etc.

Office Business: the business process is computerized by using complex software applications for biometric attendance, accounts, finance, payroll, inventory, procurements, sales recruitments, etc.

Artificial Intelligence (AI): systems and machines are equipped with advanced software applications based on Artificial Intelligence. AI is complex software where operations of machine and decision are controlled by the machine itself based on inputs received from the surrounding environments such as robots, industrial automation machines and 3D Printers.

Cartoon, Movies and Games: complex software applications are used to create cartoon movies, artificial and fiction movies, mix music work, artistic work, and video games, etc. In most cases, AI software is involved in creating intellectual creations by the machines.

Medical Industry: It is a very sensitive but demanding area. The use of application software in combination with system software makes it possible to get inputs from medical devices or sensors and produces calculated results and graphs on Graphical User Interface (GUI). Software applications play a key role in disease diagnosis, performing laboratory tests, patient monitoring, and medicinal research. Result accuracy is a central factor of software development for this sector.

Defense Industry: AI based software applications are being used widely in the defense industry such as missile technology, avionics, drone, and radar, etc. In this case the focused approach of software development is accuracy of geo-positioning.

Web designing platform independent or browser-based applications are developed for websites using special protocols and information security techniques. Email servers are also software applications where the main concern is privacy of personal information and communication. Special programming languages are used to design webpages or portals. Data security against hacking is the main challenge of the day for website development.

VII. Disclosure Requirements for Software Patents

The amount of detailed disclosure is accounted for scope of protection of a claimed invention. Similarly, for a software invention, at least following considerations may be made before defining the sufficiency and completeness of technical disclosure for grant of a patent right.

1. What is to be protected? The subject matter of claims defines the scope of protection.

2. Whether software or computer code is claimed in the set of claims?

3. What is the actual novel contribution in the claimed invention?

4. Who is the Person Skilled in the Art (PSA)? The level of expertise and understanding for each programming tool is different even within the same software engineering discipline like the concept of an "informed user" varies from market to market in Trademark cases.

5. The examination guidelines with multiple approaches for variety of software inventions must be defined for examiners.

6. Whether validation of a source code by the IP office is required before grant of a patent?

7. What would be novelty or similarity search parameters for the examiner?

8. What would be published? Whether publication includes a source code, an object code, software architecture, a front end or GUI, a block diagram, a data flow chart, DFD, ERD, CSS, metadata, data structures, an algorithm, RDBMS, a database structure or schema, cardinality, and software modeling, etc.

9. What would be the scope of rights protection and infringement?

VIII. Limitations and Challenges for Software Patent

Software engineering is an emerging field of technology. Software is being used in almost all sophisticated products from simple home appliances to advanced automated industry machines. The software wide application in various technological fields raised new research questions to be solved as unprecedented challenges. There is no sufficient available

research work in the field of IP protection and intellectual creations during software development. The challenges to be faced to enable the patent protection for software industry are listed below.

1. Software is excluded from patentable inventions under existing International IP Agreements.

2. Adoptability of patent protection due to enforced national IP Laws.

3. Opposition against the sufficient disclosure of a software invention by Multinationals Companies (Giant Software Houses).

4. Ownership issues like a product produced because of cloud computing and for an open-source software.

5. Ownership issue of intellectual creations because of Artificial Intelligence software applications or robots or machines such as painting, pictures, games, cartoon movies, 3D movies, 3D models, etc.

6. Patent enforcement of software patent against copying like cross border pricy including illicit downloading using internet.

7. Determination of inventive step for simple improvements in software inventions. For example, existing similar concepts for other fields of technology are utility patents, incremental patents, or patents of addition.

8. Decision on Term of protection for a software invention whether it should be like a term of protection for patent, industrial design, or copyright.

IX. The Disclosure Requirements for Software IP Protection

IX.1. Software as Computer Implemented Inventions (CIIs)

The computer implemented inventions (CIIs) or computer related inventions may be clearly recognized as technological software inventions and may be covered under patent protection. However, disclosure requirements must be satisfied by sharing technical information's more than algorithm. In this regard, WIPO can play a lead role for the identification of minimum standard disclosure requirements for patent protection of software inventions. All countries of the world may enjoy the advantages of patent protection for software inventions like advanced countries with IP economies.

IX.2. *Sui generis* IP Protection System for Software Protection

Neither patent nor copyright protection is fit for the complex, hi-tech and multidisciplinary software inventions like AI based software application products. Comprehensive IP protection may be offered to protect the rights of the software industry and to encourage research and development in this field. A *sui generis* IP protection system for a software invention will provide complete protection to the technical contribution and creativity and will also address all the limitations for software technology in other IP systems as mentioned above in this paper. A composite IP protection may be given by applying through single application and the scope of protection after registration should include at least following:

1. protection of design of external appearance or GUI as a whole;
2. a composite protection of GUI with a source code;
3. protection of implemented business idea transformed under software;
4. in case of a software code *as such* the offered protection should be like copyright;
5. technological inventions with embedded software should be protected like patent protection;
6. AI software should be considered like other technological inventions and should be protected like patent protection;
7. a minimum standard technical disclosure, more than sharing of algorithm, must be defined by the law and must be given to enable PSA for re-engineering of the patented software invention without an involvement of innovative effort.

X. Conclusion

Emerging technologies and advancement in existing technologies are posing many issues for legal scholars. Intellectual property right protection of software was, is and will remain a bone of contention for legal scholars due to their role in tadeonal computers and now quantum computing. Any IPR protection mechanism may be adopted depending

upon the situation of the country and objectives to be attained. A sui generis system for software protection can be the best option to protect the software and related industries' investment which is also supported by the TRIIPS agreement. This system should grant protection software for novel logic and implementation concept with at least criteria of the novelty, the inventive step, and the minimum standard enablement requirements for PSA. The requirement of industrial application may be excluded in IP protection of the computer program and software related inventions. However, the determination of *inventive step* will remain challenge like other patent cases. It is right of every country to adopt the best mechanism or a combination of mechanisms until it does not violate basic instruments like the TRIPS Agreement, the Berne Convention, and other related IP Acts.

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NEW TOOLS AND TECHNOLOGIES IN LEGAL PRACTICE

Article

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Interdisciplinary Aspects of the Introduction of Virtual Reality Technologies in Court Proceedings

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Abstract: Modern law is closely interrelated with the active development of high technologies. Judges, prosecutors, lawyers, as well as other participants of court proceedings are gradually introducing elements of digitalization into their activities. In some countries, neural networks are already being used to help the judge in making a decision in the case under consideration, and also consider court cases in the metaverse. However, any high-tech tools that are easy enough to integrate, for example, into the business sphere, are introduced into law with certain restrictions. They include normative and legal regulation, technological solutions, and digital literacy of the population. However, even all these conditions being provided, the consideration of civil and criminal cases in virtual reality is quite a difficult task. Jurisprudence traditionally remains one of the most conservative institutions, extremely reluctant to introduce high technologies. This paper, taking into account the experience of the courts of Colombia in the consideration of cases in the metaverse, elucidates technical and legal aspects of the introduction of virtual reality technologies in the consideration of civil and criminal

cases by Russian courts. The authors analyze the implementation of the principles of legal proceedings, the rights of participants, identity verification and the flow of information.

Keywords: legal proceedings; virtual reality; metaverse; principles of legal proceedings; verification of participants; rights of participants; transfer of information

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I. Introduction

Digitalization of legal proceedings in Russia and in the world as a whole has been taking place for the last 5–7 years following the rest of the institutions of society and the state, with the exception of some countries and territories. During the period from 2010 to 2023, there were several key changes in Russian judicial proceedings related to the introduction of high technologies. Thus, in 2010, the information system "KAD. Arbiter" that at that time allowed to remotely become acquainted with judicial acts posted on this platform was introduced. It was really a revolutionary step in digitalization, because if we consider a longer horizon of events, then back in 2005–2008 it was common

to see a lawyer or prosecutor in the courtroom with a notebook where clippings from *The Rossiyskaya Gazeta* with the texts of the adopted laws were pasted.

After the initial implementation of the "KAD. Arbiter" there were several updates to it, which eventually made it possible in 2021 to file claims and documents to the court remotely using verification via "Public Services" or an electronic digital signature, as well as to participate in the court session via videoconference. An important point should be noted that the parties to the case were connected to the court sessions from home or any other place with Internet access and a webcam. This option is available in Russia for arbitrazh courts (Amelin and Channov, 2023, pp. 61–64).

For criminal and civil cases considered in courts of general jurisdiction, it is possible to participate in the court proceedings remotely, but with some restrictions: a participant in civil proceedings will need to appear in person at a nearby courthouse, where he will be connected to a videoconference with the court considering his case. For criminal proceedings, videoconferencing will be used last of all other options, giving priority to the full-time presence of all participants in the courtroom (with the exception of appeals against sentences when the convicted person is already serving a sentence related to deprivation of liberty, and remote connection from a correctional institution is more often used).

Thus, if we project high technologies into legal proceedings in Russia, then the arbitrazh courts are the most "technological," where a full cycle of remote filing of a claim, participation in the consideration of a case and obtaining a decision signed by a judge using an electronic digital signature is possible. In criminal proceedings, as of the first half of 2023, this is not applicable yet.

However, the most conservative from the point of view of digitalization are the English courts that are extremely reluctant to introduce various technologies. At the same time, the question should be asked, "Does the use of a regular webcam and remote broadcast from the courtroom also mean 'high-tech'?" Taking into account the active spread of ChatGPT-type neural networks in the world, digital spaces for virtual objects (metaverses), as well as other technologies,

conventional videoconferencing can hardly be considered a high-tech solution in 2023.

II. Consideration of a Court Case in the Metaverse: The Experience of Colombia

II.1. Legislative Regulation

In this regard, the experience of the court in Colombia is interesting. This court in February 2023 was the first among all countries to hold an official court session in the metaverse. Apart from small distortions of the avatars' movements, no problems were noticed. The two-hour hearing was attended by the avatars of the parties to the dispute and the avatar of the head of the magistrate Maria Quinones Triana in a black robe. Everything went quite well, there was a live broadcast, and according to the judge, it was even more realistic than a video call, since during ordinary video conferences people tend to turn off the cameras. It should be noted that this meeting was held in compliance with all legal requirements.

The Colombian judicial system recognizes the opportunity to step up the definition and the use of tools that allow digital tools to become a reality in practice as part of the digital transformation of judicial management and strengthening public confidence in the system of administration of justice. The main goal and task of the judicial authorities in the coming years is to gradually promote digital transformation in the judicial process. Colombia has laws that oblige lawyers to use modern technology to work more efficiently.

The National Development Plan for 2018–2022 "Pact for Colombia, Pact for Justice" adopted by Law No. 1955 of 2019 (Plan Nacional de Desarrollo 2018–2022 "Pacto por Colombia, pacto por la equidad") defines digital transformation as one of the key directions for the development of the entire system of the state, including the system of administration of justice. Thus, Art. 147 of the National Development Plan establishes a number of principles that should guide the implementation of strategic innovation projects by state authorities:

— standards for personal data protection and public data disclosure;

— security and digital trust policies and standards;

— standards of interoperability between public information systems;

— priority of using cloud services.

The General Procedural Code of Colombia, put into effect by Law No. 1564 of 2012 (Código General de Procedimientos — CGP) stipulates in Art. 103 that the judiciary must "implement a digital justice plan that must be integrated into all processes and management tools of jurisdictional activities through information and communication technologies that allow the formation and manage digital files and online courts."[1]

The normative consolidation of the possibility of holding court sessions in the metaverse creates the need to solve the technical aspects of this task. The most important issues requiring fundamental study concern both the software and hardware components of this problematic situation, and the ideal (but unattainable in a reasonable time) solution to this problem is seen in the development of a specialized software and hardware complex, which includes both the design of a virtual court (taking into account the realities of Russia), the development of augmented reality software when a computer in real time imposes additional layers with virtual objects on the image of the surrounding space on the screen of various devices to expand and supplement the physical world with graphic objects, 3D animation, sounds (working with evidence, reconstruction of a crime scene, reconstruction of road accidents, etc.), and hardware development (equipment for end-to-end (E2E) encryption in communication channels, virtual reality glasses, exoskeletons for conducting an investigative experiment).

II.2. Conditions for the Metaverse

We highlight here the most important tasks that must be solved to create a prototype of the metaverse. The most important thing in

[1] EY 1564 DE 2012 "Por medio de la cual se expide el Código General del Proceso y se otras disposiciones." El Congreso: de la República. Available at: https://www.cancilleria.gov.co/sites/default/files/tramites_servicios/apostilla_legalizacion/ley_1564_de_2012_codigo_general_del_proceso.pdf [Accessed 19.07.2023].

the distributed conduct of court sessions is the authorization of all participants in the process. Technically, this can be arranged by using a simple or enhanced digital signature. Both variants are created using cryptographic technologies in accordance with the State Standard 34.10-2018 that describes algorithms for generating and verifying an electronic digital signature using operations in a group of elliptic curve points and a hashing function. The U.S. National Security Agency recommends using 384-bit keys for elliptic cryptography algorithms to protect information classified as *Top Secret*. The secret key lengths of 256 bits and 512 bits, defined in the State Standard 34.10-2018 are sufficient to ensure the level of digital signature protection required for the judicial process. To verify the participant of the process, it is necessary to generate a message, a signature key and a key for verifying the signature. The signature verification key is public so that any recipient can decrypt and verify the authenticity of the signature. If the recipient manages to decrypt the message using a public signature verification key belonging to a certain sender, then he can be sure that the message was signed with the signature key of that sender. To form an electronic signature, an external drive in the form of a USB drive is used. A qualified enhanced electronic digital signature, in comparison with an unqualified one, provides an increased degree of protection due to the possibility of issuing an electronic signature exclusively in certification centers accredited by the Ministry of Digital Development, Communications and Mass Communications of the Russian Federation.

The next most important task is to ensure the secure transmission of video information over the Internet. Possible technical problems constitute the main disadvantage of online proceedings. If there are problems with communication, the hearings may be postponed, which gives wide grounds for abuse and delaying the process. Technical interruptions can significantly complicate the process. Even minor sound problems prevent participants from catching and responding to all the questions of the court and statements of the opponents. In addition, the parties may unwittingly start interrupting each other. This creates general discomfort with the judges trying to call to order, but it is difficult to establish a normal work under such conditions. However, even if the connection is uninterrupted, it is much more difficult to

establish personal contact with the judge in the online process than when the process is being conducted in the courtroom. However, even with stable and reliable communication and uninterrupted traffic, there is a problematic situation of a man-in-the-middle (MITM) attack — a form of cyberattack in which methods are used to intercept data that allow you to infiltrate an existing connection or communication process (Bertovskiy, 2023, pp. 188–189). An attacker can be a passive listener in your conversation, stealing some information unnoticed, or an active participant, changing the content of your messages or posing as a person or system with whom you think you are talking (Sliusar et al., 2021, pp. 2257–2261).

II.3. Development of Video Services

The Covid-19 pandemic served as a powerful impetus for the developers of secure video conferencing services (Sartor et al., 2022, pp. 555–556). As an example of the diversity of these services, we can name *Zoom, Microsoft Teams, iMind, Skype, Google Meet, Jitsi Meet, Meeting U* and the Russian relevant products *eXpress, VK Teams VideoMost, TrueConf, IVA, Vinteo, Yandex.Teleconference, Webinar.ru,* and *Sber Jazz*. All of these services are conditionally suitable for holding court sessions, but there are many questions concerning their ability to ensure security and cryptographic security for all of them.

For example, the Zoom video conferencing service claims to implement E2E encryption, but it turned out that the platform actually uses its own definition of the term, which allows Zoom to access unencrypted video and audio from video conferences. In an interview, a platform spokesperson stated, “It is currently not possible to enable E2E encryption for Zoom video conferencing. A combination of TCP and UDP is used to zoom in on video meetings. TCP connections are made using TLS, and UDP connections are encrypted using AES using a key negotiated over a TLS connection” (Lee and Grauer, 2020). TLS is a technology that web servers use to protect HTTPS websites. This means that the connection between the Zoom application running on the user’s computer or phone and the Zoom server is encrypted in the same way as the connection between the user’s web browser and the

article on the https resource is encrypted. This is the so-called transport encryption — in this technology, messages are encrypted at the sender, sent to the server, decrypted there, then encrypted again and only then sent to the addressee. This protects the data well, but the information gets to the server, which means that the server owner can easily see what you sent, i.e., the Zoom service itself can access unencrypted video and audio content of meetings and there is a possibility of a man-in-the-middle attack. The fact that Zoom has the technical ability to spy on private video meetings is, to put it mildly, undesirable in a lawsuit (Shipatov et al., 2020, pp. 55–56).

Most Russian developments allow you to place a server on personal servers of ships, which allows you to provide the necessary level of security for video and audio video conferences. However, the use of ready-made solutions does not provide for the possibility of implementing a metaverse with augmented reality in the form of graphic objects, 3D animation, sounds for working with evidence, reconstruction of a crime scene, reconstruction of a traffic accident, etc.

In Russia, the experience of the courts of Colombia certainly needs to be taken into account. Back in 2021, Russian President Vladimir Putin pointed out to the need for the development of metaverses in various sectors of the economy, medicine, and education. The judicial system needs the active introduction of high technologies. The average period of consideration of a civil case in Russia is more than four months from the moment of registration of the statement of claim to the actual decision by the court (not taking into account the additional period for appeal). At the same time, the burden on judges is enormous, in 2022 more than 40 million cases were considered, although in 2018 it was a quarter less.[2]

Digitalization of legal proceedings in Russia is a set of regulatory and legal changes in conjunction with technical solutions. However, this will not be enough. Digitalization is impossible without the presence of a well-formed high-tech law, the definition of which Lev V. Bertovskiy described as a logistical, knowledge-intensive and technological regulator

[2] Judicial statistics of the Judicial Department at the Supreme Court of the Russian Federation. Available at: http://cdep.ru/ [Accessed 19.07.2023]. (In Russ.).

of public relations, which, on the one hand, uses high technologies in the process of law enforcement, and on the other hand, regulates the relations that arise with them (Bertovskiy, 2021, p. 739).

In general, the development of AI technologies in Russia goes in four directions: "natural language processing and speech synthesis," "computer vision," "promising methods of artificial intelligence" and "intelligent decision support."[3] The main directions of the development of digital legal proceedings include normative regulation, personnel and education, the formation of research competencies and technical reserves, information infrastructure and security (Selkova, 2022, pp. 56–57).

III. Conditions for the Consideration of Court Cases in Virtual Reality in Russia

III.1. Hidden Witnesses and Technology

The analysis of the current legislation in conjunction with the problems of the law enforcement officer allows us to identify the following issues that need to be worked out before the possibility of phased implementation of the experience of the courts of Colombia:

1) ensuring the rights of participants in legal proceedings;
2) implementation of the principles of judicial proceedings;
3) formation of judicial infrastructure;
4) provision of technical requirements.

Holding a court session in a metaverse (or other virtual reality), on the one hand, may not ensure the right of access to justice for certain categories of the population in hard-to-reach areas. On the other hand, the problem of so-called "secret" witnesses in a criminal case is being solved. The current legislation allows such an order of participation. In this case, the investigator (inquirer, prosecutor, court) issues a resolution on the secrecy of personal data (surname, first name, patronymic, place

[3] Roadmap for the development of "end-to-end" digital technology "Neurotechnologies and artificial intelligence." Available at: https://digital.gov.ru/ru/documents/6658/?utm_referrer=https%3a%2f%2fwww.kommersant.ru%2f [Accessed 19.07.2023]. (In Russ.).

and date of birth) that is packed in an envelope, sealed and attached to the case in this form. Only the person who classified the participant in the process and the court can open the envelope — the data should be inaccessible to anyone else.

One of the most famous cases of the secrecy of witnesses was the case of the organized criminal group "Hadi Taktash." The accusation was based only on the testimony of the killer of this organized criminal group, who later completely withdrew his testimony. Since other witnesses, fearing reprisals from the remaining gang members at large, did not agree to testify, the investigators were forced to ensure their complete confidentiality. To achieve this, the guards pulled a sheet in the doorways of their offices, put knitted balaclavas on eyewitnesses of crimes and put professional makeup on their faces. Despite unprecedented security measures, it was not possible to protect all the witnesses. Both during the investigation and during the trial, several people who testified against the leader of *Hadi Taktash* died under unclear circumstances.

Secrecy of the participant of the trial is an important institution of criminal procedure law. Law enforcement agencies should be very responsible about maintaining confidentiality with respect to such persons, because they often transmit invaluable information about an upcoming or committed crime, risking their own lives and the lives of their loved ones.

However, classifying witnesses, the defendant does not actually have the right to ask a question to a witness in the courtroom, visually observing this witness. Placing all participants in the criminal case in a common virtual room will allow them to be on equal terms. In addition, the issue of the participation of victims in cases related to rape will be resolved. It is not always possible to interrogate a woman or a minor in the courtroom about the circumstances of the crime that cause them moral suffering. An interesting solution was proposed by 3VR that develops global video surveillance systems for cities. They presented the technology of cryptographic protection of the video stream, where images of people are encrypted with secret key and visually transformed into unrecognizable masks, as in Figure 1.

Figure 1. Images of people encrypted with secret keys

Each person has his or her own individual mask — the system first recognizes face, and then assigns each a separate key. The key to "decrypt" a particular person is given only to the competent authorities, if necessary. Thus, the police can track specific suspects, but the rest of the people in the frame remain "invisible" (Bertovskiy, Novogonskaya and Fedorov, 2022, pp. 335–336). This technology may well be adopted by Russian courts to exclude the risk of identification of a secret witness.

There is also a problem of people with disabilities, whose presence in the courtroom may cause them particular inconvenience. Safety of persons involved in the conduct of court sessions is an urgent problem. There are situations when the defendants attack the convoy, try to hide in the ventilation of the courthouse, attack the judges, try to bring cold and firearms into the courthouse. The metaverse in court will almost completely eliminate such risks (Kurbatova, 2023, pp. 116–117).

III.2. Ensuring Compliance with the Principles of Legal Proceedings in the Metaverse

Ensuring the principles of legal proceedings is one of the key problems before holding a meeting in virtual reality (Polyakova, Naumov and Minbaleev, 2022, pp. 140–141). According to the current legislation, the principles include: humanity; justice; legality; presumption of innocence; administration of justice only by the court; independence of judges; publicity; equality (adversarial); reasonable time of proceedings; the right to appeal.

When holding a meeting in the metaverse, the implementation of the principle of a reasonable period of legal proceedings is promising. The speed of consideration of cases will increase significantly, it will not take months to wait for witnesses, and it will be more accessible to gather everyone in virtual reality (Galyashina et al., 2023, pp. 77–79).

The experience of the courts of the Republic of Kazakhstan is interesting. They actively introduce high technologies in legal proceedings. The principle of extraterritorial jurisdiction, put into effect on 1 August 2022, deserves attention. According to this principle, the participants in the process have the right to sue not in the place of their geographical residence, but in any other court in Kazakhstan. Which court will the dispute fall into is determined by a robotic program that does not divide courts into districts and regions. As a result, the workload of judges should be balanced. In large cities, the workload of judges exceeds the workload in rural areas by tens of times. Given the automated distribution of cases to other regions of the Republic of Kazakhstan, judgments about the possible influence of local authorities and the business elite on the court should become a thing of the past. Labor and material resources will be used more efficiently (Akhmetzakirov, 2023, pp. 30–31). Projecting the experience of the Republic of Kazakhstan in introducing the principle of extraterritorial consideration of cases to Russian courts, its provision through the use of virtual reality in the consideration of cases looks promising. In this case, the judge receives not only information from another subject of the country, but also the possibility of holding meetings, excluding the possibility of pressure on the participants from interested parties.

However, will the court's consideration of the case in the metaverse be the realization of the principle of the administration of justice only by the court? An analysis of Art. 8 of the Code of Criminal Procedure and Art. 19 of the Constitution suggests that no one can be found guilty of committing a crime and subjected to criminal punishment except by a court verdict and in accordance with the procedure established by law. In the usual sense, a judge is a professional lawyer endowed with judicial power who administers justice in specially provided buildings, for example, district courts. In addition, there is a special procedure providing for rules of conduct in the courtroom. According to Art. 158 of the Code of Civil Procedure:

1. "When the judges enter the courtroom, all those present in the courtroom stand up. The announcement of the court's decision, as well as the announcement of the court's ruling that ends the case without making a decision, all those present in the courtroom listen standing.

2. The participants in the trial address the judges with the words 'Honorable Judge!', and they give their testimony and explanations standing up. A deviation from this rule may be allowed with the permission of the presiding judge.

3. The trial takes place in conditions that ensure proper order in the court hearing and the safety of the participants in the process."[4]

Based on this, it can be concluded that court hearings should be held in the courtroom, but this is not always the case. As previously noted, since 2021, it is allowed to hold online meetings using videoconferencing. At the same time, the Supreme Court did not see this as a violation of any principle of judicial proceedings. Technical guarantees of such a meeting are required, as well as verification of the participant's identity. In practice, online identification of an individual when considering cases in an arbitrazh court occurs by showing a passport to a webcam. Naturally, it is not easy to establish the authenticity of such a passport "by eye." However, even at a regular off-line meeting, the passport is checked by the clerk of the court session without special equipment.

[4] The Civil Procedure Code of the Russian Federation. Available at: https://www.consultant.ru/document/cons_doc_LAW_39570/376ca11229e1a916d0c3afe37ef2920ba88f5a29/ [Accessed 23.02.2024]. (In Russ.).

When deciding on ensuring the principle of the administration of justice only by the court when using virtual reality as a platform for considering a case, but with the involvement of a professional judge for consideration on the merits, it is necessary to proceed from the general objectives of the proceedings (Komarov, 2023, pp. 157–158). For example, Art. 2 of the Civil Procedure Code of the Russian Federation sets the key task of "proper and timely consideration and resolution of civil cases." This principle prevails over the rule of considering cases in the courthouse by following certain general technical procedures. If all participants agree to a remote format in virtual reality with the simultaneous solution of many problematic aspects (reasonable time, security of persons, trust in the judiciary, etc.), the tasks of the proceedings will be solved, which also implies ensuring its principles.

Of course, court sessions in the metaverse or any other virtual reality will face a serious problem of proving when considering and resolving criminal cases. As Lydia A. Voskobitova rightly notes, criminal justice is an activity carried out with the interaction of people, it primarily develops social technologies and forms a certain set of methods, means, techniques of such interaction, ensuring the achievement of the goals of this activity (Voskobitova, 2023, pp. 195–196).

Full-fledged interaction of people through virtual reality is still difficult to imagine. Legal proceedings are a lively, dynamic mechanism with the presence of certain tactical legal techniques used by the participating parties, which are implemented precisely in an offline meeting (Przhilenskiy, 2023, pp. 246–247). However, the metaverse will allow you to reconstruct the event of a crime, its individual episodes. Participants in criminal proceedings will be able to literally be in the apartment where the murder took place for a detailed immersion in what happened. This is especially true for courts with the participation of jurors. The problem of digital inequality and access to justice will be solved by creating special accredited premises for access to the court session in virtual reality. This can be compared with the presence of "My Documents" centers and multifunctional centers (MFC) on the territory of Russia. The participant in the proceedings will receive an ID number that includes an analysis of his profile (voice, behavioral characteristics, fingerprint, retinal scan) which allows him to form a unique digital

profile for identification by the court. In fact, this is the procedure of identification by the secretary of the court session by presenting the passport by the participant of the trial. However, *pasting* a physical passport for a fake person is not a difficult task for the criminal world (according to various sources, the cost varies from 100 to 150 thousand rubles). Creating a digital profile of a participant with biometrics and unique behavioral traits tied to it looks like a more reliable way. Artificial intelligence is able to recognize human emotions, which will allow to establish anxiety or fear of the participant in the case, which may indirectly mean the exercise of third-party's influence on him.

Only the judge will have the right to determine the possibility of holding a meeting in virtual reality with the mandatory consent of all participants and an analysis of the totality of conditions: the complexity of the case, the number of persons, security, digital inequality (Voskobitova and Przhilenskiy, 2022, pp. 116–117). If at least one of the participants opposes such a form, then the meeting should be held in the usual form. However, in this case, technologies cannot be fully used to reproduce the crime events that are possible when participants are immersed in virtual reality. There is also a fair question about fixing court sessions in the protocol and familiarization with it by participants who had not previously participated in the case (replacement of a lawyer, new witnesses, etc.). A phased experimental introduction of court sessions in virtual reality is possible for some categories of civil and administrative cases with the so-called "absence of a dispute about law," in criminal cases of minor gravity if the accused admits to the charge.

IV. Conclusion

Holding a court session in virtual reality is technically a simple task — Colombia already has such experience. High technology allows you to participate in court proceedings from anywhere in the world. Virtual reality is actually an advanced version of the already existing video conferencing in court. Russian legislation does not provide for the possibility of holding a court session in virtual reality: questions arise about the implementation of the principles of judicial proceedings,

as well as ensuring the rights of participants. The principle of the administration of justice only by the court will not be violated, and the principle of a reasonable period of legal proceedings is ensured. Modern technical solutions allow for identity verification through biometric parameters. The metaverse is able to solve the problem of secret witnesses who are not physically present at ordinary trials. In addition, disabled people can get more opportunities when a court session is conducted in virtual reality. In any case, metaverses allow us to reach a new level of administration of justice, but the final decision on this should be made by a judge, guided not only by the characteristics of the case under consideration, but also by obtaining the consent of all participants.

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Article

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Legal Expertise as a Tool of Countering Violent Extremism in the Web 2.0

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Abstract: The paper deals with the results of the study aimed to countermeasure violent extremism in Web 2.0. The paper focuses on the results of the research entitled "Russian Legal Concept of Media Security" and implemented within the framework of the "Priority-2030" Academic Strategic Leadership Program. The increased number of public crimes committed in the new media using telecommunications technologies makes the study relevant. The study is aimed to improve the understanding of current and future global media security challenges and to explain how to resist them based on legal expertise. Legal expertise is characterized as a tool that can contribute to raising the general level of legal culture and, in this regard, the authors highlight that availability of law and language knowledge is relevant in solving criminal law issues regarding implementation of basic rights and freedoms in the digital environment. The authors examine public relations in the field of education, family relations and youth policy related to those who share traditional morality and focus on countering a destructive ideological impact on children, adolescents, and the youth, carried out in order to neutralize inimical inculcation of spiritual values alien to Russian society. The authors scrutinized social networking, a combination of mini web pages, blogs and searchable communities, to detect signs of extremist propaganda shared via internet communication as a key challenge Russian society is facing nowadays. They elucidate the importance of undertaking effective measures to protect the population from harmful effect of destructive extremist ideology and its negative psychological impact. An interdisciplinary study of media security in the paradigm of criminal law sciences was conducted on the basis of

legal expertise — a comprehensive criminalistic, criminology, forensic, psychological and linguistic approach to counteracting a destructive ideological impact on adolescents and neutralizing the mechanisms of implanting alien moral values. The authors have systematized threats to traditional Russian spiritual values and proposed to amend legislation and law enforcement practice to improve media security. Deep efforts should be made to encourage zero tolerance for extremist actions in the information sphere among people, to form their competence to ensure media security, including effective recourse to legal (or forensic) experts and authorized entities in case of violations of the law.

Keywords: legal expertise; violent extremism; law and language; expert opinion; testimony; forensic examination; linguistic evidence

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I. Introduction

Web 2.0 allows users to interact in a virtual community and collaborate with each other through social media communication as creators of user-generated content. The web is a vast store of online information that is shared and surfed by the Internet-users. Nowadays in the information space of Web 2.0, as well as in the whole world, there is an escalation of international tensions caused by both hostile foreign and domestic policy conflicts. The concerns and challenges the

societies are facing now need comprehensive and systematic approach to develop effective ways and measures to counteract emerging threats. The paper focuses on the results of the study entitled "Russian Legal Concept of Media Security" and implemented within the framework of the "Priority-2030" Academic Strategic Leadership Program. The project demonstrates the results of the efforts of the interdepartmental team of researchers[1] under academic supervision and leadership of Professor Elena I. Galyashina.

An ongoing risk of violent extremism in the Russian Federation forms a critical concern for the national security, law enforcement agencies, and the public. The society is getting serious about hostile communication strategies that threaten international stability, social cohesion, and human rights. We witness increasingly unfriendly and even openly hostile actions that stem from attempts to discredit public institutions and public officials, to carry out negative (destructive) propaganda directed against the internal unity of the country and the stability of the political system.

There is no doubt that Web 2.0 is increasingly being used as a tool to promote violent radicalism and recruit its upholders. Social networking, a combination of mini web pages, blogs and searchable communities have expanded in recent years. They have exploded with the growth of Telegram channels, accounts in the VK social network, etc. The majority of users check their profiles and their online network at least twice a week and, in many cases, — several times a day.

Some experts believe that the current Web 2.0, may become obsolete in the near future due to the emergence of augmented reality (AR) technologies and metaverse concepts. Web 3.0 is expected to transform the way we interact with the Internet, with its focus on abolishing censorship and allowing anyone to publish any content including extremist posts. The Web 3.0 concept proposes creation of decentralized autonomous organizations (DAOs) that would determine the usefulness of content based on community consensus rather than corporate interests. This approach could potentially lead to increased freedom of expression and reduce the role of corporations in content

[1] Elena A. Antonyan, Alexey V. Kokurin, Konstantin M. Bogatyrev, Natalia A. Panina.

moderation. However, there are concerns that the absence of strict oversight could allow extremist groups to exploit the metaverse for criminal purposes. Forensic techniques currently rely on empirical evidence gathered from social media platforms, which may not be effective in analyzing data collected in the virtual world of the metaverse. As communication continues to evolve in the digital realm, it will be crucial to develop new methods for analyzing information products in order to maintain public safety and security. Further research is needed to address these challenges and ensure that the metaverse remains a safe and inclusive space for all users.

Extremist propaganda shared via the Internet communication is a key challenge our society is facing nowadays. There have been only a few attempts (Schafer, 2002; Gerstenfeld, Grant, and Chiang, 2003) to analyze extremist websites systematically. In this regard, it is particularly important to undertake effective measures to protect the population, and especially young people, from harmful effects of destructive extremist ideology and its negative psychological impact.

Thus, the research "Russian Legal Concept of Media Security" within the framework of the "Priority-2030" Academic Strategic Leadership Program was carried out. An interdisciplinary study of media security in the paradigm of criminal law sciences was conducted on the basis of a comprehensive legal and linguistic approach to counteracting a destructive ideological impact on adolescents and neutralize the mechanisms of implanting spiritually alien values. The study was aimed to improve our understanding of current and future global media security challenges and their countermeasure on the basis of legal expertise.

The object of the research are public relations in the field of education, as well as the family and youth policy related to the development of a highly moral personality who shares Russian traditional spiritual values. The subject of the study is the activity of countering a destructive ideological impact on children, adolescents, and the youth, carried out in order to neutralize the inculcation of alien to Russian society moral values.

The relevance of the study is obvious due to the increased number of public crimes committed in the new media using telecommunications

technologies. Currently, there is a number of studies devoted to the issues of the integrated language and law approach in the world wide web (Goddard, 1996; Cotterill, 2003, 2004; Coulthard and Cotterill 2006; Coulthard and Jonson, 2007; Larner, 2014; Olsson, 2008; Olsson and Luchjenbroers, 2014; Shuy, 2002, 2006), but few are devoted to forensics ensuring media security (Galyashina, 2015, 2016, 2018).

The information security should be distinguished from worldview security; the first focuses on the specifics of the crime environment in the information space, the second — on protecting people's worldview from malicious intrusion of moral values that contradict Russian moral values (Galyashina, 2020a).

Theoretically, the comprehensive study was based on doctrinal foundations of criminalistics and criminology, forensic linguistics, expert and speech sciences developed by authoritative experts in the field: N.F. Bodrov, A.A. Bimbinov, and V.N. Voronin, K.M. Bogatyrev, J. Cotterill, M. Coulthard, A. Jonson, E.I. Galyashina, C. Goddard, S. Larner, J. Olsson, J. Luchjenbroers, R.W. Shuy, etc.

As a result, the researchers systematized threats to traditional Russian spiritual values and made proposals to amend legislation and law enforcement practice to improve media security. It was stated that a destructive alien ideology embraces cultivation of selfishness, permissiveness, immorality, denial of patriotism, destruction of the traditional family through the extremist activity, propaganda of non-traditional sexual relations, etc. (Levin, 2002). On the contrary, traditional Russian spiritual and moral values include, first of all, respect for life, dignity, human rights and freedoms, patriotism, citizenship, service to the Fatherland and responsibility for its fate, high moral ideals, a strong family, creative work, the priority of the spiritual over the material, humanism, mercy, justice, collectivism, mutual assistance and mutual respect, historical memory and continuity of generations, unity of the peoples of Russian Federation.

It has become obvious that deep efforts should be made to motivate citizens to zero tolerance for extremist actions in the information sphere, to form their competence to ensure media security, including effective recourse to legal (or forensic) experts and authorized entities in case of violations of the law.

II. Web 2.0 as an Extremist Weapon

The Internet has made a range of extremist discourse activities faster and secure including communication, propaganda, radicalization and recruitment (Craven, 1998). There are numerous examples of how the Internet media are being used to promote violent extremism in the Russian language segment (Bodrov, Bimbinov and Voronin, 2022; Galyashina, 2020a, 2020b). Such extremist actions are condemned by the Russian legislation and are treated as felonies (Bodrov, Bimbinov and Voronin, 2022). The Internet is good in many respects but it also facilitates terrorist communication, provides an additional venue for extremists to spread their hateful and murderous propaganda. Young people with an unsettled worldview are most influenced and are the most vulnerable group of the population to the introduction of destructive ideas. Such qualities as increased activity, readiness for decisive action, categorical assessments and conclusions are the main interest for extremists to use its potential for violent radicalization in digital environment. The Internet discourse of extremist's communities serves as a virtual society where otherwise alienated and isolated individuals can meet for recruiting, reinforcement and social networking. The challenge posed to the society is to infiltrate and erode the extremist network. But powerful conspiracy and sophisticated tools of darknet anonymization make these communities hard to penetrate. Depersonalization leads to the fact that, in some cases, it is not possible to establish real data and extremists can easily hide their real location using modern software tools.

Currently, the content of many destructively oriented internet-sites is aimed at absolutization of individual freedom, active propaganda of permissiveness, immorality and selfishness, the cult of violence, consumption and pleasure, the formation of communities that deny the natural continuation of life, contains information, the distribution of which in the Russian Federation is prohibited (Bogatyrev, 2021). This category includes information that is aimed at inciting ethnic or religious

hatred and hostility, as well as other information, the dissemination of which provides for criminal or administrative liability.[2]

A typical extremist website has an original design, a well-thought-out navigation and information search system. It exhibits extensive information about the history, program of the organization, political and economic reviews. Users of such a site, as a rule, are given access to an extensive archive of previously published information, convenient search tools allow the users easily find a topic of interest. The main forms of providing messages are news (in the form of a news feed), articles, and analytical materials. Their content is presented in a way that is beneficial to extremists.

Another category is that it is online games that are used to attract children. Obviously, online games are targeted to young people. They help to inculcate a destructive mindset in young people and to transfer destructive ideology into a social policy supporting stringent extremist impact. Content of an extremist website is usually brightly decorated. News headlines are rather sensational. The most important information is placed in the first paragraph and does not repeat the information in the title, but only explains it. A news feed and a list of analytical articles are most often located on the main page of the site and are illustrated with specially selected photographs or thematic drawings. At the same time, the source from which the images were taken is not indicated. To make the information posted on the websites more reliable, it is often indicated that it was obtained from "independent" sources. In addition, sources that are introduced as authoritative for certain user groups are accompanied by fabricated (fake) photos and video materials. Blogs, chat rooms and message boards expose new recruits to a romanticized view of extremist ideology and terrorism as a violent means of internet communication. A violent extremist act itself is deliberately designed to attract attention and communicate an aggressive message to promote its longevity and ensure its very survival.

The problem of Web 2.0 radicalization is fairly well documented by a number of studies (Galyashina, 2021a, pp. 33–43), but the question

[2] Federal Law "On Information, Information Technologies and Information Protection" No. 149-FZ dated 27 July 2006. Available at: http://www.consultant.ru/ [Accessed 08.05.2022]. (In Russ.).

remains. How can the media sphere be protected from destructive aggressive propaganda without damaging the free flow of information in the Internet media and harming the constitutional rights and freedoms of law-abiding people?

If we do not treat the Internet discourse as a crucial battleground in the war of extremism, we will not be able to defeat the actual treats to media security. Without an effective communicative strategy an extremist website stakeholder would be unable to assure a continued flow of new recruits, motivate and inspire existing followers, active supporters and passive sympathizes from which extremist organizations draw their sustenance (Schafer, 2002). It is not surprising that extremist leaders devote so much time and energy to multilanguage discourse, using Web 2.0 as an especially efficacious speech weapon. Thus, they produce a web corpus for forensic evidence extraction (Larner, 2014, pp. 14–15). Law enforcers need criminalistic recommendations to detect, investigate and counter efficiently destructive communication and extremist agitation in the Web 2.0. Creating a central criminalistics database where all instances of cybercrimes are reported for statistical purposes would be incredibly helpful. It could help to track cybercrime trends affecting adults, seniors and the youth and to design safer systems and best practices. It could be useful to guide legislation directed at a meaningful problem in a most meaningful way and to implement such techniques that are able to provide intelligence agencies with information that would lead to apprehension of would-be extremists.

III. Forensic Approach to Countering Extremist Activity

Although internationally inspired violent extremism has been actively studied by a number of researchers over the past several years, the results of the research have not been systematically applied to create forensic tools designed to help law enforcement practitioners to identify the signs of terrorist ideology in the Internet discourse and define the speech crimes (Galyashina, 2021b, pp. 7–13). Criminal cases on extremist acts are very resonant (Galyashina, 2021b, p. 6). The law enforcer has to ensure a balance of protected public interests (the foundations of the

constitutional order, integrity and security of the Russian Federation) and protection of human and civil rights and freedoms guaranteed by the Constitution of the Russian Federation, namely: freedom of conscience and religion, freedom of thought, speech, mass media, the right to free speech, the right to receive, transmit, produce and disseminate information in any lawful way, etc. Propaganda or agitation inciting social, racial, national or religious hatred and enmity is prohibited, no one may be forced to renounce their opinions.

The implantation of alien to the Russian youth spiritual values is carried out in a comprehensive manner and includes popularization of works of art, primarily films, cartoons, comics and other literature demonstrating such values in a favorable light, articles and collections of news reports, thematic discussions and communities on the Internet and informal interest groups outside it, creating an echo chamber effect, thematic events, periodicals and online publications, educational lectures and courses, statements made by influencers — media personalities who enjoy authority among young people, during which alien values are directly or covertly promoted. Hidden implantation could include promotion of values hidden behind the facade of ideas that are already receiving public support. Thus, behind the struggle for environmental friendliness or helping women who find themselves in a difficult life situation, there may be misandry and a mindset of refusing to start a family.

The responsibility for ensuring media security in the digital environment lies with law enforcement agencies. For its implementation, it is necessary to effectively carry out activities to identify upcoming and committed offenses, to disclose and investigate committed illegal acts of public danger, as well as to make decisions. Media security activities are not only carried out by government officials; this is also done by the administrations of social networks, different websites and digital platforms. Consequently, researchers who have both legal and linguistic skills are required to keep law enforcement informed of the risks to media security to be able to respond actually to what is online.

However, they cannot cope with their activities without expert support. The involvement of forensic experts is necessary both when working with traditional media and the media in the digital environment.

In order for the competent authorities to carry out their law enforcement functions effectively; they need the assistance of experts with specialized legal and linguistic knowledge. It is necessary both in the technical and content components of information security. A technical component related to the protection of information infrastructure (technologies, equipment and networks consisting of them, as well as systems and programs operating on their basis, software and hardware systems) implies the need to involve computer and technical forensic experts and specialists with appropriate technical education.

A content component that involves an information analysis requires the involvement of forensic speech experts. In order to properly analyze information products distributed through digital media (mostly being a speech product or containing a text component) for the special signs of offenses, it is necessary to involve a knowledgeable person with the appropriate competence.

A special role in cases of countering the ideology of terrorism and preventing extremism is played by forensic linguistic expertise that can be assigned to determine the target purpose of information materials.[3] Expertly performed, objective and well-founded forensic linguistic studies of extremist information materials contribute to the protection of national security, state, society and its citizens. On the contrary, unprofessionally conducted research can damage people's faith in justice. First, this applies to teenagers, whose worldview is still being formed, and whose lifestyle is characterized by youthful maximalism and lack of life experience.

IV. A Comprehensive Law and Language Approach in Extremist Cases

There are several senses associated with the law and language approach incorporating the term "linguistic evidence" in extremist cases. The term "linguistic evidence" can be used in relation with some

[3] Decree of the Plenum of the Supreme Court of the Russian Federation "On judicial practice in criminal cases on crimes of an extremist orientation" No. 11 dated 28 June 2011 (as amended on 28 October 2021). Available at: http://www.consultant.ru/ [Accessed 08.05.2022]. (In Russ.).

language data — written text or oral messages, associated with a crime or a dispute. Such media may be submitted as material evidence in the legal proceedings. The second meaning refers to an expert interpretation of the language data involved in a case as a material evidence.

Speech covers all fields of human endeavor related to his communicative, creative, professional, business, social activity. Traces of human speech activity, being imprinted on a storage device are widely involved in the field of legal proceedings as a source of evidence. Linguistic expertise based on the forensic speech science forms a specific trend in the classification of legal examinations. It is a synthetic field of oral and written speech knowledge (Galyashina, 2020b, pp. 12–13). Forensic speech science constitutes a general basis for expert researches of the speech activity products. These examinations are united by the commonality of the objects under study (products of speech activity), the unity of forensic methodology, and a set of specialized knowledge (including applied linguistics, speech acoustics, etc.).

However, recently there have been more and more situations when forensic linguists are involved as expert witnesses in the legal proceedings by different parties to give controversial testimonies in court proceedings. In this regard, we consider it is necessary to introduce into the law enforcement practice a new form of using specialized knowledge — legal expertise as a special scientific and advisory comprehensive study that allows the court to resolve a controversy in the opinions of knowledgeable linguists involved in the case.

The forensic linguistic analysis may take a form of a written document, reporting the result of an expert-linguist text examination or oral court testimony. Based on the forensic application of speech science we can talk about the formation of a new type of usage of specialized expert knowledge as a methodological basis for legal expertise and legal consulting. The subject of the scientific component of the legal expertise in the field of countering and preventing extremism covers signs of extremist activity as a threat to security of the information product turnover in the media environment.

The comprehensive legal and linguistic approach combines formal and semiotic expert analysis of the text based on jurist-linguistic research of the contested material consisting of utterances, texts, images,

messages or other manifestations of aggressive speech behavior (Durant and Leung, 2016, pp. 41–45). These are determined by the fact that the object of linguistic expertise is speech data of a dualistic semantic and legal nature (as a trace of speech activity and a *corpus delicti*). The application of a comprehensive legal and linguistic approach is in many ways crucial to qualify a speech act as an extremist one. Legal expertise can help to strengthen the party position, it can be useful to assess the compliance with procedural legislation, completeness and comprehensiveness of the expert-linguist examination, verifiability of its results based on generally accepted scientific and practical data. In the form of a scientific advisory expert opinion legal expertise could represent a comprehensive legal and linguistic (law and language) analysis of the case materials, including conflicting expert investigations (reports). It allows law enforcement agencies to determine the legal vector that will allow the court to assess their evidentiary value and make an informed decision on the case.

If there are conflicting expert's positions based on various linguistic approaches, the court may use a comprehensive law and language opinion in the status of scientific and consulting document, considering arguments of a specialist convincing.

It should be noted that under Art. 80 of the Criminal Procedure Code of the Russian Federation, a specialist with specialized legal knowledge in the field of forensic expert science and criminalistics can be engaged to provide analytical and consulting activities resulting in writing an opinion on the issues posed to the specialist by the party (Part 3 Art. 80 of the Criminal Procedure Code of the Russian Federation) and during examination of witnesses (Part 4 Art. 80 of the Criminal Procedure Code of the Russian Federation).

V. Criminalistic Revision of the Linguistic Evidence

It is indisputable that no form of human activity can be immune from mistakes. Linguist-experts also make mistakes that can and should be identified during the study of case materials with signs of extremism on the basis of a sophisticated and comprehensive forensic technique in all their diversity.

The linguist evidence does not have a pre-established probative value. It does not have an advantage over other evidences and it is evaluated in conjunction with others. However, its assessment still requires a specific approach, since this evidence is based on the use of specialized knowledge which the law enforcer does not have.

We believe that a revision of linguistic evidence in order to find and detect research errors belongs to the competence of the legal expertise carried out by knowledgeable persons in criminalistic, forensic expert and speech sciences.

On the one hand, competitiveness in the legal procedure allows the court to call up specialists to assess the expert's report on the subject of its robustness, scientific validity and proof. On the other hand, in cases of extremism, unscrupulous reviewers called by the defense very often aim to discredit the expert opinion in order to exclude it from the prosecution evidences.

It should be noted that the concept of "review of the expert opinion" is not explicitly laid down by the law. A specialist involved in reviewing an expert's report, like a forensic linguist, must be proficient in criminalistics and forensic speech science as substantiating knowledge for forensic linguistic examination.

The involvement of a specialist in the court proceedings is carried out pursuant to the procedure set forth in Parts 3 and 4 Art. 80 of the Criminal Procedure Code of the Russian Federation. Under Part 2.1 Art. 58 of the Criminal Procedure Code of the Russian Federation, the party for the defense may not be denied a request to involve a specialist in the court proceedings in order to clarify issues within his professional competence (expertise), unless there are grounds provided for in Art. 71 of the Criminal Procedure Code for his recusal. Taking into account the provisions of the Criminal Procedure Law on equality of Rights of the parties, the prosecution's request to involve a specialist cannot be denied.

The court has the right, under Part 1 Art. 69, Para. 3 of Part 2 Art. 70, Part 2 Art. 71 of the Criminal Procedure Code of the Russian Federation, to decide on the withdrawal of a specialist in case of failure to submit documents ensuring the expertise of a person whose witness testimony was requested by a party. Any amount of either critical or positive expert reviews could be prepared by any party for the trial but

they would hardly contribute to the effectiveness of the court's decision on the case. According to Art. 17, 87, 88 of the Criminal Procedure Code of the Russian Federation, verification and evaluation of expert evidence falls within the exclusive competence of the court. But a legal expertise based on criminalistic analysis can help a party to strengthen its prosecuting or defending position.

Thus, in extremism cases the court is increasingly faced with a situation where contradictory linguistic evidence could be provided by different parties: by both the defense and the prosecution. So, the criminalistic revision of different linguistic opinions in a form of advisory report containing a sophisticated and comprehensive analysis of the case materials, is advoked, since it will allow the law enforcements to maintain a balance between the right to freedom of expression, freedom to seek and receive information and abuse of these rights.

Not being a party to the case, a knowledgeable criminalist (jurist-linguist) is able to give a scientific advisory review that can be accepted by the court as evidence in the situation of opposite opinions given by two or more linguists invited by the parties. In this regard, we consider it is necessary to introduce into the law enforcement practice a new form of specialized knowledge, namely, legal expertise as a special scientific and advisory criminalistic study that helps to resolve contradictions in linguistic evidences involved in the case.

Thus, in conflict situations, in cases that cause a special public outcry, it can be quite effective to provide assistance of a specialist with dual legal (criminalistic) and linguistic (speech science) competence, attracted by the court on the initiative of the defense or the prosecution to revise contradictory expert conclusions. This form of using specialized legal and linguistic knowledge will increase the validity of the court decision.

It should be noted that legal expertise is not exclusively criminalistic or forensic. Its key feature is that the specialized knowledge is synergy (criminalistic, criminology, forensic, linguistic, psychology, etc.). Thus, in relation to cases of extremist acts, legal examination will be treated as a scientific and advisory linguo-legal opinion.

VI. Conclusion

We believe that legal expertise in the form of scientific and legal advisory report complies with the requirements of procedural legislation. It is based on specialized legal (criminalistic, forensic, etc.) knowledge and contains the results of comprehensive research on certain issues of law, representing a reasoned position concerning the intricacies of modern legislation in the field of law, as well as the methodology of criminalistics and forensic science.

Legal examination is an effective means of helping the law enforcer to solve difficult situations related to the conflict of positions of knowledgeable persons involved in the case. This is especially true in high-profile cases, such as cases of extremist and terrorist crimes. In view of seriousness of the charge and the severity of the punishment, it is especially important to avoid mistakes in establishing the facts of the case, to protect the innocent from responsibility and to ensure that the perpetrators are brought to justice.

In addition, the conclusions of legal examination, carried out at the request of public authorities, also contribute to raising the general level of legal culture and solving legal issues that arise within the framework of their current work. In this regard, the availability of law and language knowledge also seems to be very relevant in solving criminal law issues regarding implementation of information rights and freedoms in the digital environment.

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TRENDS IN LEGAL EDUCATION

Article

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Significant Aspects of Teaching Legal Negotiations to Law Students in Russia

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Abstract: The paper deals with the overview, prioritization and analysis of the elements that are inalienable in legal negotiations and teaching modules of the course on negotiations. An experienced legal negotiating coach keeps in mind a number of vital elements of the course, such as personal characteristics of learners, stylistic patterns and cultural features. The data collected in the research supports the fact that cultural shifts reflected in the statements of negotiators have a direct impact on the negotiation result and often lead to misunderstandings and inability to reach an agreement. For instance, Russian businessmen often unconsciously apply inflexible aggressive integrated strategy of negotiations. Thus, the negotiation course module devoted to cultural awareness and appropriate negotiating strategies development should contain, *inter alia*, information connected with authentic reactions of negotiators belonging to a particular ethnic group, and this information should be scrutinized and deeply considered. Consequently, it will be useful to apply the priming teaching technique through the comparison and analysis of students' responsive statements with native speakers' responsive statements in one and the same simulation which will

facilitate mastering successful negotiation skills leading to a package deal beneficial for all parties.

Keywords: negotiation; strategy; culture; package deal; cross-cultural awareness

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I. Introduction and Research Methodology

Legal education all over the world is the continuing process of acquiring and maintaining theoretical information and practical skills to provide quality client services. As a rule, a compulsory module of law school curricula in European, Eastern and American countries is connected with legal negotiations. In Russia, the aspect of mastering soft skills of legal negotiations is not included in the majority of law schools' curricula. Russian law students have an opportunity to acquire these skills doing extra-curricular classes of optional programs or participating in negotiation student clubs. In the clubs, the students gain personal negotiating experience through acquisition of theoretical knowledge on negotiation strategies and styles and mastering skills in face-to-face simulations. The students learn to analyze the appropriate strategies and styles, mostly concentrating on a successful win-win strategy. However, understanding the basics of the win-win strategy

does not always result in successful negotiations because of Russian unique cultural identity, which is reflected in the language. Thus, the research goal of the paper is to determine the aspects to be taught in the module of legal negotiations and allowing preparing successful professional negotiators.

The research is based on communicative text-based approach to studying linguistic patterns. The survey data received through application of qualitative and quantitative methods supports the issue of the leading cultural variable in the process of teaching legal negotiations. In addition, the authors have used the descriptive method and contextual analysis techniques.

II. Inalienable Elements of Negotiations

Nowadays negotiating skills of lawyers are inalienable, being manifestation of both deep analytical skills and highly effective advocacy presupposing professional liaison with clients and opponents. Different law school negotiation courses focus on experiential-learning approach with face-to-face training aiming at 1) gaining one's own experience, 2) reflecting on the material under study through self-observation and self-reflection, 3) learning theoretical generalization, and 4) verifying newly acquired information and issues through practice (Voskobitova, 2021; Igolkina, 2021; Kuznetsova, 2023; Novikov, 2022; Ignatkina, 2023; Meshkova, Stepanova and Sheremetieva, 2019). From the educational perspective negotiating is a didactic activity from which every participant is able to achieve professional mastery of legal language. It is one component of becoming a successful negotiator. Another important component relates to personal qualities of students, namely, convincing public speaking and rapid reactions to respond immediately, which is typical to an extravert psych type. One more aspect of teaching negotiations worth mentioning is cultural awareness.

II.1. Personal Characteristics of Negotiators

The coach should make a decision on the approach to teaching negotiation. As Alimova and Golovina state, "…one could take the

approach of intensive and persistent training of students to improve weaknesses. On the other hand, drawing on natural strengths and the fact that competition matters seem to be more reasonable should be taken into consideration. There is another side to the problem. People feel somewhat insecure with themselves in an environment they are not comfortable with, or doing things that are unfamiliar to them. This insecurity coupled with the natural astonishment of the competition itself might lower speaker's self-esteem and result in the speaker's evaluations being lower than initially expected" (Alimova and Golovina, 2019, p. 258).

However, personal characteristics of negotiators are reflected in personal styles of negotiating. Moslehpour indicates that there have been described four styles of negotiating: FA (Factual Style) is typical to people who are cool, collected, patient, down-to-earth, present-oriented, precise, realistic, able to document their statement, sticking to the facts that speak for themselves. IN (Intuitive Style) which is characterized by a charismatic tone, a holistic approach, a strong imagination, a tendency to jump from one subject to another, a lot of ups and downs, a fast pace, a deductive way to approach problems as well as a future orientation. NR (Normative Style) is manifest in those who judge, assess, and evaluate the facts according to a set of personal values, appeal to feelings, offer bargains, propose rewards and incentives. AN (Analytical Style) is based on logic that leads to the right conclusions, analysis of pros and cons and linear reasoning without emotions (Tu et al., 2021, p. 4).

Contemplating on the above-mentioned personal characteristics of negotiators the question arises if it is necessary to consider them in the teaching process. Negotiating is mutual process of official legal or commercial interaction devoid of personal interests of a neutral negotiator who is supposed to implement the most successful strategy under the given circumstances. Thus, adjustment to the chosen strategy which is one of the strategies earlier mastered during the training period can be considered as an intuitive practical act of a student.

II.2. Cultural Aspects of Negotiators

Difficulties in negotiations can arise from shifts in cultural patterns. According to G-C. Constantinescu, each negotiator "will use a foreign language as a translation of his/her own message, but the adapting manner of their argumentation style building can generate differences of expression, respectively understanding perception of the message, that can ineffectively interfere the communication" (Constantinescu, 2015, p. 2). The Romanian researcher M.D. Grosseck describes the success in negotiating in a foreign language as a complex of influence factors. It is not sufficient only to know the language, but also one should be aware of significant cultural aspects: tolerance, open-mindness, cultural relativism (which avoids the perception of other cultures through the prism of their own culture superior positioning) (Grosseck, 2012, p. 5075). Arguably, national cultural components shape cultural identity and influence the negotiators' behavior through language while formulating and speaking out the messages. It is obvious that statements of native speakers, their understanding of the situation and reception of information from the interlocutors is more direct to compare with non-native speakers. Differences in national backgrounds influence the stages of negotiation process, its smoothness, speed, and implementation of agreements. Generally speaking, personal behavioral features are interconnected with cross-cultural and language skills.

A lot of research has been conducted to contrast the English language of international business used by negotiators being either native or non-native speakers. Scholars specify the features typical to the culture of the non-native speaker that influence the negotiating process and are relevant to the results. According to J.L. Graham and N.M. Lam there is incompatibility between American and Chinese approaches. Americans often describe Chinese representatives as inefficient, indirect, and dishonest. Chinese partners see Americans as aggressive, impersonal, and excitable. The main reason of disbalance lies in the fact, that Americans strongly value individualism and assertiveness stating and believing in the decision as they see it, while Chinese look for a compromise and will haggle on and on meaning that it is possible to find the way to settle (Graham and Lam, 2003).

Speaking about Japanese relevant features in negotiation it is necessary to mention their strict following etiquette and dignity, often bordering with xenophobic tendency. They value real active listening of the interlocutor and expect reciprocity (Graham and Andrews, 1987, p. 72). When Brazilians are trying to arrive at a settlement with Germans, they should control their emotions. Being empathic active listeners, they react to conflicts very personally, feeling and expressing anger, while Germans look at the conflict as a game and stay neutral (Mendes de Oliveira, 2018).

German businessmen use polite expressions, stick to formal phrases, avoid jokes. "[T]hey want establishing written rules defining precisely the scope and the prerogatives of each one of the parties involved in the dispute. They negotiate hard in order to find the best solution, they divide the responsibilities and spheres of action and after that they respect with great care what there was convened. In their case it is hard, and it takes (a lot of) time to find these points, but after that, they learn exactly what they must do, and respect it with the greatest precision" (Beniamin and Adina, 2013).

The main principle of French negotiators is the mixture of rationalism and nationalism supposing that first one should find a philosophical framework to establish a vision of things; second, enter into practical matters. "When a French position, *ergo logical*, is refused or countered the French are taken aback by what they consider to be bad faith or stupidity. When 'one is right' one does not compromise" (Cogan, 2004, p. 12).

Middle East negotiations differ from Western ones in their philosophy clearly embodied in the following metaphors. "English… 'opening bid'… reflects a tendency to think of negotiation as a sporting contest governed by set rules. After a hard fight and fair game there is a result, and the teams go home… In the Middle East… games are for children, not sober political leaders, and commercial bargaining is not for the market. The prevailing metaphors of negotiation in Arabic are taken from the Koran where 'steep mountain road' recalls delicate negotiations on a mountain path between Mohammed and emissaries from Medina at a critical point in the Prophet's career" (Cohen, 2001,

p. 16). Hasty decisions look suspicious for the Eastern representatives. Arabs expect exchange of concessions.

According to P. Xiao et al., Russian businessmen tend to stick to tradition and lack flexibility. They like to follow the plan, and their bargaining power is very strong. "Although the Russian businessmen were at a disadvantage in the negotiations, they always found ways to make the other side give ground and thus gain profits. Russian businessmen pay special attention to the technical content and demand specific clauses in the negotiated projects. Working with Russian businessmen requires a strong sense of risk" (Xiao et al., 2020).

Consequently, it seems to be hardly feasible for the existing variety of culture-specific features of negotiations of different nations to invent a coaching model preserving the mentioned above cultural features. On the other hand, higher educational establishments deal with a great number of representatives from different cultures. Thus, representatives of any culture can be members of legal negotiation team of the university. The module of teaching negotiation skills should be based on a universal principle, not on special multiple cultural features or personal characteristics. It is reasonable to apply the theory of linguistic adaptation according to which effective language use adapts to context and communicative intention. Communicative context factors impact on the language patterns chosen by language users through appropriate linguistic means (Xiao et al., 2020). Initial linguistic means in teaching the language of negotiations are discourse cliches introducing different stages, steps, and reactions during official discussions: welcoming, making introductions, making small talk, setting an agenda, stating interests, making proposals, accepting proposals, asking for options, giving opinions, responding to opinions, prioritizing, offering counter-proposals, bargaining, persuading, checking correctness of verifying counterparts' statements, clarifying, taking turns, making decisions, keeping people informed, summarizing, confirming agreement, responding, outlining future action, thanking, saying goodbye. They manifest the first step or coming to the next phase of negotiations, and they give a signal to implementing the next communicative intention to be understood by the partner. However, the context and the choice

of communicative intention depend on the negotiation strategy and on the understanding of the position of the counterpart.

The most widespread theory underlying the negotiation strategies is connected with the behavioral theory of negotiations (Walton and McKersie, 1965). It is based on the initial intention of the sides to negotiations to follow one of two strategies which are distributive (positional) and integrative (principled, interest-based). The first strategy leads to win-lose (zero-sum or fixed-pie) negotiating configuration. The second one supposes reaching success through win-win or cooperative configuration. Traditionally negotiation was viewed as distributive (positional) activity. It was connected with stating and defending one's own interests of the deal. By going beyond positions, it is possible to identify interests that are mutually beneficial to all the sides. The question of what strategy to choose arises and can be answered through deep initial analysis of the situation at stake. In case there are not any underlying principles, the side might refer to positional negotiations. If there are stated or may appear any additional beneficial interests, the side should resort to integrative strategy.

The research conducted by S. Benetti et al. has revealed that despite widely spread knowledge of theoretical negotiating models "…numerous studies confirm that there are some substantial differences among cultural groups. Culture profoundly affects how people think, communicate, and behave, including the type of agreements they make and the ways they reach them. For example, individualistic cultures may be expected to be more self-centered and focused on personal gains, whereas negotiators from a collective culture concentrate more on forming a relationship and discriminate between in-group and out-group partners, feeling strongly linked to the former and promoting their collective interests and goals during the negotiation process, an approach that can lead to higher joint profits" (Benetti et al., 2021, p. 788). In their research, the scholars have conducted contrastive analysis of North American and Italian negotiating strategies. North American negotiators followed integrative strategy basing their argumentation on objectivity, avoiding haggling, despite the fact that they are impersonal and less concerned with the interests of another side. The scholars called the North Americans' negotiating style "impersonal integrative." Italian

negotiators fairly equally followed both distributive and integrative strategies. The distributive type was presented in its classical zero-sum game including the bargaining process. The integrative strategy "…shows some of the typical traits of integrative negotiation prototype, being oriented to explore interests and to create mutual value within colleagueship process but is also expressing and dealing with emotions during the negotiation, a controversial subject of research and practice. This original 'emotional integrative' prototype of negotiators that we find for Italy represents one of the most interesting contribution of implementing LCA in this context" (Benetti et al., 2021, p. 787).

Another vital principle observed by S. Benetti et al., namely, achieving success in integrative negotiations is targeting to package negotiations rather than achieving a goal issue by issue. Looking at the deal as a package agreement allows negotiators to arrive at the highest possible mutually beneficial settlement.

In fact, important aspects that should be preserved in coaching modules of a negotiation course are connected with the theory of adaptation, the background of distributive and integrative strategies and analysis of package deals. Another essential factor to be preserved in the course is a cultural variable. It is the most controversial as it is not easy to analyze, evaluate and reveal theoretical principles of cultural negotiating factors like "impersonal integrative" North American prototypes, or "emotional integrative" Italian prototype.

II.3. National Characteristics of Russian Negotiators

Speaking about the mentioned earlier international view on the Russian negotiators' characteristics such as tradition and inflexibility once can see them reflected in the style of negotiations that can be assumably called "inflexible integrative." Having been an empire for a long period of time, "…Russians perceive negotiation as a 'power game', as a 'сила' (force). They will typically present a very tough position at the beginning of a negotiation, and they will offer tough responses to their counterparts even at the final stages of negotiations. Although negotiation theorists speak about the overall opportunity and finding 'win-win' outcomes that can benefit both sides, Russians find it difficult

to adapt to this negotiation approach. Indeed, the word 'victory' itself in the Russian language means that the other side loses or leaves the game. The Russian negotiation mentality is a very strong approach, and a rather inflexible one, which to some extent ignores emotional and psychological considerations often discussed in negotiation theory" (Culture and Negotiations: the Russian Style).

According to the data given in the survey of G. Balykina on the basis of interviews conducted with 800 Russian negotiators from different districts of the country, "Russians are usually very well prepared for the negotiation, have a plan and specific strategy (78 %). Russians are often recognized to have an aggressive negotiating communicative style. At the stage of discussing terms, price, and bargaining, Russians can show their negative emotions and irritation (46 %). They can be intolerant if their opponents have different points of view, 6 % can even demonstrate their aggressiveness and attack not terms and offers but personal characteristics of negotiators of the other party. Russians are not very much caring about the partner's outcomes; they are mainly concentrated on their profits than counterpart's welfare; 20 % consider achieving their goals as the highest priority with negotiations.

Thus, communicative practices of win-lose approach are quite common, they reveal shortage of compromise thinking, and only 20 % consider searching for compromise of great importance. Masculinity orientation is apparent from communicative strategies that result in wish to force the other party to capitulate to their point of view; 92 % find important communicative skills that facilitate persuading, and even imposing their points of views" (Balykina, 2015).

Taking into account the quantitative data it is possible to correct the earlier formulated style of Russian negotiations into "inflexible aggressive integrative," keeping in mind that, unfortunately, the level of integration is rather low. It is the issue that should be considered in the course of legal negotiations in Russia to discuss the ways of improving the process of interaction while making the deal. Interaction should be more flexible and friendly to achieve best results. Concentration on mutual success makes it possible to arrive at a package deal, which has been proved to be the most effective concept of business negotiations. The core of the package deal is argumentation but not numbers and

figures. Credible principles and convincing the other side should be used in a manner that will persuade another side. This helps to share preference information and search for differences as well as count benefits and costs for each variable. In addition, it makes it possible to work out a successful combination of issues at stake and find a multi-issue combination compromise being the expected result of a professional package deal.

II.4. Law Student Negotiation Experience

To analyze Russian law students' drawbacks in reaching a package deal within the study of the cultural relevance of the behavioral theory of negotiations connected with integrative strategy we have conducted the research. To compare Russian "inflexible aggressive integrative style" and American "traditional integrative style" we have analyzed a series of ABA competition negotiations published on *ABA Law Student Division YouTube Channel*[1] and selected a situation in which sides negotiate a settlement between a potential tenant (Mr. Hassan) and a *Tenant Service*.[2]

A google form was created to collect students' responses. The form contained the description of the situation: you represent *Tenant Service* sued for infringement of private person's right. The person (Mr. Hassan) was refused for tenancy of the apartment he liked on the basis of a *Tenant Service* site report that contained information on the previous tenant history and reported a number of convictions of that person with a similar spelling of the name.

The students were asked to give responsive statements to client's lawyers' initial assertions that were given in their authentic form (scripts from the video). The instructions and explanations before each responsive statement were given in accordance with integrative strategy in compliance with the style used in authentic statements. Also, the

[1] ABA Law Student Division. Available at: https://www.youtube.com/@ABALawStudentDivisionPage [Accessed 18.02.2024].

[2] 2022 ABA Negotiation Competition. Available at: https://www.youtube.com/watch?v=7TFKycCBpsQ [Accessed 18.02.2024].

students were asked to respond as spontaneously as possible and at the same time give as detailed replies as possible.

The first initial assertion. *Our client has indicated to us that the policy of the Tenant Service on eviction and criminal records is very important to him. And we would love to start there if that is something that you would be open to doing.*

The instructions and explanations on the first responsive statement. In the responsive statement pass on to the issue if the information about the client was stated correctly in the report on evictions and convictions.

The second initial assertion. *His report details two evictions and four criminal arrests. None of those pertain to our actual client. He is a respectable man with no prior criminal history, no credit issues and a steady job and he was still not allowed to rent in a house. So, he is embarrassed, he is hurt. And that's why we are here today. He just feels disrespected.*

The instructions and explanations on the second responsive statement. In the responsive statement pass on to the issue concerning the fact that the Tenant Service gave information on the site which is in bold capital letters: **TENANT HISTORY MAY BE NOT 100 % ACCURATE**.

The third initial assertion. *Just to address those concerns. I'll let you know what our client told us. First, your report does say NOT APPROVED in big bold capital letters. Those are the only big bold capital letters on the entire report so it does seem in a way that the decision was made for a landlord because if you were a landlord with no legal background and you got a report back that said NOT APPROVED in big bold letters you probably would throw the application out.*

Second, for the note in the service site about the fact that tenant history may may be not accurate. But it was not just the tenant history that was inaccurate, it was his criminal history. So it never mentions that the criminal history may be inaccurate.

The instructions and explanations on the third responsive statement. In the responsive statement pass on to the issue that the Tenant Service is ready to improve their reporting system.

The respondents were students of Peoples' Friendship University of Russia named after Patrice Lumumba and Saratov State Law Academy who either participated in the International Negotiation Competition (national or international rounds) being university team members or had a learning practical experience of negotiations.

The results show that in the first and in the second responses the students vigorously defend (60 %) or sharply attack (30 %) or accuse (10 %) the other side although practically in all the cases the respondents start with an appropriate to the stage of negotiations and to the situation phrase.

Here are some examples of defensive statements (all students' responses are given in students' spelling and syntaxis):

Respondent 1. *We understand your client's warries, however we should have scrutinized the tenant service website before. There is the notice there featuring that tenant history may be 100 % accurate. It is impossible to miss it due to its big bold capital letters.*

Respondent 2. *It is a reasonable requirement, but your client tenancy background was thoroughly analyzed. If such a decision was made, there definitely were strict grounds for rejection. What information have you found and is it relevant?*

Respondent 3. *We understand your disappointment, however there may be some inaccuracies in the information provided. That is why we place corresponding warning in bold capital letters on our web site.*

Respondent 4. *We understand the frustration of your client. We also need to point out that the Tenant Service is not making decision for the landlord, but only provide information from the open sources which maybe not 100 % accurate which is stated in bold capital letters on our client's website. The responsibility of making the decision is still lays on the landlords.*

Respondent 5. *I see your point. However, there is a warning on our client's website that tenant history may not be completely accurate. Mistakes can happen and your client should be aware of it.*

Respondent 6. *We understand the frustration of your client. We also need to point out that the Tenant Service is not making decision for the landlord, but only provide information from the open sources*

which maybe not 100 % accurate which is stated in bold capital letters on our client's website. The responsibility of making the decision is still lays on the landlords.

Examples of attacking statements are the following:

Respondent 1. *Well, the Tenant Service makes the report based on the information provided by the clients. The Tenant Service Carefully monitors the tenant history of people. The reputation of the clients who will be provided with apartments is essential to the* ***Tenant Service****. So, can you say for sure that the information about your client specified in the report of eviction and criminal records as correct?*

Respondent 2. *I see. However, I cannot agree with you. The Tenant Service warns that the tenant history may not be 100 % accurate.*

Respondent 3. *We get your point of view. If there actually was an error in the report, the Tenant Service is sorry for this situation. However, the Tenant Service immediately warns that the site contains information in bold capital letters: tenant history may be not 100 % accurate. Therefore, we recommend rechecking all the data.*

Examples of accusing statements:

Respondent 1. *My client respects your willingness to start the negotiation of the policy. However, before we proceed to the point, my client would like to know the reason for refusal to rent an apartment. Are there any violations of the law recorded in the reports of eviction and criminal records?*

Respondent 2. *We are ready to discuss the policy and its faults. However, we would like to know, why didn't your client react instantaneously, but only in some period?*

The responsive statements to the first and second initial assertions taken from the video imply the idea of acceptance of the mistake and readiness to change the policy. *I'm just curious so I know you talk about the criminal and the eviction reports and looking at these… Are there certain ones that your client was misrepresented by that you know of? <…> Sure, we can understand how difficult that must be for your client and I do want to reiterate though we are simply a service to our clients. We did not make this decision for your client not to go into the home. We understand that this was our report that we ran. But if you look just beneath those negative information details… tenant history*

may not be 100 % accurate and we are certainly open. We are here today, and we would come to an agreement.

The third responsive statement of Russian respondents preserves the idea of solving the situation by the Tenant Service by themselves, without any mutual discussions of the ways, means and principles (total acceptance of responsibility):

Respondent 1. *We apologize for this mistake, and we want to fix the situation. The Tenant Service is ready to improve the quality of reporting system.*

Respondent 2. *Your position is quite feasible, and we accept it. Despite our reporting system existing advantages, it also has some serious disadvantages, we admit this fact and we are always ready to improve it. Unfortunately, some cones can be identified only after similar incidents. We appreciate your feedback and clear notices. They will be taken into account while updating our reporting system.*

Respondent 3. *Yes, you are right. As for the inaccuracy of the criminal history, we will double-check all the data and correct the errors. In this case, the decision will be reviewed and your client will be able to get an apartment. Moreover, we can assure you that our service is ready to improve the reporting system in order to prevent this from happening again. Despite this, we will do our best to improve our database.*

As for the responsive statement from the video, it clearly underlines the idea of cooperative decision of the situation: *We are here today that we can provide better reporting system. So, I think we are on the same page on what we want to solve. To that front maybe we can jump back to those policy changes that your client is hoping to see.*

Therefore, Russian respondents, on the one hand, produce statements starting with professional cliché, appropriate to the context, introducing the integrative strategy. On the other hand, right after pronouncing the cliché, they stop cooperation, either through using negative tone or by formulating the phrase that means that they are taking all responsibility and speak about one-sided fixture of the situation without suggesting listening to the position of another side. This fact should be demonstrated to the students in the course of teaching legal negotiations to improve the experience and work out the development

of cooperative tactics within the "inflexible aggressive integrative strategy." This can be achieved through application of the priming technique and the text-based approach to teaching. Understanding priming as the mechanism of implicit memory of an individual, which provides unconscious influence of a stimuli to processing the following stimuli, it is possible to use authentic initial statements of American — American negotiating, giving the assignment to Russian students to formulate responsive statements within the framework of integrative strategy and then contrast them with authentic American responsive statements and analyze the advantages disadvantages. The priming technique will help to acquire the skill of thinking in a cooperative way and stimulate production of flexible reactions aiming at a package deal.

III. Conclusion

The studies of legal negotiations have been ongoing for decades. Scholars and professors of different countries and cultures have conducted multiple research and surveys. There have been analyzed different aspects that can be either shallowly mentioned or deeply scrutinized in teaching the negotiation module.

The aspect connected with personal characteristics of negotiators can be shallowly mentioned due to the fact that there are no two identical individuals with the same number of reactions that can be calculated by the coach. Personal adjustment to the negotiation at stake and consequently personal negotiating style is the personal skill mastered implicitly during the training period.

Another aspect to be deeply scrutinized is connected with shifts in cultural patterns that are reflected both in the language and mentality of the negotiator. Even if the negotiators choose the most successful win-win strategy, in the course of negotiations they might unconsciously formulate the phrases that will resemble the ones used in win-lose strategy. The data of the research proves the fact that representatives of different cultures use national win-win patterns that are not universal and may lead to misunderstanding and lost expectations. The focus of the research is the win-win pattern of Russian negotiators that can be

specified as "inflexible aggressive integrative" because the level of real cooperation and integration is low.

The analysis conducted in the research by means of spontaneous reactions of the Russian law students to the initial statements taken from the authentic legal negotiations displays the tendency to use defensive, attacking and accusing statements, which can hardly lead to cooperation and success. This observation can be underlined and stressed by the coach in the course of training legal negotiations, being further discussed and analyzed in the reflection period. The combination of text-based approach and priming technique can be beneficial, since it will be possible not only to analyze personal reactions but also to listen to the reaction formulated by the representative of another culture. Such a cross-cultural variation can help to work out the negotiator's mechanism of applying the most beneficial statement even if the statement is originally alien to participant's culture. The collection of beneficial statements on all the issues of the concrete negotiation makes up the most successful package deal.

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